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National Reporter System—United States Series

THE
FEDERAL REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 212

PERMANENT EDITION

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND
DISTRICT COURTS OF THE
UNITED STATES

MAY—JUNE, 1914

ST. PAUL
WEST PUBLISHING CO.

1914

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OF THE

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

In re SWEENEY.

BIGHAM v. SOUTH SIDE TRUST CO.

(Circuit Court of Appeals, Third Circuit. April 3, 1914.)

No. 1796.

1. BANKRUPTCY (§ 188*)—PLEDGES—MORTGAGES—RIGHTS OF PLEDGEE.

Where mortgages on real property were pledged to petitioner as collateral security by a bankrupt, who, on acquiring title, leased the premises to tenants, the legal title to the property and the leases having vested in the bankrupt's trustee, petitioner as holder of the mortgages was not entitled to collect rents and profits from the mortgaged property as against the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286-289, 291-295; Dec. Dig. § 188.*]

2. BANKRUPTCY (§ 188*)—MORTGAGES ON REAL PROPERTY—ACTUAL POSSESSION—NOTICE—RIGHT TO COLLECT RENTS.

Mere notice by a pledgee of mortgages on real estate as collateral security of an asserted right to collect rents, is not equivalent to actual possession by such pledgee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286-289, 291-295; Dec. Dig. § 188.*]

Appeal from the District Court of the United States for the Western District of Pennsylvania; James S. Young, Judge.

In the matter of bankruptcy proceedings of John Francis Sweeney. On petition of Kirk Q. Bigham to restrain the South Side Trust Company from interfering with petitioner's collection of the rents of certain premises. From an order denying the petition, plaintiff appeals. Affirmed.

Ed. B. Scull and C. Elmer Bown, both of Pittsburgh, Pa., for appellant.

Geo. N. Monroe, Jr., of Pittsburgh, Pa., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. Sweeney, the bankrupt, was a builder and seller of small houses in the city of Pittsburgh. As these

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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houses came to be sold, the sale was usually made subject to a first and a second mortgage. The first, given by Sweeney, was sold to investors and has little to do (except incidentally) with the present controversy; the second was an installment mortgage given by the purchaser of the house, binding him to pay small sums each month until the principal should be discharged. These mortgages were apparently not offered in evidence—at all events, they have not been printed—but the foregoing terms are not in dispute, although we have no further information about terms and are not advised concerning the due dates either of the installments or of the full principal of the mortgage debt. In 1908 and 1910 Sweeney gave two promissory notes to Bigham aggregating \$24,600. Each of these notes was to be paid in monthly installments of \$250, and some of the second mortgages were pledged as collateral security. These mortgages were also assigned of record to Bigham, but the legal title was only held as collateral. In certain contingencies he was authorized to sell the mortgages at public or private sale, and to become the buyer himself; but he has never exercised this power, nor (even if we assume that he had the right to sue on the mortgages without first buying them in at a sale) has he ever brought suit thereon.

For several years after the notes were given, Sweeney paid the monthly installments until he had reduced the debt to \$16,000. Meanwhile changes were taking place in the incumbrances and in the ownership of the mortgaged premises. Some of the second mortgages were paid off, and others were substituted as collateral. In other instances the purchasers of the houses abandoned the attempt to pay the installments on the second mortgages and conveyed the legal title back to Sweeney (or sometimes to his wife); and in these instances leases were afterwards made by Sweeney and tenants went into possession thereunder. In the spring of 1912 Sweeney became financially embarrassed and fell into arrears in payment upon the notes. He had always collected the installments on the mortgages and the rents under the leases, and Bigham had never made these collections himself. But it was evident that both the installments and the rents were an important source of supply toward the monthly payments on the notes, and accordingly Bigham was insistent that they should be so applied. Quoting from his petition afterwards presented to the referee and now before us, he asserts that in consequence of his insistence Sweeney specially agreed to act as his agent, "to lease said premises, collect the rents thereof, account monthly, and monthly pay over to petitioner and to petitioner's account all the said rents collected by him"; these rents to be applied "on account of the sundry mortgages covering the several premises occupied by the said tenants, which said mortgages are included in the list of mortgages held by petitioner as collateral security, etc." Sweeney denies the agency, and the referee makes no finding of fact on this subject.

But it appears without dispute that on July 20, 1912, Bigham, asserting the existence of such an agency, notified the tenants of its termination, and demanded that the rents should thereafter be paid to himself. Two days later the petition in bankruptcy was filed, followed

by an adjudication on August 12. The South Side Trust Company was appointed trustee, and by operation of law became vested with the legal title to the leases and to the houses that had been reconveyed to Sweeney. Bigham and the trustee came at once into collision over the rents, and on October 21 Bigham presented a petition to the referee, setting up the special agency referred to, declaring that he had revoked it and had undertaken to collect the rents himself, and averring that the trustee had come into possession of the leases and was also attempting to collect the rents. The relief he prayed for was: (1) An order that the trustee deliver the leases to him, and account for any rents that might have been collected; and (2) an order preventing the trustee "from interfering in any way with petitioner's said tenants, and from hindering and annoying said petitioner in and about the collection of his said rents." It will be seen that this petition only refers to the leases, and asks for no relief on any other account. Both the referee and the District Court refused the prayers for relief, and the correctness of this refusal hardly needs discussion. Bigham does not contend that these leases had been assigned to him, legally or equitably, and the testimony concerning the so-called "agency" of Sweeney adds nothing of value to Bigham's position. As the trustee had the legal title to the houses and the leases, with the right to collect—subject of course to the duty of accounting to whomsoever might be ultimately entitled to the fund—Bigham's petition was properly dismissed.

[1, 2] But in some unexplained way the petition came to be treated as if it presented the claim of a mortgagee to take possession of mortgaged property, and to collect the rents thereof. Actual possession was not asserted, but the notice of July 20 was claimed to be a "constructive" possession. We do not intend to enter upon the discussion of this subject, except to say that in our opinion Bigham had no possession of the property, either actual or constructive, and had therefore no right to collect the rents, such as he might have had if the property had passed into his hands. In some particulars the law of Pennsylvania gives to a mortgagee unusual rights over the mortgaged property, but it has never gone to the length asserted here. In certain circumstances a mortgagee may acquire possession by an action of ejectment, or he may even take peaceable possession of the premises without legal proceedings, if his entry be unopposed; but we are advised of no statute or decision supporting the proposition that the mere notice of an asserted right to collect the rents is equivalent to actual possession. But Bigham is in reality not a mortgagee, but a holder of mortgages as collateral security, and we say nothing of the other difficulties that may lie in his road as a pledgee of unconverted and unsold collateral security. It is useless to discuss them, for we deal with the record as we have it, and the record is founded on Bigham's assertion that he is the virtual owner of the leases, and is entitled to their unobstructed possession and enjoyment.

The order of the District Court is affirmed.

INHABITANTS OF TOWN OF HARMONY, ME., v. TRUMAN.

(Circuit Court of Appeals, First Circuit. March 12, 1914.)

No. 1032.

1. TOWNS (§ 52*)—INCURRING INDEBTEDNESS—SUBMISSION TO VOTE.

Under Rev. St. Me. 1883, c. 51, § 138, providing that when a city or town votes at any legal meeting on the question of loaning its credit, taking stock in or aiding any person or corporation, it shall not again vote on the same subject, except at its annual meetings, a vote at a special meeting relative to issuing bonds in aid of a railroad which already had been authorized on certain conditions by a vote at a legal meeting was void, and gave no authority to issue the bonds or sell and deliver them on any terms.

[Ed. Note.—For other cases, see Towns, Cent. Dig. §§ 90-94; Dec. Dig. § 52.*]

2. MUNICIPAL CORPORATIONS (§ 943*)—BONDS—RECITAL OF COMPLIANCE WITH VOTE—EFFECT.

A recital by the selectmen of a town, in bonds issued by them in aid of a railroad that they were issued in conformity to a vote of the municipality which imposed precedent conditions, did not estop the town to deny that such conditions had been performed, unless the selectmen were vested with authority to determine the question of performance, nor unless the recital was such as would import compliance with the conditions in all substantial respects.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1972-1977; Dec. Dig. § 943.*]

3. MUNICIPAL CORPORATIONS (§ 943*)—BONDS—RECITAL OF COMPLIANCE WITH VOTE—EFFECT.

A vote of a town meeting held June 20, 1895, authorized the issuance of bonds to a proposed railroad company on condition that a guaranty should be given, to the satisfaction of a committee chosen by the town, that the balance over and above the amount of the bonds necessary for the construction and completion of the road should be subscribed and furnished and the road equipped and operated, but that if the company preferred not to give such guaranty, the selectmen might issue the bonds and take stock in the railroad upon the completion thereof, if within one year from that date. A vote passed at a special meeting held July 13, 1896, ratified and confirmed the acts of the earlier meeting, and authorized the issuance of such bonds upon receipt by the selectmen of a guaranty that the railroad would be completed and operated within six months. This vote was void because in violation of a statute prohibiting a town which had once voted on such question to again vote thereon except at an annual meeting. Without receiving any guaranty whatever the selectmen issued the bonds reciting that they were issued in conformity to the vote passed at the meeting held July 13, 1896. *Held*, that the terms of the two votes were not substantially the same, and the bonds could not be regarded as in effect reciting a compliance with the valid vote of June 20, 1895, and the town was therefore not estopped, as against bona fide purchasers, to deny compliance with the conditions imposed by that vote, since by the first vote the guaranty was to be passed upon by an independent committee, and not by the selectmen, and stock, if taken, was to be taken in a completed railroad free from debt, and with sufficient stock subscribed for to construct, equip, and operate it, and the attempted ratification of the earlier vote could not be regarded as enlarging the scope of the recital, as the purchaser could not know thereof without resort to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the town records, which would have given him notice of the earlier vote and of the invalidity of the second vote.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1972–1977; Dec. Dig. § 943.*]

Appeal from the District Court of the United States for the District of Maine; Clarence Hale, Judge.

Suit by Nathan H. Truman against the Inhabitants of the Town of Harmony, Maine. From a decree in favor of complainant (205 Fed. 549) defendant appeals. Reversed and remanded, with directions to dismiss.

Edward F. Merrill, of Skowhegan, Me. (Merrill & Merrill, of Skowhegan, Me., on the brief), for appellant.

Sidner St. F. Thaxter, of Portland, Me. (Roscoe T. Holt and Thaxter & Holt, all of Portland, Me., on the brief), for appellee.

Before PUTNAM, DODGE and BINGHAM, Circuit Judges.

DODGE, Circuit Judge. The appellee (hereinafter called plaintiff) holds 17 bonds, each for \$500, in all \$8,500, purporting to have been issued by the appellant town (hereinafter called defendant) on August 1, 1896. The defendant has refused to pay either the interest or the principal, and denies their validity.

The plaintiff's bill, filed February 12, 1912, alleges that he can maintain no action at law upon the bonds, because at the date of their issue it was not in the power of the town to incur indebtedness to the amount of \$8,500; that amount, together with its previous outstanding indebtedness, exceeding the limit of town indebtedness imposed by the Constitution of Maine by several thousand dollars. The relief he asks is that the bonds may be declared valid and enforced in equity to the extent of that amount for which the town could lawfully have bound itself at the time. This is the relief which the decree below purports to grant.

The plaintiff alleges that the bonds were issued pursuant to votes passed by the defendant town on June 20, 1895, May 11, 1896, and July 13, 1896. The defendant denies that the bonds were issued pursuant to the votes referred to, or either of them, and alleges that the bonds were issued notwithstanding that conditions of issue imposed by the votes had never been complied with.

1. The question thus raised is the first question to be considered. As to the terms of the votes referred to and the circumstances under which each was passed there is no controversy. They were as follows:

The vote of June 20, 1895, was passed at a lawful special meeting, and was, in substance:

To raise \$8,500 to aid in the construction of a railroad from Hartland to Harmony village;

To authorize the selectmen to contract that said railroad should be built;
To subscribe for stock in the railroad company as soon as it should be organized;

To issue bonds of the town to the railroad company for \$8,500 at such time and rate of interest as the selectmen should deem advisable;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"On these conditions":

That the party with whom the selectmen should contract—
"give a guaranty to the satisfaction of a committee to be chosen by said town, that the balance of the money over and above (\$8,500) necessary for the construction and completion of said road and appurtenances to said Harmony village shall be subscribed and furnished, said road equipped and operated. If, however, said railroad company prefer they need not give any guaranty to build said railroad. But the selectmen may issue said bonds and take stock in said railroad as above upon the completion of said road to Harmony village if within one year from date of this meeting."

Immediately after the vote a committee of four was chosen to act with the selectmen.

That the contemplated railroad company was afterward organized under the name of Seabasticook & Moosehead Railroad Company seems to be assumed by both parties, but the record does not show the date of its organization. By a stipulation in the record, however, filed May 8, 1913, it appears that this railroad company recorded a trust mortgage, dated October 1, 1895, for \$250,000, to secure bondholders. The record does not show that the selectmen ever subscribed for any stock in the road, although, as hereinafter stated, a certificate of stock was later delivered to them.

May 11, 1896, at another special meeting, the town passed a vote by a majority of 81 to 45, to—

"change the contract as entered into with the S. & M. R. R. Co. by the selectmen of Harmony, by extending the time from June 20, 1896, to August 20, 1896."

The record nowhere shows what this contract was, nor does it even show affirmatively any contract made at any time between the selectmen and the railroad company; but that there was some such contract seems to be assumed. This meeting and vote, however, are of no consequence, because, as the plaintiff's brief states and the District Court has found, the vote was not passed by the two-thirds majority required by statute. Neither party has relied upon it as in any way material for the purposes of the case.

The vote of July 13, 1896, was passed at a special meeting and purported to be, in substance, as follows:

That all the acts and doings of the meeting of June 20, 1895, whereby said town voted to aid the Seabasticook & Moosehead Railroad Company and to issue the bonds of the town for such purpose to the amount of \$8,500, "also to see if the town will ratify the doings of a special meeting of said town held May 11, 1896, for the purpose of extending the time within which said railroad should be built is hereby ratified and confirmed.

"And said town is hereby authorized to subscribe for and receive stock of said railroad company to the amount of [\$8,500].

"And the sum of [\$8,500] is hereby voted to said railroad company for the said stock and for the building and completion of said railroad to Harmony village.

"And the selectmen and treasurer of said town are hereby authorized to issue the bonds of the town to such an amount at a rate of interest not exceeding four per cent. per annum in such denominations time and form as they may deem to the advantage of said town and hereby authorize to sell and deliver said bonds for the purpose of aiding said (S. & M. R. R. Co.).

"And the selectmen are hereby authorized, upon receiving a sufficient guaranty that the railroad will be completed and operated to Harmony village within six months from date to deliver said bonds or the proceeds thereof

as they may deem expedient to said railroad company upon receiving such guaranty."

[1] At this meeting of July 13, 1896, however, the town was wholly without power to pass the above or any vote relating to the subject. Having voted at its legal meeting of June 20, 1895, "upon a question of loaning its credit, or taking stock in, or in any way aiding" a corporation, it was forbidden by the express terms of a Maine statute (1883, c. 51, § 138), to vote again upon the same subject except at an annual meeting, which the meeting of July 13, 1896, was not. The vote, therefore, being in direct violation of the statute, was wholly null and void. It had no effect either to ratify the vote of June 20, 1895, or to authorize a subscription by the town for stock in the railroad, or to appropriate \$8,500, either for buying the stock or for building the road. Nor did it give the town officers any authority to issue any bonds, or to sell and deliver any for the purpose of aiding the railroad, or to deliver any to the railroad company, whether upon receiving the guaranty provided for, or upon any other terms.

The selectmen and treasurer proceeded nevertheless, on August 1, 1896, to sign and issue 17 ten-year, 4 per cent. bonds, each for \$500, purporting to be bonds of the town. In each was their recital that the bond was one of the series described, and was—

"issued for the purpose of aiding the Sebasticook & Moosehead Railroad Company and in conformity to the vote of said town passed at a special meeting, held July 13, 1896, which vote is recorded in the town records of said town of Harmony."

All the bonds thus issued were immediately delivered together, by the selectmen, to officials of the railroad company, but without receiving any guaranty whatever, from the railroad or from any one else. These were the bonds now held by the plaintiff, who took them in the following November as security for a loan; and, by the failure of the borrower to pay, he has since become the owner of them. Except by the recital in the bonds, the evidence does not charge him with knowledge of any irregularities attending their issue, and he stands as a bona fide purchaser.

It is to be noticed that the issuance and delivery of the bonds without guaranty was no less in violation of the requirements imposed by the valid vote passed June 20, 1895, than of the requirements of the void vote on July 13, 1896, according to which they purported to have been issued. The valid vote required, not merely a sufficient guaranty that the road should be completed and operated within six months, but a guaranty that the necessary money in excess of \$8,500 had been actually subscribed and furnished for its completion; and the sufficiency of that guaranty was not left to the selectmen, but was to be passed on by the committee chosen for the purpose. Or if a guaranty were dispensed with, and the bonds issued for stock in the railroad company without guaranty, this was only to be done upon the actual completion of the road within one year from June 20, 1895. The selectmen, as is assumed, received stock in the railroad company to the par value of \$8,500 when they issued the bonds as above on August 1, 1896; but the road had not then been completed, nor was it ever com-

pleted by that company, which discontinued all work upon it soon afterward. Creditors attached the company's property, its equity therein was levied upon, and the mortgage it had given was foreclosed. The town offers in its answer, filed September 2, 1912, to return the \$8,500 of stock, alleging it to be worthless; and, of course, on that date it was worthless.

We agree with the learned Judge of the District Court that if the bonds had been in fact issued in conformity with the terms of the vote of June 20, 1895, they could not be held void merely because they recited the void vote of July 13, 1896, as the authority for their issue. *Wilkes Co. v. Coler*, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642; s. c., 190 U. S. 107, 23 Sup. Ct. 738, 47 L. Ed. 971.

The vote of June 20, 1895, having been the only lawful vote ever passed by the town relating to an issue of its bonds in aid of this railroad, the question is how far the selectmen's recital in the bonds issued concludes the town in the plaintiff's favor on the question of compliance or noncompliance with the conditions which that vote imposed upon the contemplated issue.

[2] The general result of the decisions of the Supreme Court cited in his opinion by the learned Judge of the District Court, the earliest being *Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579, and the latest *Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760, is, as his opinion states, that:

"Where a statute confers power upon a municipal corporation, upon performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, * * * and imposes upon certain officers * * * the responsibility of issuing such bonds when certain conditions have been complied with, recitals by such officers that the bonds have been issued in conformity with the statute have been held, in favor of bona fide purchasers for value, to import full compliance with the statute and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued."

The same principles no doubt govern when the question is not as to conformity with a statute, but as to conformity with a vote of the municipality imposing precedent conditions. But in order to enable a bona fide purchaser to invoke them, it must appear that the officers upon whose recital he relies were the officers having authority to determine whether the conditions covered by their recital had been performed or not, and their recital must also have been such as would import compliance with the conditions in all substantial respects. In *School District v. Stone*, 106 U. S. 183, at page 187, 1 Sup. Ct. 84, at page 87 (27 L. Ed. 90), one of the decisions relied on as above by the District Court, it is said, after stating the above general rule:

"But in all such cases, as a careful examination will show, the recitals fairly imported a compliance, in all substantial respects, with the statute giving authority to issue the bonds. We are unwilling to enlarge or extend the rule, now established by numerous decisions. Sound public policy forbids it. Where the holder relies for protection upon mere recitals, they should, at least, be clear and unambiguous, in order to estop the municipal corporation, in whose name such bonds have been made, from showing that they were issued in violation, or without authority, of law."

The selectmen's recital in these bonds, therefore, can conclude the town in the plaintiff's favor only so far as the selectmen were the officers vested with authority to determine whether the conditions of the vote of June 20, 1895, had been satisfied or not, and as to those conditions regarding which they were vested with such authority only so far as the terms of the recital in the bonds import compliance with them.

[3] If this recital had been that the issue was in conformity with the lawful vote of June 20, 1895, it might perhaps have been true, that vote being valid and unrevoked, that compliance with its conditions was sufficiently recited.

Instead of reciting that the bonds were issued in conformity with the lawful vote of June 20, 1895, the recital was only that they were in conformity with the unlawful vote of July 13, 1896, with a reference to that vote as it appeared on the town records; and the question is whether this can be regarded as importing compliance, in all substantial respects, with the earlier lawful vote.

We are unable to agree with the learned Judge of the District Court that the terms of the invalid vote were substantially the same as the terms of the valid one, and that the bonds may, for that reason, be regarded as substantially reciting a compliance with the provisions of the vote of June 20, 1895. As has appeared, they differed in respects which we cannot regard as immaterial. By the former vote any guaranty was to be passed upon by the independent committee, whereas, according to the latter illegal vote, it was to be passed on by the selectmen alone. The former vote, if stock was to be taken, required stock in a completed railroad, free from debt, and, having sufficient stock subscribed for, to construct, equip, and operate it. The latter illegal vote, omitting these material and vital requirements, purported to authorize the issue of the bonds for the stock and for the building and completion of an uncompleted railroad; that is, upon conditions whereby the town's interests were by no means so carefully protected as they had been in the lawful vote. Although the unlawful vote purported to ratify and confirm the lawful one, it was inconsistent with the lawful vote in respect of the conditions imposed. Neither because of the attempted ratification, which was void, nor because of any supposed conformity between the two votes, can we hold that reciting the unlawful vote of July 13, 1896, fairly imported substantial compliance with the vote of June 20, 1895.

The vote of June 20, 1895, was neither mentioned nor expressly referred to in the recital, and it is only through reference to the town records and to the unlawful vote of July 13, 1896, as it there appears, that it can be brought in so as in any way to support or aid the recital. The recital expressly describes the vote of July 13, 1896, as passed at a special meeting, and refers to the town records for its terms. As it appeared on those records, it showed, by the attempted ratification contained in it, that the town had already voted upon the question involved, could not therefore lawfully vote upon it again at any special meeting, and thus that the recited vote was unlawful. We are unable to believe that a recital by town officers, which thus afforded a pur-

chaser the means of knowledge that the vote recited as authority for their issue was void and of no effect, can estop the town from asserting that fact, or any fact disclosed by the record of the vote so recited as authority, showing noncompliance with conditions which the town had in fact prescribed.

The plaintiff, when he acquired these bonds, had the means of knowledge from them, and the town records referred to in them, that the conditions of the recited vote were inconsistent with those imposed by the vote of June 20, 1895, and also that the ratification attempted by the recited vote could not operate as a ratification. He has to rely upon the recited illegal vote if he seeks, by means of the ratification attempted in it, to extend and enlarge the scope of the recital in the bonds so as to include any of the terms of the earlier vote. Without examination of the illegal vote, he could not have known that it had attempted any ratification, and examination would have shown him, either that it was void, and therefore no ratification, or that, if valid, it repealed instead of ratifying the conditions of the former vote.

We are unable to hold that the plaintiff, in taking the bonds, had the right to assume, either from the recital they contained or from the purported vote therein mentioned, that they had been issued in conformity with the only lawful vote of the town upon the subject, so as to preclude the town from showing that in fact there had never been any such compliance. A presumption in his favor, as a bona fide purchaser, that he took the bonds without notice of any circumstances impeaching their validity may be conceded. But, on the facts which appear, we think the town may and does overcome that presumption.

2. Unless the plaintiff has the right to treat the bonds as lawfully authorized except so far as their amount is concerned, the relief sought in his bill cannot be granted.

Whether or not, if he had that right, the bonds could be adjudged valid and enforced for that proportion of their total amount, with interest, for which the town might lawfully have bound itself at the time, is a question which would have to be answered in the negative if, as in *Hedges v. Dixon County*, 150 U. S. 182, 14 Sup. Ct. 71, 37 L. Ed. 1044, the appropriation made and the issue of bonds to the amount appropriated must be regarded as one indivisible transaction.

In that case the county had voted to issue its bonds to the amount of \$87,000 as a donation to a railroad company, without any consideration whatever to the county, whether in the shape of stock or otherwise. The county was at the time allowed by the state Constitution to issue bonds for such a purpose, only to the amount of 10 per cent. of its assessed valuation—an amount much less than \$87,000—and the bonds were void at law for that reason. It was held that what the county authorized and carried into execution was one entire transaction; that to reform it so as to curtail the entire issue to such an amount as was within the constitutional limit would involve the making of a different donation from what the county voted and intended to make, and that there was no jurisdiction in equity so to modify it.

In the present case the issue of bonds was neither intended nor voted as a donation: the bonds, whether duly guaranteed or issued upon

completion of the road, were to be issued in exchange for an equivalent amount of stock; and the town got stock to the amount contemplated by the vote, though not in a completed railroad or a road having money enough subscribed for its completion. This stock, it is true, afterward turned out to be worthless; but there is nothing in the record which proves that it was absolutely without value when the town took it, or that it was then so regarded by the parties. The bonds, though issued together, bore successive numbers from 1 to 17, inclusive.

If, in view of all these facts, the transaction need not necessarily be regarded as so far entire and indivisible that to adjudge the bonds valid in a proportion of their amount, as prayed for, would be to make for the parties a contract wholly different from that which the town intended and voted, there is authority, not to be lightly disregarded, for saying that the relief which the plaintiff asks might be granted. *Dillon, Municipal Corporations* (5th Ed.) § 203, and cases cited. The learned Judge of the District Court regarded the case, in this aspect, as not within the decision in *Hedges v. Dixon County*, and granted the relief. The view we have taken of the case renders it unnecessary for us to determine whether or not his decree might have been upheld had we been able to agree with him in holding the issue of the bonds valid for any purpose in the plaintiff's favor.

The decree of the District Court is reversed, and the case is remanded to that court, with directions to dismiss the bill; and the appellant recovers its costs in both courts.

BINGHAM, Circuit Judge (concurring). This is an appeal from an order of the District Court for the District of Maine, overruling the defendant's demurrer, and from a final decree in favor of the plaintiff, in an equity proceeding brought by Nathan H. Truman against the town of Harmony, in which he asks that certain bonds of the town be declared good and valid after reducing their amount to the limit the town was authorized to issue, and for the payment of certain overdue coupons after scaling them down to correspond with the reduced value of each bond.

It appears that the town on June 20, 1895, voted an appropriation of \$8,500 to aid in the construction of a railroad from Hartland to Harmony village, in said Harmony, and authorized its selectmen to enter into a contract with any party that the road should be built, and to subscribe for stock in the road to that amount as soon as the railroad company should be organized, and that at the same time it voted to issue bonds of the town to the railroad company for said amount, upon certain specified conditions, to meet the subscription.

August 1, 1896, bonds to the amount of \$8,500, and in the sum of \$500 each, were issued and delivered by the selectmen of the town to the officers of the Sebecook & Moosehead Railway Company in exchange for stock of like amount in that railroad. At that time the outstanding indebtedness of the town was such that its authority under the Constitution of the state to increase its indebtedness was limited to \$3,654.41. The bonds were sold by the railroad, and the plaintiff subsequently became the holder of them.

These facts clearly demonstrate that the appropriation of \$8,500, and the issuance of the bonds for that amount to meet the appropriation, was one entire and indivisible transaction, and that no particular number of the bonds can be separated from the others and held to be valid as within the constitutional limit of the town to issue. The facts here presented are not the same as those in *Daviess County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. Ed. 1026, and do not authorize the conclusion there reached upon this question. That the facts here presented warrant the conclusion that the bonds were issued as an entirety, is, for all practical purposes, conceded by the plaintiff. His bill proceeds upon the theory that the vote and issue of bonds was one entire transaction; that as the transaction called for an issue in excess of the constitutional power of the town to authorize, all of the bonds were illegal and unenforceable at law, and that because of their non-enforceability as legal obligations the plaintiff should be permitted to come into equity and have the amount of the excess ascertained, the bonds scaled down to the constitutional limit, and when scaled down, declared good and valid. Furthermore, it appears from the decree that this was the course pursued at the trial. In the decree it is stated:

"That on the 1st day of August, 1896, said respondent, in addition to the indebtedness then outstanding against it, had the legal power to create an enforceable indebtedness to the amount of \$3,654.41, and that the said issue of bonds of August 1, 1896, was valid to the extent of said sum of \$3,654.41, and that each of said bonds was partially valid and partially invalid, that is to say, each of said bonds was valid in the sum which bears that proportion to \$500 that \$3,654.41 bears to \$8,500, to wit, .42993 per cent.; that upon each of said bonds numbered from 1 to 17, inclusive, the said respondent, at the time of issuance and delivery thereof, became bound to pay to the owner and holder thereof the sum of \$214.965, instead of \$500, as denominated in each of the said bonds."

And, inasmuch as none of the bonds were due at the time of the bringing of the suit, and would not become due until the 1st of August, 1916, it was further ordered and decreed—

"that the respondent shall pay the holder or holders of the said several bonds at the maturity thereof the said sum or sums of money for which the same are hereby adjudged valid, and that the said town shall pay interest upon the valid portion of each of said bonds semiannually until their maturity, at the rate of 4 per cent. per annum, according to the terms and provisions of the said bonds and the coupons thereto attached, commencing with the coupon due August 1, 1913, save and except that the interest coupons shall be reduced so as to evidence semiannual interest upon the sum of \$214.965, instead of \$500; so that each coupon shall represent interest in the sum of \$4.299, and the said bonds shall be held and considered in all respects as negotiable bonds as fully as though the said recital had not been written or stamped thereon."

And as to the interest coupons that were due, and which had not been paid, it was decreed that "the plaintiff shall recover judgment against the respondent in the sum of \$1,023.23."

1. The first question, therefore, presented by the case is whether the plaintiff, as the owner of the entire series of bonds issued by the town in excess of the limit fixed by the Constitution of the state, and which for that reason are not enforceable at law, can invoke the aid of a court of equity to afford him relief by first ascertaining the amount of

bonds which the town could lawfully have issued, and then, having scaled down the issue to the limit thus ascertained, declare such excess to be void, and the residue good and valid, and enforce payment of the interest on the residue against the town.

In *Hedges v. Dixon County* (C. C.) 37 Fed. 304, on appeal 150 U. S. 182, 14 Sup. Ct. 71, 37 L. Ed. 1044, this very question was presented and decided. In that case the plaintiffs were holders of nearly the entire issue of \$87,000 in bonds of the county of Dixon, in the state of Nebraska, which the county had issued and donated to the Covington, Columbus & Black Hills Railroad Company, pursuant to a vote of the electors of the county. In that case, as in this, when the interest coupons matured, payment was refused by the county officials, on the ground that the bonds were invalid because they exceeded in amount 10 per cent. of the assessed valuation of the taxable property of the county at the time of their issue. And the plaintiffs brought their bill, offering to surrender and cancel so much of their bonds as exceeded 10 per cent. of the assessed value of the taxable property of the county; each holder surrendering his proportionate share of such excess.

That case, when it was before the Circuit Court (37 Fed. 304), was decided by Mr. Justice Brewer, then Circuit Judge in the Eighth Circuit, who, in considering this question said:

"Conceding that the bonds, as they stand, are void, and that no recovery can be had thereon in a court of law, complainants insist that a court of equity has power to scale them down to an amount equal to that that the county might lawfully have issued, and enforce them when thus scaled down. It is said that the vice of this transaction is only in the matter of excess; that a court of equity may expunge the vice, and enforce the contract thus freed from taint. Counsel for complainants concedes that he has been unable to find any precedent for such a proceeding, and his confession of inability is satisfactory evidence that no such precedent exists, so that the question must be determined by reference to the general principles of law; and here it may be remarked that the difference between courts of law and those of equity is mainly one of forms and remedies, rather than in the matter of absolute rights and obligations. If a contract be pronounced absolutely void in a court of law, it must expect the same denunciation in a court of equity. Courts of equity, like those of law, must accept contracts as they are made, and have no power to make contracts for parties. If the contracts which parties attempt to make are void because in defiance of some statute or common law, they are void alike in either court, and neither court can change a void into a valid contract. Now, the contract in this case, in its inception, was on the part of the county a single and indivisible obligation; that is, an attempted donation of \$87,000 to the railroad company. The bonds are merely evidences of the contract, the contract standing behind them, and, whatever separate and divisible obligations of the county exist after the issue of the bonds, the contract in the first instance was single and entire. Now that was an attempted donation of \$87,000 to the railroad company. Such donation the county had no power to make, and, after it had finished its action, nothing which the promisee, the other party to the contract, could do could give validity to the obligation of the county. It was either good or bad, dead or alive, when it left the hands of the promisor. Take this illustration: If, in a state where usury avoids the entire contract, a usurious note be given, that note is void, and no willingness of the payee, no act of his, can transform that invalid into a valid contract. Of course it would be very satisfactory if the promisee, by consenting to a reduction of the interest, could give validity to a void promise, vitality to a dead contract. So here, if the promisee, the railroad company, could reduce

the extent of the promise, it doubtless would be satisfactory, but it would be thereby making a contract, or attempting to make a contract, different from that which the promisor proposed. The fact that 87 bonds were issued, instead of one, in no manner changes the primary obligation attempted to be assumed by the county."

And further on he says:

"This court can make no contract for the parties. It must take the contract which they made. That contract was one that the county was not authorized to make. The bonds were void as adjudged in a court of law, void in whole and in part, and they must be so adjudged in a court of equity; and, the county having received nothing of value, no equitable obligation can be enforced against it."

In the Supreme Court (150 U. S. 182, 14 Sup. Ct. 71, 37 L. Ed. 1044), Mr. Justice Jackson, in delivering the opinion of the court, in the same case, at the bottom of page 188 of 150 U. S., at page 73 of 14 Sup. Ct. (37 L. Ed. 1044), says:

"What the county authorized and carried into execution in the present case, both by the vote and by the donation, was one entire transaction, and if it should be so reformed as to curtail the entire issue of bonds to such an amount as was within the constitutional limits of the county to donate, it would be something different from that which was voted by the county, and carried into effect by the issue of the bonds. This would involve the making of a different donation from what the county voted and intended to make to the railroad company."

Having decided that the donated bonds were issued as one transaction, and that the issue, if regarded purely as a donation, could not be reformed by reducing the amount of the issue, he proceeds to consider what would have been the situation if the transaction constituted a contract between the railroad company and the county. As to this, he says:

"It is urged that the vote and the issue of the bonds constituted a contract between the railroad company and the county, and that the bonds issued in pursuance thereof should be scaled, as sought by the bill, to bring the contract within the authority of the county; that as the county intended to make a valid donation, such reduction of the amount of the issue, which the complainants offer to make, should be sanctioned by the court, and the residue declared valid. But the difficulty in the way of this suggestion is that, treating the transaction as a contract, it is not within the power of a court of equity to change its terms and provisions. Besides, it is not shown that the county would have voted a different amount from what was issued, or that it intended to issue a less amount. It is too well settled to need citation of authorities that a court of equity, in the absence of fraud, accident, or mistake, cannot change the terms of a contract."

Then, again, on page 192 of 150 U. S., at page 74 of 14 Sup. Ct. (37 L. Ed. 1044) he says:

"The fact that the complainants have no remedy at law, arising from the invalidity of the bonds, confers no jurisdiction upon a court of equity to afford them relief. The established rule, although not of universal application, is that equity follows the law, or, as stated in *Magniac v. Thomson*, 56 U. S. (15 How.) 299 [14 L. Ed. 696] 'that wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maximum equitas sequitur legem is strictly applicable.' Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or, in the absence of fraud, accident, or mistake, to so modify it as to make it legal and then enforce it. Courts of

equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law, and where the transaction, or the contract, is declared void because not in compliance with express statutory or constitutional provisions, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof."

This was not the only question considered in that case. The complainants also sought to sustain their right of recovery upon the ground that the county had received a benefit from the construction of the railroad which the bonds were issued to promote, that this benefit was the equivalent of the face of the bonds, and for the payment of which a contract should be implied in law.

After discussing the cases where recovery was allowed upon its appearing that the municipality had received full pecuniary consideration for its invalid bonds, and had applied the proceeds to the purpose for which the bonds were issued, and after pointing out that those cases differed from the one the court was considering in that the county of Dixon received no money for the bonds, the court said:

"The circumstances and conditions which gave the holders of the bonds an equitable right in those cases to recover from the municipality the money which the bonds represented do not exist in the case under consideration, where the county received no part of the proceeds of the bonds, and no direct money benefit, but merely derived an incidental advantage arising from the construction of the railroad, upon which advantage it would be impossible for the court to place a pecuniary estimate, or to say that it would be equal to such portion of the bonds in question as the county could lawfully have issued. * * * If any equitable claim arises in favor of the holders of the bonds it must be against the railroad company, from whom the bonds were purchased, and by whom their payment was guaranteed, as that company was the recipient of the legal consideration realized upon the negotiation of the bonds."

The decision in *Hedges v. Dixon County* is controlling upon the proposition that this court, as a court of equity, is without authority to scale down the bonds, as was done by the District Court in the decree above set forth; that it is for the parties to make their own contracts, and for the court to enforce them as made if they are legal; that the power of the court to reform contracts is limited to cases where it appears that through fraud, accident, or mistake, some provision was inserted in the contract that did not express the intention of the parties.

In all the cases to which our attention has been called, recognizing the claim of the plaintiff to have the bonds scaled down to the constitutional limit—with the exception of the case of *City of Columbus v. Woonsocket Institution of Savings*, 114 Fed. 162, 52 C. C. A. 118, hereafter considered—it appeared that the municipality sought to be charged had received from the sale of its bonds a money consideration equal to or greater than the reduced value of the bonds. While the result reached in those cases was right, the method by which it was reached was clearly wrong. It is a well-recognized principle that, under such a state of facts, the law will imply a contract to repay the purchaser of the bonds the money received by the municipality therefor, to the extent that the municipality had constitutional and statutory authority to borrow the money, but that above that limit no con-

tract will be implied. *Chelsea Savings Bank v. City of Ironwood*, 130 Fed. (C. C. A., Sixth Circuit) 410, 412, 66 C. C. A. 230; *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153; *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132; *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; *Gause v. Clarksville*, 10 Fed. Cases, No. 5,276, at page 102.

The case of *City of Columbus v. Woonsocket Institute of Savings*, 114 Fed. 162, 52 C. C. A. 118, upon which the plaintiff chiefly relies in support of its contention as to scaling down the bonds, was an action at law. The bonds there in question had been issued as an entirety. Their amount exceeded the constitutional limit which the city was authorized to issue. The plaintiff sought to recover the interest that was due on the entire issue and the principal on that half of the bonds which were then due. In the Circuit Court judgment was entered for the plaintiff for the interest on all the bonds, and for the principal on those that were due, and the city appealed. In the Court of Appeals the judgment of the Circuit Court was reversed, for the reason that the bonds, having been issued as an entirety and in excess of the constitutional limit, were illegal. Judgment, however, was entered for the appellees. This was done by scaling down all the bonds to the amount which the city was authorized to issue, and by reducing the interest on each coupon to correspond with the reduction in the amount of each bond. If an opinion was written in the Circuit Court, it does not seem to have been reported, and the case as reported on appeal does not disclose whether the city received a money consideration for the bonds or not. If it did not, the conclusion reached was erroneous, as well as the method by which it was reached, and was in direct conflict with the decision of the Supreme Court in *Hedges v. Dixon County*. The *Hedges* Case is not alluded to in the opinion, and apparently was not called to the court's attention. Furthermore, the opinion apparently ignores all the fundamental principles of law and equity, and is of little value as a precedent.

2. Is the plaintiff entitled to recover on the theory of a contract implied in law? As to this, it may be said that the plaintiff introduced no evidence that the stock received by the town for the bonds was of any value. The evidence of the defendant was that it was of no value, and in its answer it offers to return the stock to the plaintiff. The District Court ruled that it was immaterial what the value of the stock was, declined to consider the evidence on that question, and the defendant excepted. Whether the stock was of any value was material upon the question whether a contract could be implied in law. In the absence of such proof the law will not imply a contract in favor of the plaintiff, or of the railroad company from which the plaintiff received the stock. *Travelers' Ins. Co. v. Mayor of Johnson City*, 99 Fed. (Cir. Ct. App., Sixth Circuit) 663, 40 C. C. A. 58, 49 L. R. A. 123; *Chelsea Sav. Bank v. City of Ironwood*, *supra*.

The principle underlying contracts implied in law is restitution, that is, that the defendant has in his hands something of value which, in justice and equity, belongs to the plaintiff, and should be restored to him; but, as a court of law cannot order the return of the specific

thing, because of its lack of power to do so, it orders its value to be restored. Keener on Quasi Contracts, p. 286. This, however, being a proceeding in equity, we are not hampered as to the method by which restitution may be made. If the stock is returned to the plaintiff, it is apparent that he will receive everything of value that came into the defendant's hands by reason of the transaction. *Chapman v. County of Douglas*, 107 U. S. 348, 355, 356, 2 Sup. Ct. 62, 27 L. Ed. 378. The sum received by the railroad in the sale of the bonds did not come to the defendant; the railroad in making the sale was not acting in the defendant's behalf, but for itself. See *Travelers' Ins. Co. v. Mayor of Johnson City*, 99 Fed. (Cir. Ct. App., Sixth Circuit) 663, 666, 670, 40 C. C. A. 58, 49 L. R. A. 123.

3. If the bonds in question had not exceeded the constitutional limit which the town was authorized to issue, and were not for that reason invalid, or if the transaction was not entire, and their delivery was such that priority could have been given to those issued within the constitutional limit, there is still another reason why the plaintiff could not recover upon the bonds, if they were due, either in an action at law or in equity.

On the face of the bonds it is stated that they were issued in pursuance of a vote of the town passed at a meeting held July 13, 1896. The action of the town taken at that meeting was void and of no effect, as it was a special meeting, and the question of the town's "loaning its credit to the taking of stock" in the railroad had been previously voted upon at a "regular meeting," held June 20, 1895.

In the Revised Statutes of Maine, 1883 (chapter 51, § 138) it is provided that:

"Whenever a city or town has voted at any regular meeting thereof upon any question of loaning its credit to, the taking of stock in, or in any way in aiding any person or corporation, said city or town shall not vote again upon the same subject, except at its annual meeting."

The plaintiff recognizes that the bonds are in no sense legal obligations of the town, if the only authority for their issuance is that contained in the vote of July 13, 1896. But he says that adequate authority for issuing the bonds is to be found in the vote of June 20, 1895.

An examination of the vote of June 20, 1895, discloses that the authority there conferred upon the selectmen to issue and deliver bonds to the railroad company was upon the express condition that the party with whom the selectmen entered into the contract to subscribe for stock in the railroad should give a—

"guaranty to the satisfaction of a committee to be chosen by said town, that the balance of the money over and above (\$8,500) eight thousand five hundred dollars, necessary for the construction and completion of said road and appurtenances to said Harmony village, shall be subscribed and furnished, said road equipped and operated."

At the meeting of June 20 1895 the town chose a committee of seven who were to decide whether the guaranty that was to be furnished complied with the conditions of the vote, and was to their satisfaction.

The defendant contends that the conditions of this vote were never complied with. The plaintiff's answer is that the recital in the bonds that they were issued in conformity to the vote of the town of July 13, 1896, estops the town from showing that the bonds were not issued in compliance with the conditions of the vote of June 20, 1895. If the conditions specified in the two votes were the same, no doubt there might be something in this contention, but they are not the same. Under the vote of June 20, 1895, one of the conditions was that the guaranty was to be passed upon by the committee consisting of seven members, whereas under the vote of July 13, 1896, it was to be passed upon by the selectmen alone. Then, again, under the vote of June 20, 1895, the condition looked to an issue of stock to be taken in a railroad which was to be completed, free from debt, and a subscription of stock was to be had sufficient to construct, equip, and operate it. This was a material and vital condition precedent to the issuance of the bonds. Nothing of the kind was contained in the vote of July 13, 1896, as a condition, or otherwise, to the bonds being issued.

The conditions in the two votes not being the same, it remains for us to consider whether there was anything in the recital in the bonds upon which the plaintiff could fairly rely as a representation on the part of the town that the conditions of the vote of June 20, 1895, had been complied with, so as to estop the town from showing that it had not been; for unless the recital contained such a representation, there can be no estoppel. There surely is nothing in the recital from which the plaintiff could fairly infer that the bonds were issued in pursuance of the vote of June 20th, or in conformity with the conditions of that vote. But the plaintiff seeks to extend and enlarge the meaning of the recital in the bonds by a statement in the vote of July 13, 1896, wherein it was attempted to ratify the vote of June 20, 1895. It is to be borne in mind that the vote of July 13, 1896, through which the plaintiff seeks to extend the scope of the recital, was illegal and void, and it is inconceivable how the recital in the bonds can be extended and enlarged through such a medium. The vote of July 13, 1896, to have been of any force and effect, must have been a legal vote, and, if a legal vote, its conditions being different from those contained in the vote of June 20, 1895, it would, to that extent at least, operate as a repeal, and not as a ratification of the conditions of the vote of June 20, 1895.

Furthermore, if the plaintiff, or the officials of the railroad, had examined the vote of July 13th, they would have ascertained that its conditions were different from those contained in the vote of June 20th, and inconsistent therewith; and, this being so, that the ratification would operate to confirm the vote of June 20th to the extent that it authorized the appropriation of \$8,500, and not to the extent that it imposed conditions under which the bonds were to be issued. And, if they had discovered that the vote of July 13th was illegal and void, they would have known that the attempted ratification was no ratification at all. Without examining the vote of July 13th, they would not have known of the attempted ratification by which they seek to extend and enlarge the scope of the recital in the bonds; and, if they had examined it, they would either have learned that the vote was void, and

would not operate to ratify the former vote, or that it was valid, and had the effect to repeal the conditions of the vote of June 20th instead of ratifying them. In any view, the vote of July 13th does not enlarge the recital in the bonds so as to operate as a representation on the part of the town that the conditions of the vote of June 20th were complied with.

Then, again, under the vote of June 20th, the body authorized on behalf of the town to determine whether the conditions of that vote had been complied with was a committee of seven, and it was this committee, and this alone, that could be said to be authorized to make a certificate upon the bonds that they were issued, in conformity with the vote of June 20th, so as to work an estoppel. In *Dixon County v. Field*, 111 U. S. 83, at page 94, 4 Sup. Ct. 315, at page 320 (28 L. Ed. 360), it was held that:

"If the officers authorized to issue bonds, upon a condition, are not the appointed tribunal to decide the fact, which constitutes the condition, their recital will not be accepted as a substitute for proof."

For these reasons I concur in the result reached in this case.

STEBBINS et al. v. MICHIGAN WHEELBARROW & TRUCK CO. et al.

(Circuit Court of Appeals, Sixth Circuit. January 6, 1914.)

No. 2,345.

1. CORPORATIONS (§ 190*)—TRANSFER OF ENTIRE PROPERTY AND ASSETS—ACTION BY MINORITY AGAINST MAJORITY STOCKHOLDERS—BURDEN OF PROOF.

Majority stockholders of a corporation, who join in authorizing and effecting a transfer of all of its property to a new corporation, in which they also become stockholders, acquiring practically a controlling interest, have the burden of proving, as against dissenting minority stockholders, who are given no interest in the new company, that the amount received for the property was its full value.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 723-731; Dec. Dig. § 190.*]

2. CORPORATIONS (§ 182*)—TRANSFER OF ENTIRE PROPERTY AND ASSETS—RIGHTS OF MINORITY STOCKHOLDERS.

Pursuant to a vote of the majority stockholders of a manufacturing corporation, all of its property and assets were transferred to a son of its vice president and another, who in payment gave their notes for the exact amount of the company's indebtedness. Further carrying out the plan under which the transfer was made, a new corporation was organized with a capital stock of \$50,000, to which the purchasers transferred the property, receiving therefor an agreement to assume and pay the debts of the old company, and also one-half the stock of the new company; its articles of incorporation reciting that the property was of a value \$25,000 greater than such indebtedness. The stock so received was divided between majority stockholders of the old company and the son of its vice president, who together acquired the controlling interest. Complainants, who were dissenting minority stockholders owning more than one-fourth of the stock, were given no interest in the new company. There was other evidence tending to show that the value of the property in excess of the indebtedness of the old company was at least \$25,000. *Held*, that complainants were entitled to recover their proportionate share of such value

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from the new company and the majority stockholders of the old who became stockholders therein, but that certain other stockholders who voted with the majority but did not become stockholders in the new company were not liable therefor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 686-690; Dec. Dig. § 182.*]

Rights of minority stockholders as to management of corporate affairs, see note to *Wheeler v. Abilene Nat. Bank Bldg. Co.*, 89 C. C. A. 482.]

3. CORPORATIONS (§ 182*)—TRANSFER OF PROPERTY—DUTY OF MAJORITY TOWARD MINORITY STOCKHOLDERS.

Majority stockholders of a corporation occupy a fiduciary relation toward the minority, and, in authorizing a transfer of corporate property to themselves or to another corporation in which they are interested, are subject to the settled rule that trustees will not be permitted, to the detriment of their *cestuis que trustent*, to purchase and hold the trust property.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 686-690; Dec. Dig. § 182.*]

4. CORPORATIONS (§ 182*)—LIABILITY TO STOCKHOLDERS—WRONGFUL DISPOSITION OF PROPERTY.

A corporation, which through its regular corporate agencies, by a transfer of its property, wrongfully deprives some of its stockholders of the value of their stock, is liable therefor on the same principle that would hold it liable in case of its wrongful refusal to transfer stock on its books.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 686-690; Dec. Dig. § 182.*]

Appeal from the District Court of the United States for the Northern Division of the Eastern District of Michigan; Alexis C. Angell, Judge.

Suit in equity by Bliss Stebbins, Earl Card, and Richard S. Woodliff against the Michigan Wheelbarrow & Truck Company and others. Decree for defendants, and complainants appeal. Reversed.

For opinion below, see 191 Fed. 238.

This was a suit brought by appellant Stebbins, as a stockholder in the Michigan Wheelbarrow & Truck Company, a corporation of Michigan, in behalf of himself and all other stockholders who were similarly situated and might desire to join in the proceeding; and the other appellants, Woodliff and Card, were permitted later to intervene as co-complainants. Complaint was made against an executed transfer of all the company's assets, subject to its debts, to another Michigan corporation, the Saginaw Wheelbarrow Company, which was organized for the purpose of receiving the transfer; and the defendants below were these two corporations and also certain stockholders whose names are given in the margin,¹ and their relations to the companies and holdings are stated in the opinion. The transfer had been executed and delivered by a majority of the directors, with the consent of a majority in number and interest of the stockholders, of the old company; and the object of the suit was to secure the appointment of a receiver, an accounting, the winding up of the affairs of the old corporation, a sale of the corporate assets and discharge of the liabilities, and a money decree representing the value of complainant's proportionate share in such assets. Issue was joined through joint answer of the defendants and a replication. The defendants avoided a ruling upon the motion for appointment of a receiver for both companies, and also secured authority for the new company to continue to manufacture and dispose of its

¹ George A. Alderton, Melvin O. Robinson, August C. Melze, M. W. Tanner, Fred J. Fox, James S. Smart, Thomas Jackson (who died pending the suit and as to the deceased the suit was revived in the name of his executrix, Ruth Jackson), Harker W. Jackson, and Alfred A. Alderton.

product in the ordinary course of business (subject, however, to a requirement fully to account to the court), by proffering a bond, which, under sanction of an order of the court, was given in the sum of \$25,000 to the complainant, Stebbins, and conditioned to perform any decree that might be rendered in his favor. Trial was had below on a vast amount of evidence, presented through depositions and exhibits, which resulted in a dismissal of the bill; and the complainants appeal. The decision below is reported in 191 Fed. 238, where the facts as there found fully appear.

Dayton W. Closser, of Alpena, Mich. (J. H. Cobb, of Alpena, Mich., of counsel), for appellants.

R. S. Woodliff, of Detroit, Mich., in pro. per.

Weadock & Weadock, of Saginaw, Mich., for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). We concur in large measure in certain of the conclusions of fact reached by the learned trial judge, but we are not able to affirm his ultimate conclusion or the decree. The basis of the decree is that at the time of the transfer the assets of the old company were worth nothing in excess of its debts. The implication is that, if there had been a material excess in value, complainants would have been entitled to recover their respective shares in the form of a money decree. It is true that, in spite of the unusual quantity of evidence offered,² it is impossible, as the court below in substance observed, to ascertain with exactness the net value of the corporate assets at the time of the transfer; and yet the volume of business the old company evidently obtained and conducted, even down to the date of the transfer, the nature and quantity of assets it possessed, coupled with the acts and admissions of the individual defendants, impel us to believe that the assets were materially greater in value than the amount of the debts; and that the minority interest was unduly denied opportunity to share in such value. It is also true that the administration of the principal complainant as manager of the old company and his conduct as its secretary were not calculated to inspire confidence in his associates; and it is not surprising that the company dispensed with his services. But his shares of stock with those of his co-complainants, at the time of the transfer, admittedly constituted more than one-fourth of the entire capital stock of the old company; and we pass by the contention persisted in between counsel respecting Stebbins' inefficiency before his dismissal, his refusal to renew indorsements for the company, and his efforts thereafter to aid a competing company, instead of the old one, with the observation that neither criticism of his conduct nor efforts to justify it assist in solving the ultimate problem of the case. The property interests of the minority remained and could not be appropriated by the majority upon any such theory.

The old company was incorporated in January, 1900, for the purposes of the "manufacture and sale of wheelbarrows, trucks, and

² The printed record alone comprises 2938 pages, and there are besides a large number of exhibits not printed.

other kindred articles," with a capital stock of \$25,000, which was increased in September, 1901, to \$50,000. Both of these amounts, \$25,000 each, appear to have been subscribed for and paid in cash. The original capital seems to have been substantially consumed in obtaining land, constructing necessary buildings, and acquiring equipment; and still the increase was not sufficient to supply the necessary working capital. Resort was had to loans which were obtained upon indorsements of the company's paper by four of the principal stockholders, who were also directors, including complainant Stebbins. In August, 1904, the paper so indorsed amounted to about \$70,000. An agreement was then entered into binding these four directors, with four other stockholders, in separate amounts, to hold the indorsers harmless to the extent of \$50,000 in the event of their having to pay any of such notes, or their renewals, for a period of one year; and the obligations so entered into were secured by the deposit of certain of their individual securities with one of their number, George A. Alderton, as trustee. That agreement was subsequently extended for a further term of two years; that is, until August 22, 1907. Thus, if we include the capital paid in, at least \$120,000 appears to have been received by the company and applied to its plant and business. At different times it was deemed necessary by those in charge of the company to obtain additional capital by the issue of preferred stock or mortgage bonds, or to consolidate with some kindred company; but their efforts in these respects failed. The company becoming dissatisfied with Stebbins as secretary and manager, dismissed him, and in July, 1905, procured the services of Thomas Jackson as manager. Mr. Jackson, an experienced manufacturer in another line, placed his son, Harker W. Jackson, in immediate control of the Michigan Company's business.

It is needless to set out all the steps taken to bring about the sale subsequently made. The testimony is in conflict touching the methods adopted by the majority interest, that is, whether sufficient efforts were made to sell the property to strangers, whether the nominal buyers were the real purchasers, whether the purchase price was as much as might with reasonable effort have been obtained; in short, whether the sale was not in truth the execution of a scheme arbitrarily to eliminate the non-consenting minority interest. It is not worth while to try to reconcile all the phases of this conflict. It is certain that, within a few months after Stebbins was replaced by Jackson as manager, the corporate property was conveyed and transferred by the Michigan Company to Harker W. Jackson and Alfred A. Alderton, the former the son, as stated, of the manager of that company and the latter the son of one of its directors and principal stockholders; and it is not pretended that these grantees were either financially able or that they expected to make the purchase upon their own account. The sale was at last based upon an affirmative vote representing 3,100 shares, while the negative vote represented 1,300 shares.³ The deed conveying the realty bears date December 28, 1905,

³ The stockholders voting and their shares were as follows: A. C. Melze, 1,000 shares; G. A. Alderton, 500 shares; J. S. Stewart (Smart), 100 shares;

and the consideration named is nominal. The instrument transferring the goods, chattels, book accounts, etc., bears the same date and recites a consideration of \$52,942.42. However, the entire consideration is disclosed by the plan, which, as shown by the minutes of the old company and the evidence, was employed to turn over the property and assets of the old company to the new one. The sale followed a report to the stockholders of a committee of officers and directors of the old company, viz., August C. Melze, president; George A. Alderton, vice president; and M. O. Robinson, secretary. This report in terms shows the entire consideration to have been \$73,884.91, the exact amount of the company's debts. This sum was to be payable in the purchasers' negotiable demand notes running in favor of the old company, with interest at 6 per cent.; and, as was stated in the committee's report, these notes were to be "indorsed by two or more indorsers that shall be satisfactory to the board so that the same can be discounted without recourse to the company at their face value." The notes, bearing date January 3, 1906, were signed by the two purchasers, and indorsed by M. O. Robinson, A. C. Melze and G. A. Alderton, the members of the committee just mentioned, and were turned over to the old company; and these indorsements derive further significance from what followed.

Three days later (January 6th), articles of association of the Saginaw Wheelbarrow Company were signed by Thomas Jackson and the two purchasers of the property of the old company. On the same day these purchasers conveyed to the new company the realty which they had received from the old company; the consideration named here, like that in the deed of the old company, being nominal. We do not find in the record any instrument transferring the personality to the new company, but it certainly was delivered to that company. Harker W. Jackson having his attention called to the notes given as stated to the old company, in the aggregate sum of \$73,884.91, testified in respect of them:

"It was understood between the stockholders of the wheelbarrow company and Alfred Alderton and myself that these notes would be surrendered after the new company was organized on condition that the stockholders of the new company, the Saginaw Wheelbarrow Company, would assume the debts of the old company."

One of the articles of association of the new company states the amount of its capital stock (\$50,000) and the fact that it was paid, one half in cash and the other half in property. This property is classified and described and is the property so conveyed and transferred by the old company; and immediately succeeding the description and the total value affixed, this appears: "Less an indebtedness which this company assumes, * * * \$73,884.91." The new company seems to have obtained credit immediately upon its organization, and it might be inferred from some of the testimony that this was through the financial standing of some of its stockholders. Its capital stock consists

F. J. Fox, 100 shares; M. W. Tanner, 400 shares; and M. O. Robinson, 1,000 shares—total 3,100 shares, the complainants' combined holdings being 1,300 shares. The remaining 600 shares were not voted.

of 5,000 shares. Thomas Jackson and his son appear by the articles of association to have subscribed each for 900 and Alfred A. Alderton for 3,200 shares; but it is to be observed that Alfred A. Alderton's holdings were subsequently diminished to 350 shares, and that M. O. Robinson, A. C. Melze, and G. A. Alderton became possessed of 2,151 shares, which, with Thomas Jackson's holdings, gave to these four men a majority of the total number of shares. We stop to mention that others of the old stockholders, though none of the complainants, also received different amounts of the new stock, among them M. W. Tanner, who received 340 shares. He was one of the directors of the old company and joined with Melze, Robinson, and G. A. Alderton in bringing about the sale of the old company's property. The new company was then able to and it did take up the notes of the old company held by banks in Saginaw to the amount of \$69,500, which, as already stated, had been indorsed by four of the directors (Robinson, Melze, G. A. Alderton, and Stebbins), and the indorsers in turn indemnified by an agreement and collaterals deposited with G. A. Alderton, as trustee. The new company then turned these notes over to Harker W. Jackson and Alfred A. Alderton, who exchanged them for the purchase-money notes which they with their indorsers had given in payment for the old company's property, as before pointed out; whereupon G. A. Alderton, as trustee, returned the collaterals securing the indemnity agreement to the respective owners. Thus the transition from the old to the new company was effected without the payment of any money, except such as was required to pay stock subscriptions in the new company; but, as respects every ordinary object of holding stock in the old company, the protesting minority stockholders were eliminated. The record abundantly justifies a conclusion reached by the court below:

"It is quite clear that this plan of financing the new company was worked out before its actual organization was completed, and that some, at least, of the stockholders (indorsers) of the Michigan Company's notes expected to become indorsers for and stockholders in the new company."

However, the degree of credit before alluded to which the new company at once obtained is not attempted to be explained upon the theory, certainly not alone upon the theory, that it was able to secure indorsements of its commercial paper; and granting its ability in this behalf, still the reason for this is hardly to be accounted for by the cash it received upon stock subscriptions, if in truth the company derived no profit through the purchase of the property of the old company. And this brings us to a consideration of the value of the old company's assets.

Foremost among the evidential features which tend to show such value is the admitted fact that in organizing the new company the value of the old assets was fixed at \$25,000 in excess of the indebtedness. We have seen that the new company's capital stock of \$50,000 was declared in its articles of association to have been "actually paid in"; that is, \$25,000 had been paid in cash, and the rest (\$25,000) by the excess in value of its property over its indebtedness. This representation was made specific by stating the total value of the prop-

erty to be \$98,884.91, and the total indebtedness to be \$73,884.91, and so showing a balance equal to one half the capital stock. It is insisted that this excess in value was due to the payment of the other half in cash; but the fallacy of this may be seen in the obvious result that would have been attained if all the money, instead only of a substantial part, had been used to reduce the indebtedness. In that event (if it be assumed that before the receipt of the money the value of the assets and the amount of the indebtedness were equal), it is true it could have been said that the value of the assets exceeded the indebtedness to that extent; but that would not have been because the value of the assets had been increased, but because the indebtedness had been reduced; neither would the primary liability on the capital stock have been discharged. Nor was there any other method of using this money both to discharge its equivalent in any sort of corporate obligations and transmute the old assets into an augmented value equal to the sum of the indebtedness and the money; either such surplus value existed before, or it was not there later. We are not unmindful of the influence which this amount of money might ordinarily have upon the business activities of such a company; but, when this newly organized company (as it was at the date of this valuation) is compared with some of the pertinent features of the old company, the beneficial effect of such a sum in cash could not have been very material as respects increment in value of the corporate assets apart from the money itself. For example, the old company was so conducted as to be able to discount its bills. This was done by the plan before described of employing the indorsements of four of the directors for banking purposes; and it must not be forgotten that, in spite of Stebbins' refusal to sign renewal notes for the old company, he was liable under the agreement, secured by his collaterals with others, to indemnify the very indorsers who were disposing of the company's assets, and this agreement had been extended to a time more than eighteen months beyond the date of the sale. Besides, the official control of the old company had been for nearly six months practically the same as that proposed for and carried out later in the new company.

Furthermore, the representation as to value contained in the articles of association is strengthened by the fact that the directors and stockholders of the old company, who either carried out or sanctioned the preconceived plan of a new company, became stockholders in that company and the larger holders officially connected with its management. Also, pursuant to statutory requirement the old company made annual reports to the Secretary of State, in 1901 and to and including 1905, showing its condition on the 1st day of January of each year. These reports were each signed by a majority of the directors and sworn to by one of their number as secretary. Moreover, in 1902 and to and including 1905, reports were made to the old company itself, showing its condition on July 1st of each year. In each of the foregoing reports, the net value of the company's assets was reported to be more, some years much more, than the net value represented in the articles of association of the new company. In 1904 the Ameri-

can Appraisal Company, of Milwaukee, was employed at the instance of Melze and G. A. Alderton to make an appraisal of the buildings, machinery, and equipment of the old company. The appraisal company appears to have given both the reproductive and depreciated values. Based upon these depreciated values and values that were at least acquiesced in by the company (on July 1, 1904) respecting assets not so appraised, the difference between the value of the company's assets and the sum of its indebtedness shows a net value of more than twice that fixed in the articles of association of the new company. It is to be observed, however, that on November 30, 1905, Harker W. Jackson made a report to the stockholders of the old company containing the old estimates of value and the debts, in which the net value of the assets was fixed at \$23,101.07. The report also showed the value of the company's assets according to his own estimate, and, deducting the debts, the net value was fixed at \$2,934.09.

It must be conceded, in respect of the reports to the Secretary of State and the old company, that much forceful criticism has been made by counsel. We are bound under the evidence to recognize a tendency in companies, for purposes of credit, to exaggerate their financial conditions in making their annual reports to the Secretary of State. We are not so much impressed, however, concerning the reports made to the old company, which, until after the rupture that culminated in the present suit, were apparently considered by some of the principal stockholders and directors. It is difficult to conceive of either motive or reason on the part of such men to deceive themselves. We cannot attach much importance to the report made by Harker W. Jackson. That report was made at the stockholders' meeting of November 30, 1905, within a month of the sale; and it must be said of it that Jackson failed in his testimony to give any convincing reason for the large reduction he made in the value of the assets. His valuation was, moreover, fatally inconsistent with the estimate, which, in the articles of association of the new company, he shortly afterward represented to be the true value; and his valuation of November 30th cannot be explained except through his apparent zeal to exclude Stebins and secure an interest in the business through the plan now under review. And in spite of objections urged against the appraisal of the American Appraisal Company respecting some mistakes it seems to have made, its agencies engaged in the work were at least disinterested, and allowance for these mistakes cannot change the result.

The company never paid but one dividend, and the profit so implied was for the most part rather artificial than real; and although losses were suffered, yet they were incurred under circumstances that render them of little aid in determining the value of the assets. Some of those who took part in bringing about the transfer of the old company's property, among them Alfred A. Alderton, succeeded later in purchasing a number of shares of the old stock at prices varying from 10 cents to 33⅓ cents on the dollar; but naturally sales made under the conditions then existing would not reflect the true value of the stock; and the evidence does not show that the stock ever had a mar-

ket value. Testimony given by defendants concerning the value of the assets must be weighed with the effect that attaches to their treatment of the official and other reports and representations of value, to which attention has been called.

[1] Further allusion to the range of considerations embraced in the question of value is not necessary. The parties had ample opportunity to present evidence; and, plainly under the defense that the value of the assets was materially less than the indebtedness, an issue was presented which placed upon the defendants the burden of proof. *Meeker v. Winthrop Iron Co.* (C. C.) 17 Fed. 48, 51, opinion by Circuit Judge Baxter; *Robotham v. Prudential Insurance Co.*, 64 N. J. Eq. 673, 712, 53 Atl. 842; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 645, 7 Atl. 514; *Coombs v. Barker*, 31 Mont. 526, 545, 79 Pac. 1; the instant case being distinguishable from the decision of this court in *Rothchild v. Memphis & C. R. Co.*, 113 Fed. 476, 51 C. C. A. 310, because the sale of the railroad there involved was made under judicial approval and order. The defendants clearly failed to discharge this burden; and upon the whole evidence we conclude that, at the time the assets of the old company were taken over by the new company, their net value, that is, the value over and above the indebtedness, was as much as \$25,000, and so equaled one-half the par value of the entire capital stock.

[2] Manifestly this distinguishes the instant case from that of *Thoman v. Mills*, 159 Mich. 402, 124 N. W. 33, relied on by the court below. The natural inference, indeed the only rational one deducible from the evidence, is that (in order to avoid friction and obtain fresh working capital) there was a preconcerted design to get rid of Stebbins. It hardly need be added that this design was carried into execution without offering to complainants an opportunity to participate in the new enterprise. However, the circumstances of the case do not incline us to believe that the directors and stockholders who brought about the sale and in effect replaced their stock in the old company by stock in the new were conscious of their true relations and duties either to the company or the minority stockholders. Of the five directors of the old company, four sanctioned the sale to and obtained stock in the new company, viz., Melze, president, G. A. Alderton, vice president, M. O. Robinson, secretary, and M. W. Tanner. They jointly owned and voted 2,900 shares in the old company, a clear majority; Smart and Fox, who held the remainder of the majority shares, each voted his holdings of 100 shares in favor of the sale; Melze, G. A. Alderton, M. O. Robinson, and M. W. Tanner each became holders of stock, and two of them, Melze and Robinson, became directors, in the new company, but Smart and Fox sold their shares in the old company, as stated later, and did not obtain shares in the new company. Thomas Jackson, who was general manager of the old company and entitled to 500 shares therein (although at the time of the sale he had not received them, as hereinafter pointed out), became a stockholder in the new company and its president; Harker W. Jackson, who was assistant to his father as manager of the old company, also became a holder of stock in and the vice presi-

dent of the new company; and the shares in the new company acquired by the directors of the old, with the shares of the Jacksons, constituted a large majority of its entire capital stock.

[3] Considering these facts, in connection with the contested transaction, it needs only to be said of the majority directors and stockholders in the old company, as also of Thomas Jackson, that their relations and duties to that company and the minority stockholders were strictly fiducial. They concerned the very essence of the corporate power, indeed, the practical wrecking of the corporation itself through the sale of its entire property; and, since these men both sold and in effect bought the property, their acts cannot for a moment stand the test of the long-settled rule that trustees will not be permitted, to the detriment of their cestuis que trustent, to purchase and hold the trust property.⁴ The cases relied on by defendants, like *Town v. Bank of River Raisin*, 2 Doug. (Mich.) 530, and *Bank v. Salt & Lumber Co.*, 90 Mich. 345, 51 N. W. 512, are not applicable. The corporation in each of those cases was confessedly insolvent. Further, those decisions do not, as evidently they could not, proceed upon the idea that a majority interest might rightfully appropriate to their separate use and benefit surplus assets of their company in total disregard of the rights of the minority stockholders. The case thus also falls easily within the rule laid down by the present Mr. Justice Lurton in *Rogers v. Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299, 313, 33 C. C. A. 517, 531 (C. C. A. 6th Cir.):

"But the majority shareholders will not be permitted to use this power of control for the purpose of obtaining advantages for themselves at the expense of the minority, and, when an unfair and oppressive contract is shown, a case is made which will authorize interference on behalf of the injured minority."

It follows that, in accordance with the issue and theory upon which the case was presented and tried touching a money decree, the complainants are entitled to recover sums equal to 50 per cent. of the par value of their several shares in the Michigan Wheelbarrow & Truck Company, with interest thereon at 5 per cent. per annum from January 6, 1906 (the date of taking over the property), until the date of the allowance of the decree; that is to say, Bliss Stebbins upon 940 shares, Richard S. Woodliff upon 300 shares, and Earl L. Card upon 60 shares—the face value of the shares being \$10 each. We are disposed to believe, however, that a decree should not go against the defendants Fox and Smart. While it is true, as stated, that they voted in favor of the sale, yet they do not appear to have participated

⁴ *Wheeler v. Abilene Nat. Bank Bldg. Co.*, 159 Fed. 391, 89 C. C. A. 477, 479, 485, and note, 16 L. R. A. (N. S.) 892, 14 Ann. Cas. 917; *Backus v. Brooks*, 195 Fed. 452, 454, 115 C. C. A. 334 (C. C. A. 2d Cir.); *Jones v. Missouri-Edison Electric Co.*, 144 Fed. 765, 771, 75 C. C. A. 631 (C. C. A. 8th Cir.); *Jackson v. Ludeling*, 21 Wall. 616, 622, 624, 22 L. Ed. 492; *Smith v. Smith, Sturgeon & Co.*, 125 Mich. 234, 239, 84 N. W. 144; *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320, 333, 30 N. E. 667, 33 Am. St. Rep. 315; *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 433, 439, 445; *Goodin v. Cin. & White-water Canal Co.*, 18 Ohio St. 169, 182, 98 Am. Dec. 95; *Hallam v. Indianola Hotel*, 56 Iowa, 178, 180, 9 N. W. 111; *Maas v. Lonstorf*, 194 Fed. 577, 584, 114 C. C. A. 419 (C. C. A. 6th Cir.).

in any design to appropriate or get any benefit from shares of the minority. On the contrary, they sold their stock for less than its real worth to Alfred A. Alderton, who thus, through his holdings in the new company, placed himself in a position to enhance the benefits he sought under the transaction in dispute. Alfred A. Alderton and Harker W. Jackson, of course, received their stock in the new company with full knowledge of the nature of the transaction. Thomas Jackson, since deceased, received 500 shares of his stock in the new company as a gift. This was by reason of an arrangement previously entered into between him and the old company, under which he was to receive that number of the old shares in part payment for his services as its general manager. In receiving the assets of the old company through the agencies employed to bring about the transfer, the new company was chargeable with full knowledge of the facts attending the so-called sale. *Jones v. Missouri-Edison Electric Co.*, 144 Fed. 775, 776, 75 C. C. A. 631.

[4] The allowance of a decree against the old company presents some difficulty and seemingly will be of little value; yet we content ourselves with the view that the company's liability for the wrongful act, committed through the corporate agencies mentioned, of depriving complainants of the value of their stock, cannot in principle be effectively distinguished from the familiar rule of imposing upon a corporation liability for the value of shares of its stock where it wrongfully refuses to transfer them on its registry. *London, Paris & American Bank v. Aronstein*, 117 Fed. 601, 605, 54 C. C. A. 663 (C. C. A. 9th Cir.); *Dooley v. Mines & Milling Co.*, 134 Iowa, 468, 471, 109 N. W. 864, 13 Ann. Cas. 297; *Lewis v. Bidwell Electric Co.*, 141 Ill. App. 33, 35; 2 Cook on Corp. (7th Ed.) §§ 389, 392, 581, et seq., and citations.

The decree below is reversed, with costs, save that Earl L. Card will, under the order allowing his intervention, be denied recovery of costs "incurred up to and including the final decree" entered below and now under review; and the cause is remanded, with direction to enter a decree against all the appellee-defendants, except Fred J. Fox and James S. Smart, in conformity with this opinion.

MORRISON et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 2, 1914.)

No. 2295.

PUBLIC LANDS (§ 51*)—GRANT TO STATE OF SCHOOL LANDS—SUBSEQUENT INCLUSION IN FOREST RESERVATION.

Act Aug. 14, 1848, c. 177, § 9 Stat. 323, establishing a territorial government for Oregon, provided that "when the lands in the said territory shall be surveyed * * * sections numbered 16 and 36 in each township * * * shall be and the same is hereby reserved for the purpose of being applied to schools in said territory and in the states and territories hereafter to be erected out of the same." Subsequent acts relating to dona-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tions and surveys recognized such reservation, and authorized the Governor and legislative assembly of the territory to make laws for the regulation and protection of the lands so granted. Oregon Enabling Act Feb. 14, 1859, c. 33, 11 Stat. 383, under which the state was admitted, submitted to the people certain propositions "which if accepted shall be obligatory on the United States and upon the said state of Oregon, to wit: First that sections numbered 16 and 36 in every township of public lands in said state * * * shall be granted to said state for the use of schools." A certain township was surveyed in 1902, and the survey was approved by the Surveyor General for Oregon, and forwarded to the Commissioner of the General Land Office, by whom it was accepted in 1906. In 1905 the Secretary of the Interior made an order, temporarily withdrawing for forestry purposes "all the vacant and unappropriated public lands" within certain described boundaries, which included section 16 in said township, and in 1910 the President by proclamation enlarged the boundaries of a forest reserve to include said section within its boundaries, but excepted therefrom all lands which at the date of the proclamation were embraced within any withdrawal or reservation for any inconsistent use or purpose. Prior to this time, but after the approval of the survey, the state had sold and conveyed the land in suit, which was a part of said section 16, as school land to defendants. *Held*, that the legislation of Congress, accepted by the people of Oregon, amounted to a grant of sections 16 and 36 in each township, which became effective as to each section as soon as it was identified by an approved survey; the approval dating back by relation to the inception of the proceeding, that such grant could not be defeated by any subsequent withdrawal or other appropriation, and that the land in suit was within the exceptions in the withdrawal order and President's proclamation.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 138, 146; Dec. Dig. § 51.*]

Gilbert, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Oregon; Chas. E. Wolverton, Judge.

Suit in equity by the United States against W. J. Morrison, Finley Morrison, and the Sligh Furniture Company. Decree for the United States, and defendants appeal. Reversed.

Mark Norris, of Grand Rapids, Mich., and R. Sleight, of Portland, Or., for appellants.

Clarence L. Reames, U. S. Atty., and Everett A. Johnson, Asst. U. S. Atty., both of Portland, Or.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The sole question in this case is whether the lands here in controversy, which constitute a part of section 16, township 3 south, range 6 east of the Willamette meridian, in the state of Oregon, passed to that state, and through it to its grantees, prior to the attempted withdrawal of the said lands from any disposition by the executive department of the government.

The act of Congress of August 14, 1848 (9 Stat. 323, c. 177), entitled "An act to establish the territorial government of Oregon," provided in its twentieth section:

"That when the lands in the said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in said territory shall be, and the same is hereby, reserved for the purpose of being applied to schools in said territory, and in the states and territories hereafter to be erected out of the same."

In the act of Congress of September 27, 1850 (9 Stat. 496, c. 76), entitled "An act to create the office of Surveyor General of the Public Lands in Oregon, and to provide for the survey, and to make donations to settlers of the said public lands," it was provided, among other things:

"Sec. 3. That if, in the opinion of the Secretary of the Interior, it be preferable, the surveys in said territory shall be made after what is known as the goegetic method, under such regulations, and upon such terms, as may be provided by the Secretary of the Interior or other department having charge of the surveys of the public lands, and that said goegetic surveys shall be followed by topographical surveys, as Congress may from time to time authorize and direct; but if the present mode of survey be adhered to, then it shall be the duty of said surveyor to cause a base line and meridian to be surveyed, marked, and established, in the usual manner, at or near the mouth of the Willamette river; and he shall also cause to be surveyed, in townships and sections, in the usual manner, and in accordance with the laws of the United States, which may be in force, the district of country lying between the summit of the Cascade Mountains and the Pacific Ocean, and south and north of the Columbia river: Provided, however, that none other than township lines shall be run where the land is deemed unfit for cultivation. That no deputy surveyor shall charge for any line except such as may be actually run and marked, nor for any line not necessary to be run; and that the whole cost of surveying shall not exceed the rate of eight dollars per mile, for every mile and part of mile actually surveyed and marked"

—and after making certain donations of public lands to certain specifically described settlers, declared, in its ninth section, as follows:

"That no claim to a donation right under the provisions of this act, upon sections sixteen or thirty-six, shall be valid or allowed, if the residence and cultivation upon which the same is founded shall have commenced after the survey of the same; nor shall such claim attach to any tract or parcel of land selected for a military post, or within one mile thereof, or to any other land reserved for governmental purposes, unless the residence and cultivation thereof shall have commenced previous to the selection or reservation of the same for such purposes."

By its act of February 19, 1851 (9 Stat. 568, c. 10), entitled "An act to authorize the legislative assemblies of the territories of Oregon and Minnesota to take charge of the school lands in said territories, and for other purposes," Congress enacted:

"That the Governors and legislative assemblies of the territories of Oregon and Minnesota be, and they are hereby, authorized to make such laws and needful regulations as they shall deem most expedient to protect from injury and waste sections numbered sixteen and thirty-six in said territories, reserved in each township for the support of schools therein."

By its act of February 14, 1859 (11 Stat. 383, c. 33), entitled "An act for the admission of Oregon into the Union," Congress provided, among other things, as follows:

"Sec. 4. That the following propositions be, and the same are hereby, offered, to the said people of Oregon for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said state of Oregon, to wit: First, that sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands

equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools. Second, that seventy-two sections of land shall be set apart and reserved for the use and support of a state university, to be selected by the Governor of said state, subject to the approval of the Commissioner of the General Land Office, and to be appropriated and applied in such manner as the Legislature of said state may prescribe for the purpose aforesaid, but for no other purpose. Third. That ten entire sections of land, to be selected by the Governor of said state, in legal subdivisions, shall be granted to said state for the purpose of completing the public buildings, or for the erection of others at the seat of government, under the direction of the Legislature thereof. Fourth. That all salt springs within said state, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said state for its use, the same to be selected by the Governor thereof within one year after the admission of said state, and when so selected, to be used or disposed of on such terms, conditions and regulations as the Legislature shall direct: Provided, that no salt spring or land, the right whereof is now vested in any individual or individuals, or which may be hereafter confirmed or adjudged to any individual or individuals, shall by this article be granted to said state. Fifth. That five per centum of the net proceeds of sales of all public lands lying within said state which shall be sold by Congress after the admission of said state into the Union, after deducting all the expenses incident to the same, shall be paid to said state, for the purpose of making public roads and internal improvements, as the Legislature shall direct: Provided, that the foregoing propositions, hereinbefore offered, are on the condition that the people of Oregon shall provide by an ordinance, irrevocable without the consent of the United States, that said state shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof; and that in no case shall nonresident proprietors be taxed higher than residents. Sixth. And that the said state shall never tax the lands or the property of the United States in said state: Provided, however, that in case any of the lands herein granted to the state of Oregon have heretofore been confirmed to the territory of Oregon for the purposes specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act."

The propositions specifically stated in section 4 of the act of February 14, 1859, as well as the aforesaid acts respecting the school sections, were, according to the stipulation of facts entered into by and between the respective parties to the present case, accepted by an act of the legislative assembly of the state of Oregon of June 3, 1859 (Laws, 1st Extra Sess. p. 36).

The stipulation shows these further facts: Prior to May 27, 1902, the lands in controversy were unsurveyed. On that day a field survey of their east boundary was made, and on June 2d following the north, west, and south boundaries thereof were surveyed, and the said section 16 subdivided according to the rules of the Land Office for surveying the lands of the government. This field survey was approved by the United States Surveyor General for the state of Oregon June 2, 1903, and on the 8th of the same month that officer transmitted copies of the plat of the survey and field notes to the Commissioner of the General Land Office at Washington, which survey was accepted by the Commissioner January 31, 1906. On November 16, 1907, the Commissioner directed the Surveyor General to place a plat of the survey in the field, in the local land office of the United States at Portland, Or., which was on the same day accordingly filed in that office. Shortly prior to the acceptance by the Commissioner of the survey mentioned, to wit, on the 16th day of December, 1905, the Secretary of

the Interior made an order temporarily withdrawing, for forestry purposes, from all forms of disposition whatsoever except under the mineral laws of the United States—

"all the vacant and unappropriated public lands within the areas specifically described in that certain letter of the Commissioner of the General Land Office, of date December 12, 1905, to the Secretary of the Interior, including all of township three (3) south, range six (6) east of the Willamette meridian."

In December, 1905, a telegram was sent by the Commissioner of the General Land Office to the register and receiver of the United States land office at Portland, Or., informing him of said withdrawal, and stating that the land had been withdrawn for forestry purposes, and on December 19, 1905, a letter was sent by the said Commissioner to the register and receiver, giving him the same information. The said withdrawal, so made by the Secretary of the Interior and the Commissioner of the General Land Office, described said lands according to the rectangular system of government survey. October 10, 1906, the state of Oregon, in pursuance of its laws for the disposal of lands owned by it, executed a certificate of sale to one Robert F. Loudon for the S. E. $\frac{1}{4}$ of the said section 16, and to Alvina S. Loudon a similar certificate for the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of the said section, who thereafter assigned the said certificates of sale to the appellants Finley and W. J. Morrison, and on January 9, 1907, the state of Oregon, on the surrender of such certificates, executed to the latter purchasers a deed of grant covering the said described lands. On July 9, 1910, the said Morrisons conveyed the same lands to the appellant Sligh Furniture Company. January 25, 1907, the President of the United States issued a proclamation enlarging the Cascade Range Forest Reserve, the boundaries of which included the said land, which proclamation, however, provided, among other things, that all lands which at the date of the proclamation were embraced within any withdrawal or reservation for any use or purpose to which the reservation for forest uses was inconsistent, were excepted from its force and effect.

It is thus seen that long before Oregon became a state Congress provided that when the lands in the then territory should be surveyed under the direction of the government of the United States preparatory to bringing the same into market, sections numbered 16 and 36 in each township in the territory—

"shall be, and the same hereby is, reserved for the purpose of being applied to schools in said territory, and in the states and territories hereafter to be erected out of the same."

Two years and more later, in passing what is commonly known as the Donation Act, Congress expressly provided that no donation right thereby conferred should affect any sixteenth or thirty-sixth section, if the residence and cultivation upon which such donation right is founded "shall have commenced after the survey" of such sixteenth and thirty-sixth sections; and by a subsequent act of January 7, 1853 (10 Stat. 150, c. 6), it gave to the territory of Oregon the right to take other lands in lieu of such of the sixteenth and thirty-sixth sections as should be acquired by third parties under the Donation Act.

By its Act of February 19, 1851, respecting the territories of Oregon and Minnesota, Congress expressly authorized the Governors and legislative assemblies of those territories—

"to make such laws and needful regulations as they shall deem most expedient to protect from injury and waste sections sixteen and thirty-six in said territories, reserved in each township for the support of schools therein."

And finally, by the Enabling Act of February 14, 1859, Congress expressly declared, among other things, that the propositions thereby offered to the people of Oregon for their acceptance or rejection, "if accepted shall be obligatory upon the United States, and upon the state of Oregon." Those propositions were, we repeat:

"First, that sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools. Second. That seventy-two sections of land shall be set apart and reserved for the use and support of a state university, to be selected by the Governor of said state, subject to the approval of the Commissioner of the General Land Office, and to be appropriated and applied in such manner as the Legislature of said state may prescribe for the purpose aforesaid, but for no other purpose. Third. That ten entire sections of land, to be selected by the Governor of said state, in legal subdivisions, shall be granted to said state for the purpose of completing the public buildings, or for the erection of others at the seat of government, under the direction of the Legislature thereof. Fourth. That all salt springs within said state, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said state for its use, the same to be selected by the Governor thereof within one year after the admission of said state, and when so selected, to be used or disposed of on such terms, conditions, and regulations as the Legislature shall direct: Provided, that no salt spring or land, the right whereof is now vested in any individual or individuals, or which may be hereafter confirmed or adjudged to any individual or individuals, shall by this article be granted to said state. Fifth. That five per centum of the net proceeds of sales of all public lands lying within said state which shall be sold by Congress after the admission of said state into the Union, after deducting all the expenses incident to the same, shall be paid to said state, for the purpose of making public roads and internal improvements, as the Legislature shall direct: Provided, that the foregoing propositions, hereinbefore offered, are on the condition that the people of Oregon shall provide by an ordinance, irrevocable without the consent of the United States, that said state shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof; and that in no case shall nonresident proprietors be taxed higher than residents. Sixth. And that the said state shall never tax the lands or the property of the United States in said state: Provided, however, that in case any of the lands herein granted to the state of Oregon have heretofore been confirmed to the territory of Oregon for the purposes specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act."

The propositions so submitted to the people of Oregon having been accepted by them, it cannot be doubted, we think, that the legislation of Congress amounted to a congressional grant to that state of all the sixteenth and thirty-sixth sections for school purposes, to which no right of any third party attached prior to the proper identification of such sections.

Such identification of the lands here in controversy was first made by the survey in the field June 2, 1902, which survey, it appears, was

approved on the same day by the United States Surveyor General for the State of Oregon, and by him transmitted to the General Land Office on the 8th of the same month, where it remained unaltered until its express approval by that office on the 31st day of January, 1906, and where in the meantime it met with recognition and was acted upon to identify the lands in question by the Commissioner of the General Land Office on the 12th and 19th days of December, 1905, and by the Secretary of the Interior on the 16th day of December, 1905, in making his order of withdrawal relied upon by the government in the present case. The fact that there was a delay of about 3½ years in the *express* approval of the survey by the Commissioner of the General Land Office is, in our opinion, wholly unimportant, and by no means unusual. The approval, when made, under the familiar doctrine of relation adopted by the courts for purposes of justice, related back to the inception of the proceeding, thereby perfecting the grant which was promised by the government when Oregon was a territory, and confirmed when it, as a state, accepted the propositions offered by Congress in its Enabling Act of 1859. It was, as said by the Supreme Court in a similar case—

“an unalterable condition of the admission, obligatory upon the United States, that section 16 in every township of the public lands in the state, which had not been sold or otherwise disposed of, should be granted to the state for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in future, or as operating to transfer the title to the state upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. In either case, the lands which might be embraced within those sections were appropriated to the state. They were withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted. All that afterwards remained for the United States to do with respect to them, and all that could be legally done under the compact, was to identify the sections by appropriate surveys; or, if any further assurance of title was required, to provide for the execution of proper instruments to transfer the naked fee, or to adopt such further legislation as would accomplish that result. They could not be diverted from their appropriation to the state.” *Beecher v. Wetherby*, 95 U. S. 517, 24 L. Ed. 440.

In the case cited the court proceeded:

“In *Cooper v. Roberts*, 18 How. 173 [15 L. Ed. 338], this court gave construction to a similar clause in the compact upon which the state of Michigan was admitted into the Union, and held, after full consideration, that by it the state acquired such an interest in every section 16 that her title became perfect so soon as the section in any township was designated by the survey. ‘We agree,’ said the court, ‘that, until the survey of the township and the designation of the specific section, the right of the state rests in compact, binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But, when the political authorities have performed this duty, the compact has an object upon which it can attach, and, if there is no legal impediment, the title of the state becomes a legal title. The *jus ad rem*, by the performance of that executive act, becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others.’ In this case, the township embracing the land in question was surveyed in October, 1852, and was subdivided into sections in May and June, 1854. With this identification of the section the title of the state, upon the authority cited, became complete, un-

less there had been a sale or other disposition of the property by the United States previous to the compact with the state. No subsequent sale or other disposition, as already stated, could defeat the appropriation."

We see nothing in the cases of *Minnesota v. Hitchcock*, 185 U. S. 373, 22 Sup. Ct. 650, 46 L. Ed. 954, or *Wisconsin v. Hitchcock*, 201 U. S. 202, 26 Sup. Ct. 498, 50 L. Ed. 727, as applied to the facts in the present case, at all inconsistent with what was said in *Beecher v. Wetherby*, 95 U. S. 517, 24 L. Ed. 440, or in *Cooper v. Roberts*, 18 How. 173, 15 L. Ed. 338.

In *Minnesota v. Hitchcock* it appeared that the sixteenth and thirty-sixth sections were not surveyed until after the rights of the Indians had attached thereto, and that therefore the lands there in question were not "public lands" at the time of the grant contained in the act admitting the state. The court in its opinion in *Minnesota v. Hitchcock* expressly referred to and quoted from the case of *Beecher v. Wetherby*, as also its previous decisions in the cases of *United States v. Thomas*, 151 U. S. 577, 14 Sup. Ct. 426, 38 L. Ed. 276, and *Cooper v. Roberts*, 18 How. 173, 15 L. Ed. 338, and, so far from disapproving of them, pointed out the distinctions existing between them and the case then under consideration.

The case of *Wisconsin v. Hitchcock*, *supra*, was expressly based upon the *Thomas Case*, which in turn referred to the case of *Beecher v. Wetherby* with approval.

It hardly need be said that, the lands here in controversy being embraced by the grant to the state of Oregon, the withdrawal order made by the Secretary of the Interior on December 16, 1905, which in express terms excluded therefrom all lands previously appropriated, could not defeat or in any way affect such grant. *Tubbs v. Wilhoit*, 138 U. S. 134, 11 Sup. Ct. 279, 34 L. Ed. 887. And, as has been seen, the proclamation of the President of date January 25, 1907, also expressly excepts from its operation any inconsistent rights.

For the reasons stated, the judgment is reversed, and the cause remanded to the court below, with directions to dismiss the bill.

GILBERT, Circuit Judge (dissenting). The opinion of the majority of this court is based upon what was said, rather than what was decided, in *Beecher v. Wetherby*, 95 U. S. 517, 24 L. Ed. 440. There was under consideration in that case the act for the admission of the state of Wisconsin, of date August 6, 1846 (9 Stat. 58, c. 89, § 6), which provided—

"that section numbered 16 in every township of the public lands in said state, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools."

The section 16 which was in controversy in that case had been included in lands occupied by the Menomonee Indians, which they had held under treaty since 1825. In 1848 they ceded certain of their lands, and there was set apart to them by the President a portion thereof, which included the land in controversy. The Legislature of Wisconsin by a joint resolution of February 1, 1853 (Laws 1853, p. 110) declared its assent that the Indians remain on the tract so set apart to them.

Under the act of Congress of February 6, 1871 (16 Stat. 404, c. 38) the lands so set apart were directed to be sold for the benefit of the Indians, and upon such sale the plaintiff obtained patents to section 16. In the meantime, in 1854, the lands had been surveyed. The court held the plaintiff's patents void, and ruled that the grant to the state had attached upon the identification of the land by the survey of 1854, subject only to the Indian's right of occupancy; that when that was extinguished the title of the state was complete. In *Minnesota v. Hitchcock*, 185 U. S. 373, 22 Sup. Ct. 650, 46 L. Ed. 954, the court thus stated the purport of the decision in *Beecher v. Wetherby*:

"The ruling was that the United States held the fee, subject only to the Indian right of occupancy; that by the school land section in the Enabling Act there was a grant, or promise to grant, in either event to be taken as an appropriation of the fee to the state, subject to the Indian right of occupancy; that the Indians had removed from the lands and had received other lands for their occupation; and hence all Indian rights had ceased."

The essential difference between *Beecher v. Wetherby* and the case at bar is that in the latter there had been no survey or identification of the lands at the time when they were set apart for a reservation, and I submit that the decision of the present case is controlled by the principle stated in *Heydenfeldt v. Daney Gold, etc., Co.*, 93 U. S. 634, 23 L. Ed. 995. In that case the provision of the Enabling Act for the admission of Nevada of March 21, 1864 (13 Stat. 30, c. 36), as to school lands, declared that they "shall be, and are, hereby granted." The lands had not then been surveyed, nor had Congress then authorized any disposition of the public lands within that territory. It was held, notwithstanding that there were words of present grant in the act, the intention was to grant such school lands as at the time of survey and identification had not been disposed of. The court said:

"Until the status of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them."

And again:

"It is quite certain that the language of the qualification was intended to protect the state against a loss that might happen through the action of Congress in selling or disposing of the public domain."

It is contended that the decision in that case was based upon the fact that the territory of Nevada was a mining country, that Congress must have intended that the mineral land should remain subject to discovery, entry, and exploitation, and that those features distinguish the Nevada act from all others. But that decision has been recognized, both by the Supreme Court and by the Land Department, as settling general principles applicable to other school land grants. It is true that the case was not mentioned or discussed in the opinion in *Beecher v. Wetherby*, but it was cited in the brief of counsel, and it is in entire harmony with what was actually decided in that case. In *New York Indians v. United States*, 170 U. S. 1, 18, 18 Sup. Ct. 531, 534 (42 L. Ed. 927), the court cited the *Heydenfeldt Case*, and, after quoting the language of the grant to Nevada said:

"These words were held, under the peculiar language of the act, not to constitute a grant in present, but an inchoate and incomplete grant until the

premises were surveyed by the United States, and the survey properly approved."

In *Minnesota v. Hitchcock* the court said:

"As in *Heydenfeldt v. Daney Gold & Silver Mining Co.*, *supra*, priority was given to a mining entry over the state's school right, so here, in terms, preference is given to private entries, town-site entries, or reservations for public uses. In other words, the act of admission with its clause in respect to school lands was not a promise by Congress that under all circumstances, either then or in the future, these specific school sections were or should become the property of the state. The possibility of other disposition was contemplated, the right of Congress to make it was recognized, and provision made for a selection of other lands in lieu thereof. In this connection may also be noticed the act of February 28, 1891 (26 Stat. 796, c. 384 [U. S. Comp. St. 1901, p. 1381]), although passed after the approval of the agreement for the cession of these lands by the Indians. That act in terms authorized the selection of other lands 'where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States.'"

The grant to Minnesota which was construed in that case is identical in language with the grant to the state of Oregon, and the construction which the court placed upon it is, it seems to me, absolutely conclusive of the question which is presented on this appeal.

The general intention and policy of congressional grants of school lands to the states, and the construction which Congress placed upon its grants, is shown in its legislation on the same subject subsequent to the grant to the state of Oregon, legislation which clearly indicates that Congress did not consider that by virtue of those grants it had wholly parted with title and control of the school lands. Twelve days after the date of the grant to Oregon, Congress enacted:

"That where settlements, with a view to pre-emption, have been made before the survey of the lands in the field which shall be found to have been made on sections sixteen or thirty-six, said sections shall be subject to the pre-emption claim of such settler; and if they, or either of them, shall have been or shall be reserved or pledged for the use of schools or colleges in the state or territory in which the lands lie, other lands of like quantity are hereby appropriated in lieu of such as may be patented by pre-emptors." Act Feb. 26, 1859, c. 58, 11 Stat. 385.

This act was subsequently embodied in section 2275 of the Revised Statutes, and by the act of February 28, 1891 (26 Stat. 796, c. 384 [U. S. Comp. St. 1901, p. 1381]), it was amended by inserting the following:

"And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said state or territory where sections 16 or 36 are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States," etc.

The decisions of the Secretary of the Interior relating to public lands have uniformly followed the rule of the *Heydenfeldt* Case. In *State of Colorado*, 6 Land Dec. Dept. Int. 412, Secretary Lamar, referring to the act of February 28, 1861 (12 Stat. 172, c. 59), which provided a temporary government for the territory of Colorado, "that when the land in the said territory shall be surveyed, under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be and the same are hereby reserved for the purpose

of being applied to schools in the states hereafter to be erected out of the same," said:

"It is evident from the very terms of the grant that Congress intended to grant to Colorado (and the same is true of other states) two sections for every township in the state, to be taken of the sixteenth and thirty-sixth sections, where such sections at the time of survey have not been sold or otherwise disposed of; and, where at the time of survey such sections have been sold or disposed of, then other lands equivalent thereto, and as contiguous as may be, are granted to said state in lieu of the sixteenth and thirty-sixth sections."

In *Gregg v. State of Colorado*, 15 L. D. 151, Secretary Nobel said of the Heydenfeldt Case:

"The principle, distinctly announced by the court, is that until the status of the land is actually fixed by survey, as shown by the township plat, so that the grant may attach to the specific section, the government has the absolute power to dispose of it as a part of the public domain, and to provide for its disposal in any manner that may promote the public interest."

In *State of Oregon*, 41 Land Dec. Dept. Int. 259, concerning section 2275 of the Revised Statutes, as amended by the act of February 28, 1891, it was said:

"It is clear from this section that title does not pass to the state until survey, nor to reserved lands until the reservation is vacated and the land restored to the public domain. Until such event the right of the state is merely expectant, or inchoate, and though it may stand upon such expectant right and await release of the land from reservation and its restoration to the public domain, it has no title it can convey or right it can assign."

In *Boise National Forest*, 38 Land Dec. Dept. Int. 224, construing the act of July 3, 1890 (26 Stat. 215, c. 656), providing for the admission of Idaho into the Union, "that sections numbered sixteen and thirty-six in every township of said state, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said state for the support of common schools," it was held that the withdrawal of certain lands upon the application of the Governor of Idaho for a survey of the lands under the act of August 18, 1894, did not operate to remove them from the jurisdiction of the United States by reason of the provision contained in the President's proclamation, excepting from the effect thereof all lands which might have been, prior to the date of the proclamation, embraced in any legal entry or covered by any lawful filing duly of record. In *State of Florida*, 38 Land Dec. Dept. Int. 350, it was said:

"This department and the courts have uniformly held that the grant of school sections in place does not attach to any particular tract of land until the same is identified by survey. See *Heydenfeldt v. Daney Gold & Silver Mining Co.*, 93 U. S. 634 [23 L. Ed. 995]; *Minnesota v. Hitchcock*, 185 U. S. 373 [22 Sup. Ct. 650, 46 L. Ed. 954]."

Under the acts for the admission of the states of North Dakota, South Dakota, Montana, and Washington, the policy of congressional legislation in regard to the granting of school lands to the states was still more clearly expressed in a proviso—

"that the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in the Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain." Act Feb. 22, 1889, c. 180, 25 Stat. 679.

I submit that the decree should be affirmed.

UNITED STATES v. HAMBURG-AMERIKANISCHE PACKETFAHRT
ACTIEN GESELLSCHAFT.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 39.

SHIPPING (§ 207*)—LIMITATION OF LIABILITY—CLAIM OF UNITED STATES.

The primary purpose of the Limited Liability Acts in favor of ship-owners (Rev. St. §§ 4283-4285 [U. S. Comp. St. 1901, pp. 2943, 2944], and Acts June 26, 1884, c. 121, § 18, 23 Stat. 57, as amended by Act June 19, 1886, c. 421, § 4, 24 Stat. 80 [U. S. Comp. St. 1901, p. 2945]) was the promotion of the general welfare of the nation by giving encouragement to capital to invest in the building and navigation of ships in accordance with the policy of other maritime nations, and, under the general principle that such statutes are binding on the sovereign, the acts apply to the government of the United States, which is bound, equally with other claimants, by a decree granting such limitation and enjoining the prosecution of actions against the shipowner.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 555, 643, 644; Dec. Dig. § 207.*]

Limitation of owner's liability, see note to *The Longfellow*, 45 C. C. A. 387.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the United States against the Hamburg-Amerikanische Packetfahrt Actien Gesellschaft. Decree for defendant, and libellant appeals. Affirmed.

This is an appeal taken by the United States from a final decree of the United States District Court for the Southern District of New York dismissing a libel. The libel was filed to recover damages sustained by the United States as the result of the total loss of a number of sacks of both registered and ordinary mail, alleged to be of the value of approximately \$50,000, which had been delivered at the port of New York about January 31, 1912, to the Steamship Alleghany, owned by the respondent, the Hamburg-Amerikanische Packetfahrt Actien Gesellschaft, a corporation organized under the laws of the Empire of Germany. On February 2, 1912, the Alleghany collided with a British steamship Pomaron, as a result of which the Alleghany sank and became a total loss, together with all her cargo, including the mail aforesaid. It was expressly admitted by the respondent that both vessels were at fault for the collision because of the negligence of those in charge of their navigation.

Prior to the commencement of the suit, and in February, 1912, the respondent, pursuant to the Revised Statutes of the United States, §§ 4283-4285, and the several acts and statutes amendatory thereof and supplemental thereto (U. S. Comp. St. 1901, pp. 2943, 2944), filed a petition in the District Court for the Southern District of New York for the limitation of its liability for the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

loss resulting from said collision. On January 25, 1913, a decree was entered providing that all claims not already presented should be forever barred, and enjoining "all persons whosoever or corporations whatsoever" from instituting any suit in any country or jurisdiction against the Hamburg-American Line for loss growing out of the collision. As the United States had made no claim and commenced no suit within the period fixed by the court's decree, the respondent claims the decree is a bar to the prosecution of this suit.

Henry A. Wise, U. S. Atty., and Addison S. Pratt, Asst. U. S. Atty., both of New York City.

Haight, Sandford & Smith, of New York City, for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). By the common law both in England and in the United States the personal liability of the owner of a vessel for damages by collision was the same as in other cases of negligence, being limited only by the amount of the loss and by the owner's ability to respond. *The Main v. Williams*, 152 U. S. 122, 126, 14 Sup. Ct. 486, 38 L. Ed. 381. It appears, too, that the civil law and the general law maritime at first made no distinction in this respect in favor of shipowners. Emerigon, *Contrats à la Grosse*, c. 4, § 11. Mr. Justice Brown, one of the great admiralty judges of this country, in his opinion in *The Main v. Williams*, *supra*, makes the following valuable historical statement concerning the limitation of liability principle in cases of maritime loss:

"But, however the practice originated, it appears, by the end of the seventeenth century, to have become firmly established among the leading maritime nations of Europe, since the French Ordinance of 1681, which has served as a model for most of the modern maritime codes, declares that the owners of the ship shall be answerable for the acts of the master, but shall be discharged therefrom upon relinquishing the ship and freight. Bk. 2, tit. 8, art. 2. A similar provision in the Ordinance of Rotterdam of 1721 declared that the owners should not be answerable for any act of the master done without their order, any further than their part of the ship amounted to; and by other articles of the same ordinance it was provided that each part owner should be liable for the value of his own share. The French Ordinance of 1681 was carried, with slight change of phraseology, into the commercial code of France, and all the other maritime nations whose jurisprudence is founded upon the civil law. Code de Commerce (French) art. 216; German Mar. Code, art. 452; Code of the Netherlands, art. 321; Belgian Code, art. 216; Italian Code, art. 311; Russian Code, art. 649; Spanish Code, art. 621, 622; Portuguese Code, art. 1345; Brazilian Code, art. 494; Argentine Code, art. 1039; Chilean Code, art. 879."

Emerigon in his treatise of *Contrats "à la Grosse"*, after stating that the owners of the ship are bound in *solido* by everything which the captain does in the course of the voyage for the promotion of the voyage, goes on to say that the action in *solido* "does not exist against the owners farther than according to the interest which they have in the body of the ship; hence if the ship perish, or if they abandon their interest, they are no longer liable for anything."

There thus existed a conflict between the maritime law of England and of the United States on the one hand and the maritime law which the states of continental Europe had for several centuries enforced.

In 1734 the British Parliament adopted a limited liability act (7 Geo. II, c. 15) which limited the liability of shipowners to the value

of the vessel and her freight money in cases where the master or the mariners, without the privity and knowledge of the owner, embezzled or made away with any gold, precious stones, or other goods or merchandise, or committed some other misconduct in connection therewith. The act was passed in pursuance of a petition presented by the merchants of London to the House of Commons, who were stirred thereto by the decision in *Boucher v. Lawson*, Hardw. 85, holding a shipowner liable for coin embezzled by the master after shipment. The preamble of the act is illuminating as to the motive and purpose of Parliament in its enactment. It reads:

"Whereas it is of the greatest consequence and importance to this kingdom to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants and others from being interested and concerned therein, and whereas it has been held that in many cases owners of ships or vessels are answerable for goods and merchandise shipped or put on board the same, although the said goods and merchandise, after the same have been so put on board, should be made away with by the masters or mariners of the said ships or vessels, without the knowledge or privity of the owner or owners, by means whereof merchants and others are greatly discouraged from adventuring their fortunes as owners of ships or vessels, which will necessarily tend to the prejudice of the trade and navigation of this kingdom."

In 1786 the Act of 26 Geo. III, c. 86, was passed amending the earlier act and extending the limitation of liability to cases of fire and to cases where the master or privies were not privy to the embezzlement. This was followed in 1813 by the Act of 53 Geo. III, c. 159, extending the limitation of liability to all cases of loss arising in any manner.

In the United States, Congress did not legislate upon the subject until 1851, when it enacted the limited liability act which has been incorporated into the Revised Statutes, §§ 4282 to 4290. This act has since been amended by the Acts of 1884, c. 121, § 18, 23 Stat. 53, 57, and Acts of 1886, c. 421, § 4, 24 Stat. 79, 80. The act provides, so far as it applies to the facts of this case, that the liability of the owner or owners of any vessel for any loss by collision shall in no case exceed the value of the interest of such owner or owners in such vessel and her freight then pending, and that, if the whole of the ship and her freight shall not be sufficient to make compensation to those who suffer the loss, they shall receive compensation in proportion to their respective losses. To this end it is provided that the owner or owners of the vessel may take appropriate proceedings in any court for the purpose of apportioning the compensation to be made to those suffering the loss. It is further provided that the owner or owners of the vessel are to transfer his or their interest in such vessel and freight for the benefit of the claimants to a trustee to be appointed by a court of competent jurisdiction to act as such trustee for the persons who may prove to be legally entitled thereto, after which transfer all claims and proceedings against the owner or owners shall cease.

The respondent has fully complied with the terms of the act; the proceedings to limit liability having been prosecuted to final decree in which it was provided that all who had not filed claims in the course of the proceeding should be forever barred and perpetually enjoined

from bringing and prosecuting any suits or proceedings whatever against this respondent.

The United States did not appear in the proceeding or file any claim, although the pendency of the proceeding was known to it. Notwithstanding the final decree enjoining all the world from prosecuting further proceedings against the respondent for losses occasioned by the sinking of the *Alleghany*, this libel was filed to recover \$50,000 for the loss of the mail.

The United States claims such a property in the mails, whether registered or not, as to permit it to maintain the libel and to recover the full value of the mail matter lost, irrespective of its legal liability to the senders or addressees thereof for all or only a part of the value. In 1845, in *Searight v. Stokes*, 3 How. 151, 169 (11 L. Ed. 537), the Supreme Court held, in an opinion written by Chief Justice Taney, that "the United States have unquestionably a property in the mails." And in 1894 the doctrine was reasserted by the court in the case of *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092.

A railroad or a steamship company carrying the mails of the United States is not, in respect to such service, a common carrier but is a public agent of the United States employed in performing a governmental function. The transportation company in carrying the mails owes a duty to the government for a loss occasioned by the negligence of its servants. Whether or not it is under any obligation to the sender or the addressee of the mail is a question upon which we do not find it necessary to pass and concerning which we express no opinion. See *Boston Ins. Co. v. Chicago, etc., R. R. Co.*, 118 Iowa, 423, 92 N. W. 88, 59 L. R. A. 796; *German State Bank v. Minneapolis, etc., Ry. Co.* (C. C.) 113 Fed. 414; *Bankers' Mutual Casualty Co. v. Minneapolis, etc., Ry. Co.*, 117 Fed. 434, 54 C. C. A. 608, 63 L. R. A. 397. It seems to have been admitted by each party to this litigation that no liability exists on the part of the government to the senders or the addressees of the unregistered mail matter lost by the sinking of the ship. But under the acts of Congress and the postal regulations adopted thereunder, a liability on the part of the government has been created respecting registered mail matter. Authority for the registry of mail was first given in 1872, but the act then passed (Act June 8, 1872, c. 335, 17 Stat. 300) expressly provided that the Post Office Department or its revenue was not to be liable for the loss of any mail matter on account of its having been registered. In 1897, by virtue of an act then passed (Act Feb. 27, 1897, 29 Stat. 599, c. 340 [U. S. Comp. St. 1901, p. 2685]) and the postal regulations adopted thereunder, the Department for the first time assumed liability for the loss of first-class registered mail matter, but limited the amount to the value of each package, not exceeding \$10 in any one case. In 1902 the limit of liability was increased, in the case of first-class registered mail, to the amount of \$25. And in 1911 the privilege of liability was extended to third and fourth class registered matter. But the liability thus assumed related only to the domestic mail. Its liability in respect to foreign mail is governed by the provisions contained in the Universal Postal Convention concluded in 1906 between the United States and other nations, and the Parcels Post Conventions entered into by the

United States and most of the Central and South American countries. Under these provisions no liability is assumed or imposed for unregistered mail and the liability of each country for the loss of registered mail is limited to the sum of 50 francs.

The Limited Liability Act was passed for the purpose of putting American shipping upon an equality with that of other maritime nations, and also because it was believed to be of great importance to the country that our maritime commerce should be encouraged and extended. Mr. Justice Bradley, in *Norwich Co. v. Wright*, 13 Wall. 104, 20 L. Ed. 585, in giving the reasons which led to the passage of the act, pointed out that:

"The great object of the law was to encourage shipbuilding and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. * * * The public interests require the investment of capital in shipbuilding, quite as much as in any of these enterprises."

The public benefit which was to be derived from the upbuilding of the shipping interests was the purpose of the act and the only proper justification for its enactment. It is most important that this fact be kept in mind in any attempt to construe the law.

That Congress has the power to grant the right of limitation of liability is not questioned and could not be. It exists under the constitutional power of Congress to regulate commerce. *Providence, etc., Steamship Co. v. Hill Mfg. Co.*, 109 U. S. 578, 589, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038; *Lord v. Goodall Steamship Co.*, 102 U. S. 541, 26 L. Ed. 224. It exists also under the admiralty clause of the Constitution. *Ex parte Garnett*, 141 U. S. 1, 11 Sup. Ct. 840, 35 L. Ed. 631; *Rounds v. Providence, etc., Steamship Co.*, 14 R. I. 344.

Congress also changed the maritime law of this country in other important particulars which need to be considered in this same connection. The law of the United States originally was that the shipowner could not by any contract with the shipper exempt himself from all liability for loss or damage to the cargo resulting from the negligence of his master and crew. Stipulations of this nature were regarded as contrary to the policy of the law of this country. In European countries, however, contracts exempting from liability were recognized and enforced. For precisely the same reasons which influenced Congress to enact the Limited Liability Act, that body was led in 1893 to pass the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445, 446 [U. S. Comp. St. 1901, p. 2946]). The third section of the act provides that, if the owner of the vessel exercises due diligence to make the vessel seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner, agent, or charterers, are to be held liable for losses resulting from errors or faults in navigation or in the management of the vessel nor are they to be held liable for losses arising from dangers of the sea, or acts of God, or public enemies, etc. It will be noticed that the act does not empower the shipowner to secure exemption by contract from liability, but it provides by positive and express enactment that he shall not be liable in certain particulars if he has exercised due diligence in the matters specified. It is also a material fact

that the statute refers in no way, either directly or indirectly, to the United States. It is also a material fact that the purpose of Congress in enacting both acts was the same, the upbuilding of the commercial prosperity of the nation.

The contention of the United States is that, as the government is not mentioned in the Limited Liability Act, it is entitled to maintain the libel and recover from the respondent the damages suffered by the loss of the mail due to the sinking of the vessel occasioned by the negligence of those in charge.

The contention of the respondent is that, conceding the negligence, it is released from liability because the contract of carriage was subject to and governed by the terms and provisions of the Limited Liability Act and the amendments thereto; the vessel being seaworthy and properly equipped.

The case turns solely on the question whether this act applies to the government of the United States. If it does, the libel was properly dismissed. If it does not, then an error was made by the court below and the decree should be reversed. The government bases its contention that it is not bound by these acts, upon the principle that the sovereign is not bound by the terms and provisions of general acts unless expressly mentioned therein.

Chitty, in his work on *Prerogatives of the Crown*, published in 1820, states, on page 385, the matter as follows:

"The general rule clearly is that, though the King may avail himself of the provisions of any acts of Parliament, he is not bound by such as do not particularly and expressly mention him. To this rule, however, there is a most important exception, namely, that the King is impliedly bound by statutes passed for the public good; the relief of the poor; the general advancement of learning, religion, and justice; or to prevent fraud, injury or wrong. * * * But acts of Parliament which would divest or abridge the King of his prerogatives, his interests or his remedies, in the slightest degree, do not in general extend to or bind the King unless there be express words to that effect. * * * And in mere indifferent statutes, directing that certain matters shall be performed as therein pointed out, the King is not thereby in many instances prevented from adopting a different course in pursuance of his prerogative."

Blackstone's statement is as follows:

"The King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised ('any person or persons, bodies politic or corporate, etc.') affect him not in the least, if they may tend to restrain or diminish any of his rights or interests. * * * Yet, where an act of Parliament is expressly made for the preservation of public rights and the suppression of public wrongs and does not interfere with the established rights of the Crown, it is said to be binding as well upon the King as upon the subject; and likewise the King may take the benefit of any particular act, though he be not especially named."

In Professor Max Muller's *Last Essays (First Series)* p. 214, may be found the following interesting statement, which shows the antiquity of this principle of the maritime law:

"In some of the tablets published by Oppert & Menant (*Documents juridiques de l'Assyrie*, 1877, p. 19) we find the earliest legal provisions on commercial law and maritime insurance. The principle that, if the merchant is shipwrecked, the shareholders have no claim on his estate is clearly recognized."

"The same principle prevails in Roman law, which ordains *ut merces ex ea*

pecunia comparatæ * * * *periculo creditoris navigent*, and it is quite possible that Greek merchants may have adopted the principle that *fœnus una cum mercatore perit* from the Phœnicians, the Romans from the Greek."

An explanation of the principle is given by Alderson, B., delivering the judgment of the court in *Attorney General v. Donaldson*, 10 M. & W. 123, 124 (1842), where he said:

"It is inferred *prima facie* that the law made by the Crown, with the assent of the Lords and Commons, is made for subjects and not for the Crown. *Wilson v. Barkley* (1561-62) Plow. 223."

The Supreme Court of the United States mentioned the principle in *United States v. Herron*, 20 Wall. 251, 255 (22 L. Ed. 275), Mr. Justice Clifford saying:

"Where an act of Parliament is made for the public good, as for the advancement of religion and justice, or to prevent injury and wrong, the King is bound by such act, though not particularly named therein; but where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the King, in such case the King is not bound, unless the statute is made to extend to him by express words."

But an exception is made in the case of statutes enacted for the public good. In such cases the sovereign is bound, though not named. In *Beal's Cardinal Rules of Legal Interpretation*, London (2d Ed.) 1908, p. 291, it is said:

"Where a statute is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the Crown shall be bound by such statute, though not particularly named therein."

The same exception is also announced in *Maxwell on Interpretation of Statutes* (4th Ed.) p. 209.

It is a cardinal rule of construction that every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain its object, courts consider the necessity of enactment, the defects in the law as it existed, and the remedy provided by the statute, and they are accustomed to give to the statute that construction which is best calculated to advance its object by suppressing the mischief and securing the benefits intended. We may therefore inquire as to the necessity for the enactment by the Congress of the Limited Liability Law and as to the object which it was intended to accomplish.

The spirit in which the act should be interpreted was well stated by Mr. Justice Bradley in *Providence & New York Steamship Co. v. Hill Mfg. Co.*, 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038, where he said:

"In these provisions of the statute we have sketched in outline a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to shipowners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the shipowner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly dimin-

ished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions."

In *La Bourgogne*, 210 U. S. 95, 120, 28 Sup. Ct. 664, 52 L. Ed. 973, the above statement of Mr. Justice Bradley was approvingly quoted by the present Chief Justice.

We have seen that the Congress in the enactment of the Limited Liability Act intended to bring the law of this country into conformity with the maritime law of Europe. If the principle were now to be ingrafted upon our law that the government is not bound by the provisions of the act, it would seem as though, in establishing such an exception, we should be departing from the principle applied in other countries and to that extent going contrary to the intention of the Congress. Our attention has not been called to the fact that any such exception has been made or asserted on behalf of any European state; certainly no such exception has been established in favor of the Crown under the English Limited Liability Act. In *Lords of the Admiralty v. Temperley*, 2 Pritch. Adm. Dig. 1339, in 1881 the Attorney General undertook to raise the question. But, when the time came to argue the point, he stated that the Lords of Admiralty had concluded that it would not be fitting, as they were constantly entering into contracts with shipowners that they, as against a shipowner who had contracted with them, should raise the question whether the Crown was bound by the act.

In *The Zoe*, 11 P. D. 72 (1886), the Crown applied to get its pro rata share of the fund in court. Other claimants contended that the Crown was not subject to the act, and was bound to leave the fund to them, and avail itself of its personal remedy against the shipowners. Butt, J., said, in granting participation to the Crown:

"I have some doubt whether the Crown is not bound to come in and claim pro rata with the other claimants against the fund, in court."

In *The Winkfield* (1902) Prob. 42, an action for loss of mail, the government came in with the other claimants. It appears, therefore, that in England, where the prerogative of the sovereign is far greater than it is in this country, the Crown does not claim exemption from the Limited Liability Act.

We also have seen that the primary purpose of Congress in the adoption of the act now under consideration was the promotion of the general welfare of the nation by giving encouragement to capital to invest in the building and navigating of ships so that the commerce of the United States might be developed. And we have also seen that the government is bound by laws enacted for the promotion of the public good. We conclude, therefore, that upon well-established principles the government should be bound by the Limited Liability Act enacted for the promotion of the general good. If the public purpose is clear, the legislative intention is not to be defeated by the fact that the immediate benefit may be private and individual. The character of the Limited Liability Act is not at all changed because the immediate benefit may accrue to private persons who own the ships. The controlling motive of the enactments was the general good of the country as a whole. And for this reason, in our opinion, the govern-

ment should be held bound by the act. We do not believe that the Congress intended to compel private individuals to make concessions they are required to make under these acts to promote the general welfare while reserving to itself exemption from any similar concession. To permit the government to enforce the full extent of its claims while denying the same right to private individuals would not only result in marked injustice of which the government should never be guilty, but it would serve to defeat the very ends and purposes of the legislation itself.

So, too, a distinction exists between ordinary statutes of limitation and the Limited Liability Act. Statutes of limitation are simply statutes of repose, the object of which is to suppress fraudulent and stale claims from springing up at great distances of time and surprising the parties or their representatives when all proper evidence is lost. The courts have said that such statutes are for the benefit and repose of individuals and not to secure general objects of policy and morals. See *Quick v. Corlies*, 39 N. J. Law, 11; *Clark v. Augustine*, 62 N. J. Eq. 689, 51 Atl. 68; *State Trust Co. v. Sheldon*, 68 Vt. 259, 35 Atl. 177. In that respect, therefore, they differ from the Limited Liability Act which was enacted to secure general objects of policy.

So in the tariff law the exemption of the government from the payment of duties does not rest, in this country, on the principle of prerogative. The explanation of it is that it would be a wholly unnecessary and entirely useless proceeding if the government were to be required to withdraw money from the treasury with one hand and immediately repay it into the treasury with the other. There can be no rational justification for any construction of a law which would require such a course to be pursued.

In *United States v. Hoar*, 2 Mason, 311, 314, Fed. Cas. No. 15,373, as early as 1821, Mr. Justice Story repudiated the idea that the exemption of the government from the operation of statutes of limitation rested in the notion of the prerogative. He based it on the principle of the preservation of the public rights from loss by the negligence of public officers. And that idea was accepted by the Supreme Court in *Fink v. O'Neil*, 106 U. S. 281, 1 Sup. Ct. 325, 27 L. Ed. 196, where the court says the doctrine rests "not upon any notion of prerogative."

It seems to us that the true principle, so far as our state and national governments are concerned, was correctly stated by Mr. Justice Story in *United States v. Hoar*, *supra*, when he said:

"Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the Legislature, before a court of law would be authorized to put such an interpretation upon any statute."

But in our judgment it is proper to hold that, because of the nature of the mischiefs to be redressed by the Limited Liability Act, the government of the United States is bound by the act. Any other construction would greatly diminish the value and efficiency of the act and largely defeat what we conceive to have been the intention of the law-making body of the nation. To hold otherwise would be to adminis-

ter "with a tight and grudging hand" so much deprecated by the Supreme Court.

We find ourselves in accord with the action taken in the court below and with the opinion rendered by the District Court in an analogous case, in the Matter of the Petition of Lloyd Italiano Societa di Navigazione, as Owner of the Steamship Florida, 212 Fed. 334.

The decree is therefore affirmed.

LACOMBE, Circuit Judge (concurring). For the purposes of this action it may be assumed that the government is correct in the contention that it has such a property in the mails as would permit it to maintain suit for their loss. I therefore have not found it necessary to look into that branch of the case and express no opinion thereon. I concur with Judge ROGERS in his discussion of the main question in the case and in his conclusion that the Limited Liability Statutes apply to the government. It seems to me that these acts were passed, not for the benefit of a class, but emphatically for the public good; for the good of the whole people. The object was to put this country on a better basis by stimulating the growth of a mercantile marine, whereby this country could compete with other nations in the carrying trade, so that the resources of the country in time of peace would be increased, and a valuable naval reserve, such as other great sea powers possess, would be provided for any future time of trouble. That one class in the community happens to be primarily benefited is an incident of such legislation, but it is an incident which, as it seems to me, should not be allowed to dwarf or obscure the main intent.

BANK OF ANDREWS et al. v. GUDGER.

In re CHEROKEE TANNING EXTRACT CO.

(Circuit Court of Appeals, Fourth Circuit. March 13, 1914.)

No. 1251.

1. COURTS (§ 489*)—CONFLICTING JURISDICTION—PRESUMPTION.

In a case of conflict as to jurisdiction, a state court of general jurisdiction is presumed to have jurisdiction of all matters justiciable in that state, while a United States District Court is confined to the jurisdiction expressly conferred or necessarily implied by the federal statutes.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1330, 1333-1341, 1372-1374; Dec. Dig. § 489.*]

Conflict of jurisdiction of federal courts with state courts, see note to Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 356.]

2. BANKRUPTCY (§ 63*)—INVOLUNTARY PROCEEDINGS—ACTS OF BANKRUPT.

A suit by minority stockholders in a state court and the appointment of a receiver pursuant to Revisal N. C. 1905, § 1196, authorizing suits to dissolve a corporation which is in imminent danger of insolvency, and section 1219, authorizing the appointment of a receiver for such a corporation, did not entitle creditors to relief in the bankruptcy court until the corporation became insolvent and committed an act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 63.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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3. BANKRUPTCY (§ 20*)—CONFLICTING JURISDICTION OF COURTS OF BANKRUPTCY AND STATE COURTS.

The pendency of a suit in a state court for the dissolution of a corporation, instituted by minority stockholders, and the possession of the corporate property by a receiver appointed therein, did not deprive creditors of their right to have the corporate assets brought into the bankruptcy court for administration there, where they duly asserted that right and had the corporation declared bankrupt as soon as it was known to be insolvent and had committed an act of bankruptcy, though the receiver was appointed more than four months before the filing of the petition; as stockholders could not acquire through the receiver or otherwise any lien or other claim not subordinate to the rights of creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. § 20.*]

4. BANKRUPTCY (§ 20*)—CUSTODY OF PROPERTY—ADVERSE HOLDING.

A receiver of a corporation appointed by a state court in behalf of, or at the instance of, stockholders could not hold the corporate property adversely to the receiver in bankruptcy claiming on behalf of the creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. § 20.*]

Petition for Revision of Proceedings of the District Court of the United States for the Western District of North Carolina, at Asheville, in Bankruptcy; James E. Boyd, Judge.

In the matter of the Cherokee Tanning Extract Company, bankrupt. On petition by the Bank of Andrews and another to superintend and review an order requiring A. A. Fain, a receiver appointed by a state court, to turn over the property of the bankrupt to Vonno L. Gudger, receiver. Order affirmed.

Donald Witherspoon, of Murphy, N. C. (James H. Merrimon, of Asheville, N. C., and Witherspoon & Witherspoon, of Murphy, N. C., on the brief), for petitioners.

Alf. S. Barnard, of Asheville, N. C., and W. D. Payne, of Charleston, W. Va. (Stevens & Anderson and Merrick & Barnard, all of Asheville, N. C., and Payne, Minor & Bouchelle, of Charleston, W. Va., on the brief), for respondent.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. [1] This petition to superintend and revise in the bankruptcy of Cherokee Tanning Extract Company presents to the court a delicate matter of conflict between the superior court of the state of North Carolina and the District Court of the United States for the Western District of North Carolina. In accordance with the accustomed dignity and decorum of the federal and state courts in such a condition, the judges of the courts concerned have asserted their convictions of judicial duty with the utmost courtesy and consideration for each other, leaving the differences to be settled by appellate courts in the manner provided by law. This court enters upon the consideration of the questions involved giving full force to the law that the superior court of North Carolina is a court of general jurisdiction and that the presumption is therefore in favor of its jurisdiction as to all matters justiciable in that state,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

while the District Court of the United States is confined to the jurisdiction expressly conferred or necessarily implied by federal statutes. Case of the Sewing Machine Companies, 85 U. S. (18 Wall.) 553, 557, 21 L. Ed. 914.

The material facts are not in dispute. Cherokee Tanning Extract Company, a corporation organized in 1902 under the laws of North Carolina, was engaged in the manufacture of tanning extracts in that state. By a summons dated April 21, 1913, and a complaint verified April 30, 1913, W. C. Barker, W. J. Dingleline, Henry A. Walker, and W. S. Barker, as minority stockholders of the corporation, brought their action in the superior court of North Carolina for the county of Cherokee against the corporation and H. N. Gitt, W. P. Stine, and Frank W. Hunt, setting out in the complaint many acts tending to show fraudulent mismanagement of the company by the majority of the stockholders and the board of directors for the purpose of depreciating the stock in furtherance of an alleged plan to purchase the stock at a low price to the great injury of the minority stockholders. The caption of the complaint included as plaintiffs those above named "and all others, the stockholders and creditors of the Cherokee Tanning Extract Company who will come in and make themselves parties and contribute to the cost of the suit." There was also an allegation in the complaint that the action was brought for the benefit of the plaintiffs and all creditors and stockholders who would come in and make themselves parties to the suit and contribute to the expenses. Insolvency at the time the action was brought was negated by the following allegation as to the danger of future insolvency:

"Plaintiffs repeat and reaffirm their allegation that the defendant Cherokee Tanning Extract Company is in imminent danger of becoming insolvent unless this honorable court should intervene and prevent the carrying out of the unlawful and fraudulent agreements entered into between the said Gitt and Hunt, which agreements constitute acts of wrongful oppression of the minority stockholders and ought not to be allowed. They reassert and reaffirm the liabilities of said Gitt and Stine on account of their alleged misconduct, and they respectfully submit to the court that a receiver to take charge of and wind up the affairs of the corporation is the only salvation for the minority stockholders and for the creditors of said company."

The prayer for relief was as follows:

"Wherefore plaintiffs demand judgment that a receiver be appointed to at once take charge of all the property and effects of the Cherokee Tanning Extract Company; that said receiver, if it shall be determined that these plaintiffs cannot do so, be directed to at once assert in this action, or a proper one to be begun for the purpose, a liability against the said H. N. Gitt and W. P. Stine and Frank W. Hunt on account of said acts; that said receiver be authorized and directed to at once sell all of the manufactured product of the said defendant company at market price for cash; that he be authorized to use up only the material on hand in the manufacture of extract and that it be sold at the market price; that said receiver take charge of all the property and effects of every kind, including choses in action; that the same be sold upon such terms as the court may direct, said choses in action collected; and that all the property and business of the Cherokee Tanning Extract Company shall be sold out and the proceeds thereof applied, under the order of this court, as the law directs; for the costs of this action and for such other and further relief in the premises as to the court may seem to be just."

On May 5, 1913, Hon. Henry P. Lane, judge of the superior court sitting in Cherokee county, made an ex parte order appointing J. Q. Barker receiver to take charge of the corporate property, under a finding by the court recited in the order that the corporation "is being mismanaged and is in imminent danger of becoming insolvent," and that suit should be brought on behalf of the corporation against the defendants, Hunt, Gitt, and Stine, on account of their alleged misconduct of the affairs of the corporation. The order required the defendants to show cause at a future day why a permanent receiver should not be appointed. Barker, the receiver appointed by the court, took charge of the property under the order. The complaint was afterwards amended in particulars not important to this controversy. The defendant corporation and Gitt and Stine demurred and answered, and by the answer put in issue the material allegations of the complaint, specifically denying that the corporation was in imminent danger of insolvency, unless it should be made so by the action instituted by the plaintiffs.

A motion made by the defendants to discharge the receivership was heard by Hon. G. S. Ferguson, judge presiding at the November term, 1913, of the superior court for Cherokee county. The motion was refused in an order containing the following as the reason for the refusal:

" * * * The court adjudges that it is apparent that the majority stockholders have combined together to control the affairs of the corporation, the Cherokee Tanning Extract Company, and have undertaken in an illegal and unauthorized manner to force the minority to sell their stockholdings at a price to be fixed by the majority, and to exclude the minority from any voice or participation in the management of the affairs of the corporation, and to control the corporation, as they see fit, and have mismanaged the affairs of the corporation, and have done other things which make it apparent to the court that it is impossible that the corporation should longer exist and carry on its business and that a sale of its assets and winding up of its affairs, including the payment of its debts, is all that remains to be done."

In the meantime on September 25, 1913, the stockholders of the corporation by resolution admitted its inability to pay its debts caused by the differences between its stockholders; and thereafter on September 30, 1913, Kanawha Valley Bank and two other creditors filed their petition in the District Court of the United States for the Western District of North Carolina in which they alleged that the Cherokee Tanning Extract Company had committed an act of bankruptcy by the resolution of the stockholders and directors admitting its inability to pay its debts, and prayed that the corporation be adjudged an involuntary bankrupt. The corporation answered by H. N. Gitt, president, admitting the allegations of the petition and consenting to the adjudication; and on October 7, 1913, the referee in bankruptcy made the adjudication. Other creditors were allowed, at their own request, to become parties and join in the petition by order of the District Judge, and on October 28, 1913, the District Judge adjudged the corporation bankrupt. J. Q. Barker, the temporary receiver, and A. A. Fain, who had been appointed permanent receiver by the state court, and J. Q. Barker, and Andrews Lumber Company, styling themselves creditors of the bankrupt corporation, appeared in the bank-

ruptcy proceedings by answer filed November 7, 1913, setting up the proceedings in the state court, the appointment of the receivers, and possession of the property by Fain as receiver under order of that court. Depending on the proceedings in the state court, these parties moved before the District Judge to set aside the adjudication in bankruptcy. The motion was denied by order dated November 7, 1913. On November 10, 1913, the District Judge made an order appointing Vonno L. Gudger receiver, directing him to take possession of the property of the bankrupt corporation, and restraining the receivers of the state court and the Bank of Andrews from disposing of the property in their hands. This order was exhibited to the judge presiding in the superior court for Cherokee county, who refused to order a delivery of the property to the bankruptcy receiver. Demand for possession was then made by Gudger as receiver in bankruptcy and refused by the receivers appointed by the state court. Thereupon on November 14, 1913, the District Judge made an order requiring the receivers appointed by the state court to show cause why they should not be required to turn over the property. Upon hearing the return, which contained all the proceedings in the state court, the District Judge held it to be insufficient; and on December 15, 1913, ordered Fain, the permanent receiver, to turn over the corporate property to Gudger, the receiver appointed by the federal court. Gudger as receiver was directed to present the order to the judge of the superior court for Cherokee county with the request that Fain be directed to turn over the property to him as receiver appointed by the bankruptcy court.

The petition to superintend and revise by setting aside the order of the District Judge restraining Fain, the receiver appointed by the state court, from disposing of the property of Cherokee Tanning Extract Company and requiring him to turn it over to Gudger, the receiver appointed by the bankruptcy court, rests on the proposition that the bankruptcy court could not interfere with the custody of the receiver of the state court for these reasons:

First. The state court had acquired jurisdiction of the parties and the property which was the subject of this action more than four months before the adjudication in bankruptcy.

Second. The state court, having the property in custody when the bankruptcy proceedings were instituted, had a right to retain and administer the property as a court of concurrent and co-ordinate jurisdiction, as a matter of right and not merely upon the principle of comity.

Third. Even if the bankruptcy court had the right to the custody of the property for administration in bankruptcy, it could only acquire the custody by a plenary suit instituted by the receiver as trustee in bankruptcy.

Fourth. The state court having refused to recognize the jurisdiction of the bankruptcy court, its judgment in doing so was binding upon all parties until reversed on appeal.

[2] It is important to observe that the order of the District Court adjudicating the Cherokee Tanning Extract Company a bankrupt has

not been brought up for review, and that adjudication must therefore stand in this proceeding as conclusive on all parties. On the other hand, there can be no doubt that the state court had jurisdiction as to the action brought by the minority stockholders to dissolve the corporation and wind up its affairs because of the abuse of its corporate powers to the injury of its stockholders and because of the imminence of insolvency alleged in the complaint presented to that court. Revisal of North Carolina, § 1196. As an incident to the suit for dissolution, the state court had also the power to appoint a receiver under section 1219 of the Revisal. When the suit for these purposes was instituted in the state court, it had exclusive jurisdiction, for insolvency was negatived by the complaint and answer, and the jurisdiction of the bankruptcy court depends on insolvency.

The complaint in the state court purported in its caption and in its allegation to be for the benefit of stockholders and of creditors who might come in and contribute to the expense; but no creditor was made a party, nor has any creditor acquired any right or set up any claim in the state court. Nevertheless if the corporation had remained solvent, the state court would have had exclusive jurisdiction to convert the corporate assets into cash and settle the claims of creditors, and the creditors could not have sought payment in any other tribunal.

From these considerations as to which, it seems to us, there can be no difference of opinion, it is evident that the bankruptcy court had no jurisdiction, and it was impossible for the creditors to avail themselves of the relief provided for them in the federal bankruptcy statute until the corporation became insolvent, and committed an act of bankruptcy more than four months after the commencement of the action and the appointment of a receiver by the state court.

[3] The case then comes to this: Does the pendency of a suit in a state court instituted against a corporation by stockholders for the protection of their rights, and the possession of the corporate property by a receiver appointed in such suit, deprive creditors of the corporation of the superior right conferred on them by the federal statute to have the corporate assets brought into the federal court for administration under an adjudication in bankruptcy when they have duly asserted the right and had the corporation declared bankrupt as soon as it was known to be insolvent and had committed an act of bankruptcy? It seems clear that to this question there can be only a negative answer. An affirmative answer would mean that the stockholders of a corporation or the members of a partnership could at their will deprive creditors of the right conferred upon them by the federal statute to have the property of an insolvent debtor administered by the bankruptcy court.

Such a case is entirely apart from those cases in which a creditor has gone into the state court and established or acquired by his suit a legal or equitable lien on the property in the hands of the court four months before the filing of the petition in bankruptcy. In such cases the courts have held that the creditor is entitled to enforce his lien in the first court that acquired jurisdiction. The distinction is also

evident between this case and those cases where the state court held the property by its receiver, and there was no question of the subsequent coming into existence of facts giving rise to the right to invoke the exclusive jurisdiction of the federal court.

[4] There is no support for the claim that this is a case of adverse possession by the receiver of the state court, for there could be no adverse possession of the corporate property in behalf of or at the instance of stockholders of an insolvent corporation against the receiver in bankruptcy claiming on behalf of creditors.

The fact that the receiver was appointed by the state court more than four months before the filing of the petition cannot affect the matter, for creditors were not before the state court and had not acquired any lien on the property; and stockholders, in the nature of things, could not acquire through the receiver or otherwise any lien or other claim that was not subordinate to the right of creditors to have the estate administered in bankruptcy for their benefit.

In all this, however, we have only set out the principles and the rule thus tersely and conclusively stated by Chief Justice Fuller in the case of *In re Watts*, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933:

"The New Albany Trust Company was appointed receiver of the property of Zier & Co. under section 1245 of the Revised Statutes of Indiana, Thornton's Rev. Stat. of 1897, providing that this might be done, 'when a corporation has been dissolved, or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights'; and it was directed to complete unfinished contracts but to make no new ones. The winding up of the business was contemplated and entered upon. Whether the transfers of \$3,100 and \$9,600 could have been overhauled in that suit we need not inquire, as they were undoubtedly acts of bankruptcy, and as such justified the application to the bankruptcy court. And the operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under state statutes. The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive. Necessarily when like proceedings in the state courts are determined by the commencement of proceedings in bankruptcy, care has to be taken to avoid collision in respect of property in possession of the state courts. Such cases are not cases of adverse possession, or of possession in enforcement of pre-existing liens, or in aid of the bankruptcy proceedings. The general rule as between courts of concurrent jurisdiction is that property already in possession of the receiver of one court cannot rightfully be taken from him without the court's consent, by the receiver of another court appointed in a subsequent suit; but that rule can have only a qualified application where winding up proceedings are superseded by those in bankruptcy as to which the jurisdiction is not concurrent. Still it obtains as a rule of comity, and accordingly the receiver of the District Court brought his appointment to the knowledge of the Floyd Circuit Court and requested the delivery of the assets."

Our conclusion is that under the facts here appearing the jurisdiction of the state court over the property in the hands of its receiver came to an end by the adjudication in bankruptcy; that thereafter Fain, as receiver, had no authority to sustain his custody of the property; and that the District Judge was right in ordering it to be turned over to the receiver in bankruptcy, and in directing that the order be presented to the judge of the state court for his consideration. The judgment of the District Court is affirmed.

Affirmed.

SMITH v. NELSON LAND & CATTLE CO. †

(Circuit Court of Appeals, Eighth Circuit. March 3, 1914.)

Nos. 4028, 4029.

1. CORPORATIONS (§ 467*) — POWERS — NOTES — EXECUTION — ACCOMMODATION MAKER.

A land and cattle corporation had no power to become an accommodation maker of certain notes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1831; Dec. Dig. § 467.*]

2. COURTS (§§ 366, 372*)—FEDERAL COURTS—RULES OF DECISION—STATE STATUTES—NEGOTIABLE INSTRUMENTS LAW.

While a federal court, in an action on certain notes, is not bound to follow the view expressed by the highest state tribunal on the question of negotiability of certain notes when dependent on general principles of the law merchant, yet where such question is governed by a negotiable instruments law adopted by the state, the federal court is bound to give force and effect to the statute if applicable.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968, 977-979; Dec. Dig. §§ 366, 372.*]

State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 533.]

3. BILLS AND NOTES (§ 146*)—NEGOTIABLE INSTRUMENTS LAW—EFFECT.

Gen. St. Kan. 1909, § 5254, providing that instruments, to be negotiable, must be in writing and signed by the maker or drawer, must contain an unconditional promise or order to pay a sum certain in money, must be payable on demand or at a fixed or determinable future time, and must be payable to order or to bearer, did not change the common law merchant as to the fundamental requirements of negotiable instruments.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 361; Dec. Dig. § 146.*]

4. BILLS AND NOTES (§ 155*)—NEGOTIABILITY—TIME OF PAYMENT—EXTENSION—PROVISIONS.

Where certain notes provided that "sureties" consented that time of payment might be extended without notice thereof, such provision did not apply to any party signing the notes, and, there being no persons to whom it did apply, the presence of the clause did not render the notes nonnegotiable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 407-410; Dec. Dig. § 155.*]

5. BILLS AND NOTES (§ 155*)—NEGOTIABILITY—MORTGAGES.

Where certain notes negotiable in form were secured by a mortgage, their negotiability was not destroyed by a provision of the mortgage that in the event of certain contingencies the whole sum for which the notes were given might be declared due and payable, on the theory that the time of payment of the notes was thereby rendered uncertain.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 407-410; Dec. Dig. § 155.*]

6. BILLS AND NOTES (§ 205*)—TRANSFER WITHOUT INDORSEMENT—STATUTES.

The last clause of Gen. St. Kan. 1909, § 5302, providing that negotiation of an instrument transferred without indorsement takes effect as of the time when indorsement is actually made, has no application to the rights of a transferee of negotiable notes without any indorsement whatever.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 205.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

†Rehearing denied June 4, 1914.

7. BILLS AND NOTES (§ 362*)—INDORSEMENT—TRANSFER WITHOUT INDORSEMENT—STATUTES—"HOLDER."

Gen. St. Kan. 1909, § 5302, provides that, where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires in addition the right to have the indorsement of the transferor, but for the purpose of determining whether the transferee is a holder in due course the negotiation takes effect as of the time when the indorsement is actually made. Section 5311 declares that, in the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable, but a holder who derives his title through a holder in due course, and is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to him. Negotiable Instruments Law (Gen. St. 1909, § 5248) § 2, defines the word "holder" to mean the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof, and provides that the word "bearer," when used in the act, means a person in possession of a bill or note which is payable to bearer. *Held*, that the word "holder," used in the beginning of the last clause of section 5311, includes any transferee of negotiable paper; and hence, where notes negotiable on their face were transferred by indorsement before maturity, and the indorsee, also before maturity, transferred the notes to defendant S. without indorsement, he was nevertheless a holder, deriving his title through a holder in due course, and as such was entitled to enforce the notes free from equities between the original parties.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 937-943; Dec. Dig. § 362.*

For other definitions, see Words and Phrases, vol. 4, pp. 3319, 3320.]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit by the Nelson Land & Cattle Company against George H. Smith. From a judgment in favor of complainant, declaring all the notes sued on but one void in the hands of Smith for want of power in complainant to execute them, and granting judgment in favor of Smith on the one note, complainant appeals, and Smith prosecutes a cross-appeal. Reversed and remanded, with directions to dismiss the bill and to enter a decree in favor of cross-complainant, Smith, for the amount due on all the notes.

Alfred A. Scott, of Topeka, Kan. (William S. Hamilton and J. M. C. Hamilton, both of Ft. Madison, Iowa, and Owen J. Wood, of Topeka, Kan., on the brief), for Smith.

H. L. Moore, of Excelsior Springs, Mo. (W. A. Craven, of Excelsior Springs, Mo., and Lee Monroe, of Topeka, Kan., on the brief), for Nelson Land & Cattle Co.

Before ADAMS and CARLAND, Circuit Judges, and RINER, District Judge.

CARLAND, Circuit Judge. These are appeals from a judgment rendered in an action brought by the Cattle Company against George H. Smith et al., for the purpose of having certain promissory notes, a mortgage securing the same, and assignments of certain land contracts and certificates executed for the same purpose canceled. Smith filed a cross-bill, asking to have the amount for which he held the notes,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mortgage, contracts, and certificates as security ascertained, and a sale of the security to satisfy the same. The trial court granted the relief prayed by Smith as to one note of \$1,600, and canceled four other notes of \$3,350 each as prayed by the Cattle Company. The facts which determine the correctness of the ruling below appear from the record as follows: November 19, 1907, the Cattle Company, by Fred P. Nelson, president, and Gust A. Nelson, secretary and treasurer, Celia M. Nelson, and Hugo E. Nelson executed and delivered to E. H. Luikart five promissory notes, one of which was in the following words and figures:

"\$1600.00

Sharon Springs, Kan., November 19, 1907.

"On or before one year after date, we, or either of us, promise to pay to E. H. Luikart or order, at the State Bank of Sharon Springs, Sharon Springs, Kansas, the sum of one thousand six hundred dollars, for value received, with interest at 7 per cent. per annum from date. Interest payable annually, and defaulting interest to bear same rate of interest as principal. The makers, indorsers and guarantors of this note hereby severally waive presentment of payment, notice of nonpayment, protest and notice of protest, and diligence in bringing suit against any party hereto, and sureties consent that time of payment may be extended without notice thereof.

"The Nelson Land & Cattle Co.,

"Fred P. Nelson (Pres.).

"Gust A. Nelson (Sec. and Treas.).

"Celia M. Nelson.

"Hugo E. Nelson."

The remaining four notes were of the same tenor and effect, except that they were for the sum of \$3,350 each, and became due in two, three, four, and five years from date. The Cattle Company also executed and delivered a mortgage on real estate and assigned in blank and delivered to Luikart certain land contracts and certificates to secure the payment of the notes. The Cattle Company was a corporation, and signed the notes before delivery without any consideration therefor passing to it. On or about May 19, 1908, Luikart, the payee of the notes, for value received indorsed and delivered the notes in due course to Roy C. Smith and Albert Anthes, doing business under the firm name of Anthes & Smith. The indorsement on each note was as follows:

"Without recourse; pay to the order of Anthes & Smith—E. H. Luikart."

The mortgage was duly assigned by Luikart to Anthes & Smith, and the land contracts and certificates transferred to them by delivery. Subsequent to the indorsement of the notes to Anthes & Smith, but before maturity, they were transferred by them to the defendant and cross-complainant, George H. Smith, in part payment of an antecedent debt owing to Smith by Anthes & Smith. The mortgage, land contracts, and certificates were also transferred with the notes. The note for \$1,600, due November 19, 1908, was indorsed to George H. Smith in blank by Anthes & Smith. None of the other notes were indorsed by them. No attack is made upon the mortgage or assignments of the land contracts and certificates, except through the attack on the notes; hence they need not be further considered in this opinion. George H. Smith was not a party to any illegality affecting the notes, and fraud is not claimed on the part of any one.

Upon the foregoing facts the Cattle Company claims that the execution of the notes by it as an accommodation maker, without consideration, was ultra vires and void, and that the invalidity of the notes for the above reason can be urged against George H. Smith, the present owner and holder of the same, for the reason: First, that the notes are not negotiable in form; second, if they are negotiable in form, then the facts show George H. Smith not to be a holder in due course. The trial court decided that the notes were negotiable in form, and that the \$1,600 note was valid in the hands of George H. Smith, for the reason that it was indorsed by Anthes & Smith, and therefore as to it George H. Smith was a holder in due course, but as to the remaining four notes he was not a holder in due course, because they were not transferred to him by indorsement, and therefore were void in his hands for want of power in the Cattle Company to execute the same.

[1] It must be conceded that it was beyond the power of the Cattle Company to become an accommodation maker of the notes in controversy. *Park Hotel v. Fourth National Bank*, 86 Fed. 742, 30 C. C. A. 409, and cases cited (8th Circuit); *Thompson on Corporations*, § 2225; *Daniel on Negotiable Instruments*, § 386 (1913); *Cattle Company v. Loan Company*, 65 Kan. 359, 69 Pac. 332.

It is claimed that the notes are not negotiable in form by reason of the following language found therein:

"The makers, indorsers and guarantors of this note hereby severally waive presentment of payment, notice of nonpayment, protest and notice of protest, and diligence in bringing suit against any party hereto, and sureties consent that time of payment may be extended without notice thereof."

[2, 3] The notes are undoubtedly Kansas contracts; and, while we are not bound to follow the view expressed by the highest tribunal of the state upon general principles of the common law merchant (*Oates v. National Bank*, 100 U. S. 239, 25 L. Ed. 580; *Railroad Co. v. National Bank*, 102 U. S. 14, 26 L. Ed. 61; *Dygert v. Vermont Loan & Trust Co.*, 94 Fed. 913, 37 C. C. A. 389; *Northern Nat. Bank v. Hoopes* (C. C.) 98 Fed. 935; *Phipps v. Harding*, 70 Fed. 471, 17 C. C. A. 203, 30 L. R. A. 513), when, however, a state has adopted a negotiable instrument law by statute, we must give force and effect to such law in all cases where the same is applicable. We do not find, however, that section 5254, Gen. Kan. Stat. 1909, has changed the common law merchant as to the fundamental requirements of negotiable instruments. It provides that such instruments:

"(1) Must be in writing and signed by the maker or drawer; (2) must contain an unconditional promise or order to pay a sum certain in money; (3) must be payable on demand, or at a fixed or determinable future time; (4) must be payable to order or to bearer."

[4] Coming now directly to the point urged by counsel for the Cattle Company, does the language above quoted from the notes offend against the requirement that an instrument to be negotiable must be payable on demand or at a fixed or determinable future time? The only language contained in the notes which could be claimed to violate the above rule is the following:

"And sureties consent that time of payment may be extended without notice thereof."

As between the Cattle Company and Hugo Nelson, who received whatever consideration there was for the notes, it may be said that the former was surety for the latter, but in law and to the world the Cattle Company was one of the makers of the notes, and all persons dealing with them had the lawful right to treat it as such. The time of payment named in the notes was certain when they were made. It was certain when they came into the hands of Luikart, Anthes & Smith and George H. Smith. It is certain now, and still it is claimed that, ever since the notes were made, the time of payment has been uncertain. The time of payment of any promissory note may be extended, and no one has ever thought of urging that fact to destroy its negotiability. So the contention must come to this: That it is the extension without the consent of a party to the note which would make the time of payment as to him uncertain. If, however, there are no parties to the notes whose consent is not required before the time of payment may be extended, then the clause waiving such consent as to the parties not signing the notes cannot affect the time of payment, and we are of the opinion that the present is such a case. In other words, we are of the opinion that the language hereinbefore quoted could not, in law, have applied to any party signing the note, and that therefore it did not operate in any way to render the time of payment of the note uncertain. Being of this opinion, we shall refrain from discussing the question as to what might be our view if the language, used in the note in regard to consent of sureties, could be legally applied to any party who signed the notes. The decisions upon this subject are in conflict. Those tending to sustain the views of the counsel for the Cattle Company have all been examined; and, having in view our construction of the language contained in the notes in question, we do not find any of them parallel to the case at bar.

[5] It is also urged that the provision in the mortgage which was given to secure the notes that in the event of certain contingencies the whole sum for which the notes were given might be declared due and payable render the time of payment of the notes uncertain, and therefore destroy their negotiability. There is no merit, however, in this contention, as has been held by the Supreme Court in *Chicago Railway Co. v. Merchants' Bank*, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349.

The notes, in our opinion, being negotiable in form, it remains to inquire as to the rights of George H. Smith. What we have said so far in this opinion must result in an affirmance of the judgment below, so far as it was in his favor, as the \$1,600 note was received by him in due course by the indorsement of Anthes & Smith. We think that, if George H. Smith must stand on the character of his own title, and cannot claim protection by virtue of the title of Anthes & Smith, then the ruling of the trial court as to the other four notes was right. An indorsee of negotiable paper in due course may obtain a better title than his indorser, and in that event may stand upon such title; but is it necessary that he be an indorsee in order to claim the title of a transferor, who was an indorsee in due course? In other words, cannot George H. Smith, although the notes were transferred to him by delivery, use the Anthes & Smith title to insulate the *ultra vires* attack

of the Cattle Company? Does not the transferee for value of negotiable paper obtain whatever title his transferor had, irrespective of the mode of transfer? As we have heretofore said, these notes are Kansas contracts; and, if there are statutes of that state which determine the legal position of the holders thereof, they must be enforced. Sections 5302-5311, Gen. Stat. Kan. 1909, read as follows:

"Sec. 5302—Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor; but for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made."

"Sec. 5311—In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable; but a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter."

[6, 7] The last clause of section 5302 has no application to the question now under discussion, for there never was any indorsement of the four notes in question by Anthes & Smith; and counsel for George H. Smith are not claiming that he was an indorsee in due course, but that under the first clause of this section and the last clause of section 5311, George H. Smith obtained whatever title Anthes & Smith had. The last section does not read: "But a holder in *due course* who derives his title through a holder in due course and who is not," etc. Such language would be entirely useless, for if the holder was a holder in due course, he would be fully protected in any event. The law was enacted in order to protect all holders of whatever character of negotiable paper, providing they derive their title to the same from a holder in due course. Anthes & Smith were holders in due course, free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and could have enforced payment of the notes for the full amount thereof against all parties liable thereon. Gen. Stat. Kan. §§ 5305-5310. Being such holders when they transferred the notes to George H. Smith for value without indorsing them, the transfer vested in George H. Smith such title as Anthes & Smith had. Section 5302, *supra*. This provision of the law negatives the idea that there can be no transfer except by indorsement, for the reason that the law declares what title a transferee shall acquire, when it is transferred to him without indorsement. It is true section 5311 uses the word "holder" in describing the persons who shall derive their title to negotiable instruments from a holder in due course; and counsel for the Cattle Company urge the proposition that George H. Smith was not a holder under the provisions of section 2 of the Negotiable Instruments Law of Kansas. That section provides as follows:

"Definitions and meaning of terms. In this act, unless the context otherwise requires: * * * 'Holder' means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof." Gen. St. 1909, § 5248.

The same section provides that the word "bearer" when used in the act means the person in possession of a bill or note which is payable

to bearer. It is claimed that George H. Smith was not the bearer of the notes because they were not payable to bearer, and that he was not a payee or indorsee for the reason that he was not named as payee in the notes and they are not indorsed to him. It will be noticed, however, that the law only provides that these definitions shall apply unless the context of any particular portion of the law otherwise requires. To decide that the word "holder" as used in the first part of the last clause of section 5311, hereinbefore quoted, does not include a transferee like George H. Smith, who received the notes in question from Anthes & Smith without their indorsement, would be inconsistent with the first clause of section 5302, above quoted, for that section provides that where a holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as transferor has therein. This section simply uses the words "transfer" and "transferee," and in no way declares that a transferee shall also be a holder within the definition of section 2, above mentioned. We, therefore, think, within the language of said section 2, that the context of sections 5302 and 5311 require that the word "holder," used in the beginning of the last clause of section 5311, should be held to include any transferee of negotiable paper.

The result of what we have said is that we are of the opinion that George H. Smith has the same title to the four notes in controversy that was possessed by Anthes & Smith, by virtue of the statutes of Kansas, and that, possessing such title, he is entitled to enforce payment of the same against the Cattle Company. We have thus far considered the question last discussed with reference to the statutes of Kansas, and we think our interpretation of the same is in line with the decision of the Supreme Court of Kansas in *Underwood v. Fosha*, 89 Kan. 768, 133 Pac. 866; and we think the weight of authority, independent of statute, is in favor of the views hereinbefore expressed. Section 803, 1 Dan. Neg. Inst. (5th Ed.); *Gunnison County Commissioners v. Rollins*, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689; *Town of Fletcher v. Hickman*, 165 Fed. 403, 91 C. C. A. 353; *Cromwell v. County of Sac*, 96 U. S. 51, 24 L. Ed. 681; *Bodley v. National Bank*, 38 Kan. 59, 16 Pac. 88.

The case of the *First National Bank v. McCullough*, 50 Or. 508, 93 Pac. 366, 17 L. R. A. (N. S.) 1105, 126 Am. St. Rep. 758, is relied upon by counsel for the Cattle Company. This case may be said to be contrary to the views hereinbefore expressed. It has been reported in 17 L. R. A. (N. S.) 1105, and an interesting note accompanies the report of the case, in which the annotator does not agree with the conclusion reached in the case cited.

We place our decision upon the statutes of Kansas as construed by the Supreme Court of that state, and as we construe them. We cannot see how the ruling thus established can work any injustice. The Cattle Company could not have avoided the notes on the ground of *ultra vires* in the hands of Anthes & Smith, and they are in no worse position now than they would have been if Anthes & Smith still owned them.

The decree below is reversed, and the cause is remanded, with directions to dismiss the original bill at the costs of the complainant and to enter a decree in favor of the cross-complainant, George H. Smith, as prayed for in his cross-bill, and that he also recover his costs

KEMMERER et al. v. ST. LOUIS BLAST FURNACE CO. et al.

(Circuit Court of Appeals, Eighth Circuit. February 24, 1914.)

No. 4044.

1. JUDGMENT (§ 735*)—RES JUDICATA—QUESTIONS CONCLUDED.

A judgment of a state court, in an action on a note brought by the payee, which adjudges that the maker, who counterclaimed on the ground that bonds pledged by it to the payee to secure the note were worth about \$4,000, and that the payee sold them at private sale and purchased them, and allowed the maker a credit of \$100, take nothing by its counterclaim, is not res judicata on the issue of the validity of the bonds.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1263, 1265; Dec. Dig. § 735.*]

2. CORPORATIONS (§ 469*)—BONDS—FICTITIOUS ISSUE.

Under Const. Mo., art. 12, § 8, and Rev. St. Mo. 1909, § 2981, providing that bonds of a corporation shall be issued only for money paid, labor done, or property actually received, and all fictitious increase of indebtedness shall be void, bonds of a corporation, issued and pledged to secure a pre-existing debt due from it, are invalid where no consideration passed to it from the creditor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1832; Dec. Dig. § 469.*]

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit by M. S. Kemmerer and another, a copartnership, doing business as the Whitney-Kemmerer Company, against the St. Louis Blast Furnace Company and others. From a decree denying relief, complainants appeal. Affirmed.

Henry B. Davis, of St. Louis, Mo. (Charles Erd, of St. Louis, Mo., on the brief), for appellants.

William G. Pettus, Lewis & Rice, and Stewart, Bryan & Williams, all of St. Louis, Mo., for appellees.

Before SANBORN and CARLAND, Circuit Judges, and RINER, District Judge.

CARLAND, Circuit Judge. On October 23, 1912, the District Court for the Eastern District of Missouri, Eastern Division, entered a decree of foreclosure and sale in an action therein pending, wherein Whitney-Kemmerer Company, a copartnership, were complainants, and the St. Louis Blast Furnace Company, St. Louis Union Trust Company, and the McPheeters Warehouse Company were defendants. The property covered by the mortgage or trust deed was sold and the proceeds, amounting to \$75,000, was paid to the receiver appointed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by the court, and now awaits distribution. The court referred all claims against the Blast Furnace Company, the mortgagee, to a master, who heard all parties interested, and made a final report which was approved by the court. Among the claims presented to the master for allowance, were those of Whitney-Kemmerer Company, which arose in this way: October 1, 1910, the St. Louis Blast Furnace Company executed and delivered its promissory note to Whitney-Kemmerer Company for the sum of \$3,664.62, payable November 25, 1910, with interest at 7 per cent. per annum from date. The note was given by the Furnace Company to Whitney-Kemmerer Company in settlement of a pre-existing and past-due indebtedness for goods, wares, and merchandise sold and delivered by the payee in said note to the maker thereof. The note contained a collateral security agreement in the usual form, which recited that \$4,000 in bonds of the Furnace Company were deposited with Whitney-Kemmerer Company as security for the payment thereof. Two of the bonds pledged were for \$1,000 each, and four for \$500 each. They were part of a series of 300 bonds, all of like date and tenor, except as to amount and maturity, aggregating in principal sum \$200,000, and all equally secured by a certain mortgage dated as of January 1, 1910, made by the Furnace Company to the St. Louis Union Trust Company as trustee, being the same mortgage which was foreclosed in the present proceedings. About February 1, 1911, the Whitney-Kemmerer Company sold the bonds pledged to secure the payment of the note at private sale for \$100; D. S. Bygate, acting for the pledgees, purchased the bonds for their use and benefit. November 17, 1911, Whitney-Kemmerer Company recovered a judgment against the Furnace Company on the note for \$4,237.61, being the amount of principal and interest due thereon, less the \$100 received from the sale of the bonds. July 1, 1912, there was due on the judgment \$4,440.60, and on the bonds the sum of \$4,480. Whitney-Kemmerer Company presented both of these claims for allowance to the master, claiming that the amount due on the bonds was a secured claim under the mortgage. The master disallowed the amount claimed to be due on the bonds, for the reason that the bonds were void, there being no lawful power in the Furnace Company, under the laws of Missouri, to issue the same under the circumstances shown in the record, the Furnace Company having been organized under the laws of that state.

[1] In the suit on the note in the Circuit Court of St. Louis, the Furnace Company interposed a counterclaim, wherein it alleged that the bonds pledged to secure the payment of the note were worth approximately \$4,000, and that Whitney-Kemmerer Company had sold the same at private sale, purchased the bonds themselves and only allowed a credit of \$100, and the counterclaim prayed for a judgment against Whitney-Kemmerer Company for \$3,900. At the trial the court adjudged that the Furnace Company take nothing by its counterclaim. The Whitney-Kemmerer Company claimed before the master that the validity of the bonds in question was adjudicated in the suit on the note; the master held otherwise. The report of the master having been approved by the District Court, Whitney-Kemmerer

Company has appealed from the judgment approving the master's report, so far as their claim on the bonds is concerned. Only two errors are assigned, the ruling of the court holding the bonds invalid, and the ruling on the plea of *res adjudicata*. The validity of the bonds was in no wise in issue in the suit on the note, and the ruling below upon the plea of *res adjudicata* must be affirmed.

[2] We now come to consider the ruling of the court holding the bonds invalid. The law of Missouri which it is claimed invalidates the bonds is as follows:

"No corporation shall issue stock or bonds, except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void." Const. Mo., art. 12, § 8.

"The stock or bonds of a corporation shall be issued only for money paid, labor done or money or property actually received." Rev. St. Mo. 1909, § 2981.

A reading of the plain language of the Constitution and statute, ought to be sufficient to uphold the ruling of the court below. We approach the consideration of the question involved with the belief that it is our duty to give effect to such legislation in all cases where the law applies, and not by any strained construction to thwart its purpose out of any consideration of mere business convenience. This case presents a good illustration of the evil which the lawmaking power sought to prevent. No consideration, whatever, passed from Whitney-Kemmerer Company to the Furnace Company at the time the bonds were issued and pledged, and none ever has passed on account of the bond issue; still an indebtedness of \$4,480 is sought to be proved against the Furnace Company. If this does not make the amount of the claim fictitious within the meaning of the law, then we are unable to comprehend the meaning of the word. Fictitious—not true or real. Cent. Dict.

In Wisconsin the Legislature, in order to prevent the issuance of bonds by corporations under such provisions as above quoted, by having a small consideration pass at the time the bonds are issued, has provided that corporations of that state shall not issue any bonds or other evidence of indebtedness, except for money, labor or property estimated at its true value actually received by it, equal to 75 per cent. of the par value thereof, and that all bonds issued, contrary to the provisions of this law, should be void. Section 1753, Wisconsin Statute. Such a law would prevent just what happened in the case at bar. The Whitney-Kemmerer Company received the bonds, and soon sold them at private sale to themselves for \$100, and now present a claim against the Furnace Company for \$4,480. It is not surprising that the Furnace Company went into the hands of a receiver; no corporation could survive such business methods.

The Constitution of Arkansas of 1874 (article 12, § 8) contained a provision for all practical purposes the same as the above provision quoted from the Constitution of Missouri. In *Memphis & Little Rock Railroad v. Dow*, 120 U. S. 287, 7 Sup. Ct. 482, 30 L. Ed. 595, the Supreme Court, in holding that such a provision did not prevent the carrying out of an agreement between mortgage bondholders of an embarrassed railroad company in the state of Arkansas, by which it

was agreed that trustees should buy in the mortgaged property on foreclosure, and convey it to a new company to be organized by the bondholders, which should issue new mortgage bonds to pay the expenses of the sale, and other new mortgage bonds to be taken by the bondholders in lieu of their old bonds, and full paid-up stock subject to the mortgage debt, to be delivered to and held by the bondholders without any payment of money, said:

"The prohibition against the issuing of stock or bonds, except for money or property actually received or labor done, and against the fictitious increase of stock or indebtedness, was intended to protect stockholders against spoliation, and to guard the public against securities that were absolutely worthless. One of the mischiefs sought to be remedied is the flooding of the market with stock and bonds that do not represent anything whatever of substantial value."

In the same case the court approved the following language used by the Supreme Court of Illinois in *Peoria & Springfield Railroad Co. v. Thompson*, 103 Ill. 187, saying:

"In reference to a provision in the Constitution of Illinois, adopted in 1870 [Const. 1870, art. 11, § 13], containing a prohibition, as to railroad corporations, similar to that imposed by the Arkansas Constitution upon all private corporations, the Supreme Court of the former state, in *Peoria & Springfield Railroad Co. v. Thompson*, 103 Ill. 187, 201, said: 'The latter part of the clause of the Constitution in question, which declares that "all stocks, dividends, and other fictitious increase of the capital stock or indebtedness of such corporation shall be void," we think, clearly points out the chief object which the constitutional convention sought to accomplish in adopting it; and to this we must look in a large degree, for a solution of the language which precedes it. The object was, doubtless, to prevent reckless and unscrupulous speculators, under the guise or pretense of building a railroad or of accomplishing some other legitimate corporate purpose, from fraudulently issuing and putting upon the market bonds or stocks that do not and are not intended to represent money or property of any kind, either in possession or expectancy; the stock or bonds in such case being entirely fictitious. * * * Under this provision of the Constitution railroad companies have no right to lend, give away, or sell on credit, their bonds or stock, nor have they the right to dispose of either, *except for a present consideration*, and for a corporate purpose.'"

Without some such provision as is found in the laws of Wisconsin the provisions that we have quoted from the Constitution and law of Missouri do not require that money, property, or labor, received in exchange for bonds, shall be of the equal market value of the bonds, provided the transaction is a real one, based upon a present consideration, and having reference to legitimate corporate purposes. In *Farmers' Loan & Trust Co. v. San Diego St. Car Co.* (C. C.) 45 Fed. 518, Judge Ross, in speaking with reference to a constitutional provision of California, similar to the one in the Constitution of Missouri, used the following language:

"This constitutional and statutory inhibition is plain, and has but one meaning—the money paid, labor done, or property actually received must be paid, performed, or received, as the case may be, on account of the issuance of the bonds; and any bonds issued contrary to this provision are of course illegally issued. This provision does not mean, and cannot be held to mean, that such bonds may be issued as collateral security for any sort of pre-existing indebtedness. Now none of the bonds in question are, or ever were, issued or held for money paid, labor performed, or property actually received on account of their issuance. On the contrary, all of them

were delivered and are held as collateral security in part for pre-existing indebtedness of the defendant corporation," etc.

In *Nichols v. Waukesha Canning Co.* (D. C.) 195 Fed. 807, Sanborn, District Judge, in holding that the issuance of bonds by a corporation for antecedent debts was not an issuance for money, labor, or property within the provisions of section 1753, Statute of Wisconsin 1898, said:

"Literally considered, these bonds are not within the statute, because they were not issued for money, nor for property estimated at its true money value. Existing debts are not money, and to say that they are property capable of estimation at its true money value does considerable violence to the words used. No property, claim, or debt was released or given up. Had the bonds been issued at the time of the respective loans, but for some reason the money not then paid over, subsequent payment of it might fairly be said to bring the case within the statute. The bonds would then be issued for money, as in the *Kenosha Case* they were issued for property. *Haynes v. Kenosha Electric Co.*, 139 Wis. 227, 119 N. W. 568, 121 N. W. 124. Again, if the notes or claims had been given up and canceled, and the bonds taken outright at not more than four to three, another question would be presented. This might be held the purchase of property at not less than three-fourths of its true value. No such novation, however, occurred. The intent and purpose of the statute will be presently considered; but from the language alone it is clear to a demonstration that the issue of bonds for a pre-existing debt not surrendered is not covered. Pre-existing debts are neither money nor property capable of being valued unless actually given up. * * * The true intent and purpose of the statute were to prevent the creation of corporate securities not representing actual value, and also to prevent the sacrifice of such value by summary sale of the bonds. Such sales of fairly good securities, which may have been pledged at the lawful rate of four to three, often result most disastrously to the debtor. The bonds, put out at three-fourths their value, at forced sale bring 5 to 25 per cent. of their face. This is applied to the debt, and the balance still stands against the debtor, plus the par value of the bonds sold. The sale may thus nearly double the total indebtedness. It is said in argument that the language of the Wisconsin court in the *Pfister Case*, as to the necessity of an argument [agreement] that pledged bonds shall be accounted for on the basis of at least three-fourths par, is a dictum, not necessary to the actual decision. Possibly this is true, but its wisdom cannot be gainsaid. If bonds can be pledged at 75 and then sold at 5, the restriction imposed by the statute is of no force."

The history of the bonds pledged in this case makes the language above quoted appropriate. In *Pfister v. Milw. Elec. Ry. Co.*, 83 Wis. 86, 53 N. W. 27, bonds for \$250,000 were issued as security for a cash loan of \$125,000. Chief Justice Lyon, in speaking of the provisions of the Wisconsin statute, said:

"The object of the statute is to protect stockholders and bona fide creditors from the improvident issue of its bonds by the corporation, which might, and, if allowed, probably would, result in the wrecking of the corporation. Hence the statute requires that no corporate bonds shall be issued unless the company shall actually receive therefor 75 per cent. of their par value. When a corporation puts its bonds beyond its control by hypothecating them as security for loans, or for any other purpose, or in any other manner, it issues them, within the meaning and intention of the statute. If it so hypothecates them without stipulating that they shall be accounted for at not less than 75 cents on the dollar of their par value, it violates the statute, and the bonds thus issued are void. Any other construction would render the statute a dead letter, thus defeating all the wise and salutary purposes it was intended to accomplish. Had the company sold *Pfister* the 250 bonds

for \$125,000, it would have been a safer transaction for stockholders and bona fide creditors of the corporation, for in that case nothing would have remained due to Pfister. But now, if this transaction is upheld, Pfister may sell his remaining bonds for 25 cents on the dollar of their face value, or less, and thus leave due him a large debt from the company, while the company would remain liable for the full face value of the bonds. No construction of the statute which would permit such an evasion of its provisions can be tolerated."

The same rule was adopted by the Circuit Court for the Eastern District of Wisconsin in *National Foundry & Pipe Works v. Oconto Water Co.* (C. C.) 52 Fed. 36, approved in *Mowry v. Farmers' L. & T. Co.*, 76 Fed. 38, 22 C. C. A. 52. The authorities are in entire harmony to the effect that under such provisions of law as we are considering, a pledge of bonds is an issue thereof; that where there is no statutory restriction the courts will ordinarily leave a private corporation to determine the amount of labor, property, or money which it will receive for its bonds or other evidence of indebtedness; that a private corporation having authority to borrow money may pledge its bonds for that purpose. But the great weight of authority is clearly to the effect that the money, labor, or property received for the bonds, whatever its value, must constitute a present consideration for the issuance thereof. Counsel for appellant have cited cases which they claim are authority for the proposition that a private corporation may pledge its bonds to secure an antecedent debt, under such constitutional and statutory provisions as are in force in Missouri. An examination of these cases discloses that not more than one of them can be said to support the proposition as stated, and it is doubtful whether that one, when rightly considered, does so. The case last referred to is *Nelson v. Hubbard*, 96 Ala. 238, 11 South. 428, 17 L. R. A. 375. Under the Code of Alabama a private corporation has the power—

"to borrow money, and to mortgage, or otherwise convey or pledge its property, real or personal, and its franchises to secure the payment of the money so borrowed, or any other debt contracted by it."

The Constitution of Alabama has the same provision as that of Missouri. The Supreme Court of Alabama in the case cited decided that a difference between the amount of bonds issued and the debt does not create a fictitious increase of indebtedness if they can properly be regarded as issued for money, labor done, or money or property actually received, and that the power to borrow money given by the Code included the power to pledge the bonds of the corporation, secured by its mortgage on property as collateral security for debts of the corporation presently created or already owing. Whether or not the bonds of a private corporation could be pledged for an antecedent debt was not the question directly in issue in the case, and we fail to find in it any strong support for the position of counsel. *Firth Co. v. South Carolina Loan & Trust Company*, 122 Fed. 569, 59 C. C. A. 73, is not in point. In that case it appears that the Constitution of South Carolina has the same provision as that of Missouri, and the court decided that a pledge of bonds was an issue thereof, the bonds in the case being issued for a present consideration in money, which was spent by the corporation for legitimate corporate purposes, to wit, the purchase of

machinery. The case also decided that the mere fact that the amount of the bonds exceeded the indebtedness did not create a fictitious indebtedness. *Western Supply Co. v. U. S. Mex. Trust Co.*, 41 Tex. Civ. App. 478, 92 S. W. 986, simply decided that the Texas Southern Railway Company, having authority under the laws of Texas to issue bonds, could pledge them, and that the constitutional provision of Texas, which is the same as that of Missouri, did not mean that there must be a dollar in money received for each dollar of bonds. *Gilchrist Trans. Co. v. Phoenix Ins. Co.*, 170 Fed. 279, 95 C. C. A. 475. This case decided that a pledge of bonds was an issue thereof and that a private corporation that had the power to borrow money, under the laws of Ohio, and issue bonds and notes therefor, could pledge its bonds to secure another indebtedness. No constitutional or statutory provisions like those in the case at bar were considered by the court.

Farmers' Loan & Trust Co. v. Toledo, 54 Fed. 759, 4 C. C. A. 561. It was decided in this case that under the laws of Michigan, which authorize railroads to issue and dispose of bonds for the purpose of borrowing money, a railroad company might pledge its bonds for money borrowed. No constitutional or statutory provisions like those in the case at bar were in the case.

Atlantic Trust Co. v. Woodbridge Canal, etc., Co. (C. C.) 79 Fed. 842. In this case Judge Morrow decided that a provision of the Constitution of California, similar to that of Missouri, did not prevent corporations from pledging their bonds as collateral security to secure the payment of a debt less in amount than the amount of the bonds, and also that to pledge the bonds was an issue thereof.

We have examined all the cases cited by counsel, and have examined all others which we have been able to find; and, with the exception of *Nelson v. Hubbard*, supra, we find the whole trend of authority supporting the proposition that there must be a present consideration, in order to satisfy the demands of such constitutional and statutory provisions as are here involved. Any other construction simply fritters away the safeguards which the Legislature sought to throw around the creation of corporate indebtedness.

The decree below must be affirmed; and it is so ordered.

ILLINOIS CENT. R. CO. V. NELSON.

(Circuit Court of Appeals, Eighth Circuit. March 7, 1914.)

No. 3967.

(*Syllabus by the Court.*)

1. MASTER AND SERVANT (§ 250*)—INJURY TO SERVANT—PROCEDURE—STATE AND FEDERAL LAW.

Where, in an action against a common carrier for a negligent injury, the same party, if any one, is entitled to recover on the alleged cause of action, and the rules of law governing the trial of the issues in the case are the same under the federal employers' liability act and under the state laws, and no question of jurisdiction is involved, it is immaterial

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

whether the action, trial, and judgment are conducted under the federal laws or under the state laws.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 805; Dec. Dig. § 250.*]

2. APPEAL AND ERROR (§ 854*)—HARMLESS ERROR—ERRONEOUS REASON FOR RULING.

The fact that a court gives a wrong reason for a right ruling does not render it erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. § 854.*]

3. WITNESSES (§ 269*)—CROSS-EXAMINATION—EXTENT.

The party on whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination, and a violation of this right is reversible error. If the cross-examiner would inquire of the witness concerning matters not opened on the direct examination, he must call him on his own behalf.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.*]

4. DAMAGES (§§ 32, 50, 52*)—PERSONAL INJURIES.

In an action for a personal injury, the plaintiff may recover for the bodily suffering and mental pain which are inseparable from, and so necessarily and inevitably result from the injury, in this case for the mental pain which the plaintiff sustained while, immediately after a wreck, he was pinned to the ground so near a fire that he was in danger of being burned before he could be released by the sawing of a beam.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 40, 41, 71, 100, 255, 257-259; Dec. Dig. §§ 32, 50, 52.*]

5. MASTER AND SERVANT (§ 265*)—INJURY TO RAILROAD EMPLOYÉ.

It is not indispensable to a recovery under the law of Iowa (section 1307, Code 1873) for an injury caused by the operation of a railroad by the defendant that the plaintiff should prove that at the time he was injured he was engaged in the discharge of some duty in connection with the use or operation of the railroad.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

6. TRIAL (§ 260*)—INSTRUCTIONS.

The refusal to give a requested instruction in the words of counsel is not error, where the court embodies the substance of the instruction in its general charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

7. APPEAL AND ERROR (§ 760*)—ASSIGNMENTS OF ERROR—BRIEF.

Where counsel do not consider errors assigned of sufficient importance to point out in their brief the pages in the bill of exceptions in the printed transcript of the record where the rulings of the court challenged with the objections and exceptions to them may be found, the court will not ordinarily deem them of sufficient materiality to search through the record to find and discuss them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3095; Dec. Dig. § 760.*]

In Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Action by Lu Verne D. Nelson, a minor, by Emma D. Nelson, his next friend, against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

F. H. Helsell, of Ft. Dodge, Iowa (Helsell & Helsell, of Ft. Dodge, Iowa, and Blewett Lee and W. S. Horton, both of Chicago, Ill., on the brief), for plaintiff in error.

M. J. Wade, of Iowa City, Iowa, and Arthur G. Bush, of Davenport, Iowa (Wade, Dutcher & Davis, of Iowa City, Iowa, Ely & Bush, of Davenport, Iowa, and Loren Risk, of Waterloo, Iowa, on the brief), for defendant in error.

Before SANBORN and SMITH, Circuit Judges, and POPE, District Judge.

SANBORN, Circuit Judge. The plaintiff below, Lu Verne D. Nelson, was a fireman employed by the Illinois Central Railroad Company in firing the engine on the first section of its train No. 71 going west on the night of January 6, 1912. When that engine arrived at the station of Wise, it went out of commission, the way car or caboose of that section was attached to the rear of the second section of No. 71, and when this composite train went out of Jesup, the next station west, Nelson was riding in that caboose. About four miles west of Jesup, while that train was proceeding on its way, the third section of No. 71 ran into the rear of it and seriously injured the plaintiff. He sued the company for negligence and recovered a judgment of \$6,000. The railroad company specifies many alleged errors in the trial, but those upon which its counsel seem to rely most confidently challenge the rulings of the court relative to the question whether the recovery should have been had under the federal employers' liability act or under the law of the state of Iowa. These rulings relate to motions to amend the pleadings, to the striking out of evidence tending to prove that the plaintiff and defendant were both engaged in interstate commerce when the plaintiff was injured, to the admission and exclusion of evidence, and to instructions to the jury given and refused.

[1] In his original complaint Nelson stated a cause of action under both the federal law and the state law. The defendant answered that it admitted that the plaintiff was injured at the place stated in his complaint, but that it denied that the plaintiff or the defendant was engaged in interstate commerce at the time of the accident and injury. It alleged that the plaintiff assumed the risk of the accident and that he was guilty of negligence which contributed to his injury. After the jury was impaneled and before any evidence was introduced, counsel for the defendant admitted in open court that the defendant was liable for the injury of the plaintiff, unless the latter assumed the risk of his injury or was guilty of contributory negligence. Thereupon counsel for the plaintiff immediately made a motion to amend his complaint by striking out the averment that the plaintiff and the defendant were engaged in interstate commerce at the time of the accident so that the complaint would state a cause of action under the law of Iowa alone. Although the defendant had denied in its answer that either of the parties was engaged in interstate commerce at the time of the accident, its counsel objected to this amendment. Counsel for the plaintiff then offered to admit that both parties were engaged in interstate commerce if counsel for the defendant would say that he

wished to allege that fact. His offer, however, was not accepted, and the court granted his motion to amend. The paragraph of defendant's answer in which it had denied that either of the parties was engaged in interstate commerce at the time of the accident read in this way:

"It admits that at the time stated it was a corporation engaged at certain places in interstate commerce, but it specifically denies that at the time and place where the defendant claims he was injured that either the plaintiff or defendant at the time of the accident and in connection therewith, was engaged in interstate commerce."

As soon as the plaintiff's amendment which stated his cause of action under the state law was allowed, defendant's counsel moved to amend this paragraph of the answer by substituting for the words, "but it specifically denies" therein the words, "and it admits and avers," and by substituting the word "and" for the word "or" between the words "plaintiff" and "defendant." The court granted this motion. In the course of the trial evidence was introduced which tended to prove that each of the parties was engaged in interstate commerce at the time of the accident. At the close of the trial no substantial evidence had been introduced in support of the defense of assumption of risk, or in support of the defense of contributory negligence. The plaintiff then moved the court to strike out the evidence that the parties were engaged in interstate commerce at the time of the accident on the ground that the answer did not set up that defense, counsel for the defendant moved to amend the answer so as to plead that defense, but his motion was denied, and the motion of the plaintiff to strike out the evidence was granted.

No error is perceived in these rulings. The defendant was offered its choice of the defense of a cause of action for an admitted liability under the federal law or under the state law. When the plaintiff alleged that his cause of action arose under the federal law, the defendant denied that it arose under that law. When the plaintiff alleged by an amendment that his cause of action arose under the state law, counsel for the defendant now insists that he intended to amend his answer so as to plead that it arose under the federal law. The court held that his amended pleading was insufficient to present that issue, and that ruling was clearly right, for it was indispensable to a plea of that fact that the defendant should aver that the plaintiff and his employer were each engaged in interstate commerce at the time of the accident, and the defendant did not allege that the plaintiff was so engaged. There was no error in the granting of the motion to strike out the evidence to the effect that the parties were engaged in interstate commerce because there was no pleading to warrant its admission and it was no abuse of discretion for the court to refuse the defendant permission, at the close of the trial, to inject that issue into the case when the record conclusively proved that the only purpose of the attempt to introduce it was to postpone the plaintiff's recovery of damages caused by the admitted negligence of the defendant.

Not only this, but if there had been error in these rulings it

would not have been fatal to this trial, because defendant's liability for its negligence was admitted, there was no substantial evidence of the plaintiff's assumption of the risk of his injury, or of his contributory negligence, the same person, the plaintiff, was entitled to recover whether his cause of action arose under the federal law or under the state law, the only question remaining at issue was the amount of the recoverable damages, and the rules for the measurement of these damages were identical under the federal law and under the state law, so that it appeared beyond doubt from the pleadings and the evidence that an error in these rulings did not prejudice and could not have prejudiced the defendant, and error without prejudice is no ground for reversal. Where, in an action against a common carrier for a negligent injury, the same party, if any one, is entitled to recover on the alleged cause of action, and the rules of law governing the trial of the issues in the case are the same under the federal employers' liability act and under the state laws, and no question of jurisdiction is involved, it is immaterial whether the action, trial, and judgment are had under the federal law or under the state law.

Because there was no substantial evidence to sustain a verdict that the plaintiff assumed the risk of his injury or that he was guilty of contributory negligence, this record satisfies beyond doubt that the alleged errors in the rulings of the court on these subjects, as well as on matters relating to the question whether the cause of action arose under the federal law or under the state law, did not prejudice and could not have prejudiced the defendant, and they are accordingly dismissed without further discussion, whether they were made upon questions regarding the pleadings, upon the admission or exclusion of evidence, in the charge of the court, or in its refusal of requested instructions.

[3] A witness was asked this question on his cross-examination:

"Now, when a train was abandoned that way, and the engine is out of commission, and they are taken in by another train, what crew is in charge of transportation?"

The plaintiff objected to the evidence sought by this question as incompetent, irrelevant, and immaterial, the court declared that if the objection that this was not proper cross-examination was made he would sustain it, the plaintiff made that objection, the court sustained it, and this ruling is specified as error. The record discloses the fact that the witness had testified that the conductor and crew of the second section of train No. 71 pulled the composite train out of Jesup after Nelson's engine was out of commission. When, after the above ruling, that fact was called to the attention of counsel for the defendant, he declared that, if he had been certain that the record so showed he would never have asked the question, counsel for the defendant answered that the fact that the crew of the second section pulled the train was conceded, and the witness then made the following answers to questions by the court:

"Q. Didn't you so answer, Mr. O'Connor? A. The engine of the second section pulled the train, yes, from Wise. Q. Well, the crew that belonged to

that section would be operating it, wouldn't they? A. Yes, sir. Q. Nelson did or did not belong to that crew? A. To that engine crew he did not."

Conceding that if the evidence of what crew would ordinarily take charge of the transportation when the engine of one train became out of commission and it and a part of its train was attached to another train was material, the court was doubtless in error in its view that the question which sought this evidence was not proper cross-examination.

[2] Nevertheless, the ruling was right because the objection that the evidence was immaterial was interposed to it, and it certainly was immaterial, and the fact that the court gives a wrong reason for a right ruling does not make it erroneous. Moreover, the colloquy which has been recited demonstrates the proposition that the defendants could not have been prejudiced by the ruling in any event.

It is specified as error that the court sustained the objection, "Not proper cross-examination, irrelevant, and immaterial," to the question, "Did you see him (Nelson) or any one else going and looking out the back door, or watching for that train while you were in there at that time?" which the defendant propounded to a witness for the plaintiff. This witness had testified that after they left Jesup he was riding in the caboose with Nelson and others for some time before and when the accident occurred, and that the train had not stopped after it left Jesup, but he had given no testimony relative to his care or the care of any one to guard against the third section of train No. 71 which they all knew was to follow it. The question, therefore, was not proper cross-examination, and there was no error in the exclusion of the answer to it. The party on whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination, and a violation of this right is reversible error. If the cross-examiner would inquire of the witness concerning matters not opened on the direct examination, he must call him on his own behalf. *Harrold v. Territory of Oklahoma*, 169 Fed. 47, 52, 94 C. C. A. 415, 17 Ann. Cas. 868, and cases there cited; *Resurrection Gold Mining Co. v. Fortune Gold Min. Co.*, 129 Fed. 668, 674, 64 C. C. A. 180.

[4] After the wreck Nelson was found pinned to the ground by a beam across his broken arm so near to a fire which had immediately started that there was danger of its burning him before the timber could be sawed so that he could be released. After evidence of this situation had been introduced, he was asked to describe his feelings or thoughts at that time and place with reference to the danger from that fire, if there was any, and he answered, over the objection of the defendant that it "was a self-serving declaration, no part of the *res gestæ*, irrelevant, incompetent, and immaterial, and that it embraced matters which were not evidential of an injury," "I was in lots of pain and was afraid of being burned," and complaint is made that the court admitted this evidence. But in an action for personal injury the plaintiff may recover for the bodily suffering and the mental pain, which are inseparable from, and which necessarily and inevitably result from the injury (*Southern Pacific Co. v. Hetzer*, 135 Fed. 272, 274, 68 C. C. A. 26, 1 L. R. A. [N. S.] 288), and the bodily suffering and mental pain

of which this evidence treated was of that character. There was no error in its admission.

[5] Counsel for the defendant specify as error the refusal of the court to instruct the jury that the plaintiff could not recover under the laws of the state of Iowa (section 1307, Code) unless he had proved that at the time of the accident he was engaged in the discharge of some duty in connection with the use and operation of a railroad; but there was no error in that refusal. *Marion v. Chicago, Rock Island & Pac. Ry. Co.*, 64 Iowa, 568, 572, 21 N. W. 86; *Pierce v. Central Iowa Ry. Co.*, 73 Iowa, 140, 142, 34 N. W. 783. Moreover, the alleged errors in the charge and rulings of the court relative to the liability of the defendant were not and could not have been prejudicial to the defendant because it had admitted its liability in the absence of assumption of the risk and contributory negligence by the plaintiff, and there was no substantial evidence to support either of those defenses.

[6] Complaint is made that the court refused a request to instruct the jury that: (1) The burden of proof was on the plaintiff regarding the cause of any physical condition he claimed, to establish by a preponderance of the evidence the facts relied upon by him for recovery; (2) that it was necessary for him to prove the cause or causes of such condition to a reasonable certainty, by evidence reasonably certain and sure, and that such cause or causes might not be determined upon suggestion, possibility, guess, or presumed without proof. But the court instructed the jury that the questions for their determination were the character and extent of the injuries sustained by the plaintiff in the wreck in question and (2) the amount for which the defendant was liable to the plaintiff for such injuries, and then proceeded to say:

"The questions you are to determine then by your verdict are reduced to those two, and I must say to you that the burden of proof is upon the plaintiff in this case to establish by the fair preponderance of the credible evidence both of these questions. You cannot find either of them from mere conjecture or guess, but you must find them from the sworn evidence adduced and admitted upon the trial before you and by such reasonable inferences and deductions that may be drawn therefrom by you."

There is no merit in this complaint. The refusal to give a requested instruction in the words of counsel is not error where the court embodies the substance of the instruction in its charge.

[7] There are other specifications of error. Counsel for the defendant assigned 52. Those upon which they appeared upon the brief and oral argument to place their chief reliance have now been discussed and ruled. These rulings have disposed of the larger number and the more important of their specifications. Those which have not been reviewed at length are doubtless of little moment, for, while counsel have cited the pages in the printed transcript where they allege in their assignment of errors that these errors have been committed, they have not deemed them of sufficient importance to point out in their brief the pages in the bill of exceptions printed in the transcript as required by the rule and practice of this court, where the proof, if there be any, of their averment of these errors may be found, so that these specifications, as well as some of those which have been searched out, considered, and ruled, fall under the familiar rule that:

"Where counsel do not consider the errors which they assign of sufficient importance to point out in their brief the pages in the bill of exceptions printed in the transcript where the rulings which they challenge may be found, in accordance with rule 24 of this court and its former rulings, the court will not ordinarily deem the questions they seek to present of sufficient materiality to search through the record to find and review the rulings." Rule 24, par. 2, subd. 3, 11 C. C. A. lxxxviii, 47 Fed. xi, 188 Fed. xvi, 109 C. C. A. xvi; Rule 21 Supreme Court, par. 2, subd. 3 (32 Sup. Ct. x); *Chicago Great Western Ry. Co. v. Egan*, 159 Fed. 40, 46; *Northwestern S. B. & Mfg. Co. v. Great Lakes E. Works*, 181 Fed. 38, 45, 104 C. C. A. 52.

The search which has discovered the rulings the court has discussed has been rewarded by the disclosure of no error, and it now invokes the rule and pursues the search no farther.

Let the judgment below be affirmed.

MAYOR AND ALDERMEN OF JERSEY CITY et al. v. CENTRAL R.
CO. OF NEW JERSEY.

(Circuit Court of Appeals, Third Circuit. March 25, 1914.)

No. 1782.

1. MUNICIPAL CORPORATIONS (§ 974*)—TAXATION—REVIEW—CONCLUSIVENESS.

Where a state board of taxation and the board of equalization of taxes had authority only to reduce an assessment to the true value of the property, and had no authority to raise the assessment of property undervalued by the taxing officers on the complaint of a party whose property was overvalued, their decisions on appeals by such party for the purpose of having its assessment reduced were not res judicata in a suit to enjoin enforcement of the tax on the ground that the assessment of its property at its full value, while other property was systematically undervalued, was an unjust discrimination.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2083-2086; Dec. Dig. § 974.*]

2. MUNICIPAL CORPORATIONS (§ 979*)—TAXATION—INJUNCTION—ADEQUATE REMEDY.

Where the state boards having authority to review assessments for taxation and the common-law courts could only reduce assessments to the true value, and could not raise other assessments systematically made at 70 per cent. or less of the true value, without making the 165,000 or more owners parties, and the taxes, if paid under protest, could be recovered only by suit against the state, city, and county to whom they would have been distributed, there was no adequate remedy at law against the unjust discrimination involved in assessing complainant's property at its full value, preventing relief by injunction.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2120-2123; Dec. Dig. § 979.*]

3. MUNICIPAL CORPORATIONS (§ 979*)—TAXATION—INJUNCTION—LACHES.

Where in 1899 land was assessed for taxation, and a writ of certiorari to review the assessment allowed by the New Jersey Supreme Court, from which court the case was taken by writs of error to the Court of Errors and Appeals and United States Supreme Court, which in 1908 decided against the owner's contention that the property was not taxable, and during the pendency of the litigation, though taxes were annually assessed, nothing was done toward their collection or enforcement, a suit brought seven months after the issuing of the mandate of the United

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

States Supreme Court to enjoin the sale of the land for such taxes, on the ground that the land was assessed at its full value, while other property was systematically assessed at 70 per cent. or less of its value, was not barred by laches; negotiations for the adjustment of the taxes having been pending during the seven months.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2120-2123; Dec. Dig. § 979.*]

4. COURTS (§ 282*)—UNITED STATES COURTS—JURISDICTION—CONSTITUTIONAL QUESTIONS.

A United States District Court had jurisdiction of a suit to enjoin a sale of land for taxes on the ground that the land was assessed at its full value, while other property was assessed at 70 per cent. or less of its value, in violation of Const. U. S. Amend. 14.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 820-824; Dec. Dig. § 282.*]

5. CONSTITUTIONAL LAW (§§ 213, 254*)—DUE PROCESS—EQUAL PROTECTION OF THE LAWS.

The inhibition of Const. U. S. Amend. 14, against depriving a person of life, liberty, or property without due process of law, or denying the equal protection of the laws, applies not only to legislative enactments, but to such conduct of the state's ministerial agents as accomplishes the purposes denounced.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 735; Dec. Dig. §§ 213, 254.*]

Appeal from the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Bill by the Central Railroad Company of New Jersey against the Mayor and Aldermen of Jersey City and another. From a decree in favor of complainant (199 Fed. 237), defendants appeal. Affirmed.

John Milton, Corp. Counsel, of Jersey City, N. J., for appellants. R. V. Lindabury, of Newark, N. J., and George Holmes, of Jersey City, N. J., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. The complainant below, a railroad corporation of the state of New Jersey, filed its bill against the defendant below, a municipal corporation of the said state, to restrain the collection of taxes levied by the latter on assessments of complainant's property, alleged to have been so unfairly and inequitably made as to violate the provisions of the fourteenth amendment of the Constitution of the United States. The defendant below filed an answer to complainant's bill. At the hearing, evidence was taken in support of the allegations of the bill, but no proofs were taken by the defendant. Consequently, there is little or no dispute as to the facts of the case, which may be summarized (largely from the brief of the appellee) as follows:

The complainant is the owner of two tracts of land, consisting partly of upland and partly of land under the waters of the Hudson river. These tracts are what is known as third-class railroad property—that is, property held for railroad uses but not yet so applied—and they

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

are therefore taxable locally (Comp. Stat. N. J. 1910, vol. 4, p. 5260, § 445). Complainant acquired these tracts by purchasing a strip of *ripa* from the owners, and then obtaining a grant from the state for the lands under water in front thereof. These two tracts are known respectively as lot 22, block 2154, and lot 1, block 1497, and were claimed by the taxing authorities of Jersey City to be within its territorial limits for the purpose of taxation. The greater part of these tracts consists of lands still under water, although a part of lot 22, block 2154, has actually been reclaimed by the complainant and is used by it in part for railroad purposes, there being about six acres occupied and used by its Phillips Street Branch Railroad.

The complainant is a railroad corporation created by special charter granted by the state of New Jersey and is engaged in local and interstate commerce on an extensive scale. In 1899, the city of Jersey City assessed these lands for taxation. The complainant, being advised that the lands, at least so far as they lay under the waters of the Hudson river, were not within the jurisdiction of the city of Jersey City or of the state of New Jersey, applied to the New Jersey Supreme Court for a writ of certiorari to review said assessments. The writ was allowed. The New Jersey Supreme Court (70 N. J. Law, 81, 56 Atl. 239) sustained the authority of the city to tax this property. A writ of error was sued out from the New Jersey Court of Errors and Appeals to review this judgment. The judgment of the State Supreme Court was affirmed upon this writ of error. 72 N. J. Law, 311, 61 Atl. 1118. A writ of error was then sued out of the United States Supreme Court to review the judgment of the New Jersey Court of Errors and Appeals. The United States Supreme Court in turn affirmed the judgment of the state Court of Appeals. 209 U. S. 473, 28 Sup. Ct. 592, 52 L. Ed. 896. This decision was rendered in June, 1908, and a mandate issued, which was filed with the clerk of the New Jersey Court of Errors and Appeals on the 9th day of June, 1908, but no judgment has been entered thereon in either of the state courts.

In the years subsequent to 1899, the city, persisting in its claim, annually assessed taxes against these properties. The complainant, in the years 1900 and 1901, appealed to the State Board of Taxation and that board found the true value of lot 1, block 1497, for each of said years, to be \$500,000. The city acquiesced in this finding, and for the years 1902, 1903 and 1904 the local assessors assessed the property at said sum. In the year 1905, they assessed it at \$550,000. From this assessment the complainant filed an appeal, but the board failed to take action thereon. In the year 1906, the local assessors assessed this lot at \$1,125,000. The complainant appealed to the Board of Equalization of Taxes, and that board determined the true value thereof to be \$747,820. The local assessors, in the year 1907, assessed this lot at \$1,450,000, and the State Board of Equalization of Taxes determined the true value, as it did in the previous year, to be \$747,820.

For the years 1899 to 1904, both inclusive, the local assessors assessed lot 22, block 2154, at \$1,603,000. Against these assessments

for the years 1900, 1901 and 1902, the complainant appealed to the State Board of Taxation, which confirmed them. In 1903 complainant appealed, and again in 1905 it appealed, but the board failed to act on either appeal. In both years the assessment on this lot was \$1,803,000. In 1906 the assessment was \$2,390,000. Upon an appeal to the State Board of Equalization of Taxes this latter assessment was reduced to \$1,603,000. In 1907, the local assessment on this lot was \$3,720,000, and on appeal this assessment was reduced by the Board of Equalization of Taxes to \$1,743,000. The increase of \$143,000 over the amount fixed by the State Board as the true value of the property for the preceding year was due to the fact that part of the lands assessed lying under water had been filled in and reclaimed by the complainant.

As the fundamental right of the city to tax these properties at all was involved in the litigation then pending, by common consent of the parties, nothing was done toward the enforcement of the payment of these taxes until after the decision of the United States Supreme Court. The city then took the matter up and advertised the properties for sale for the arrears of taxes. It was to restrain these sales that the bill in this case was filed.

The bill charges and the complainant offered proof to show that the assessors of Jersey City, in the year 1899 and the subsequent years to and including 1906, "designedly, intentionally, habitually and systematically" undervalued the property of individuals in said city for the purposes of taxation and over-valued the property of the complainant, whereby there was during the said period "designedly, intentionally, habitually and systematically" levied by the authorities of the said City upon and against the complainant's said lands, taxes largely in excess of those assessed and levied upon the property of individual owners in said taxing district contributing to the same common burden of taxation.

The bill further charges that the complainant has exhausted all remedies afforded by the laws of the state of New Jersey, not only in respect of the correction of the said valuations and assessments of said lands for taxes, but also in respect of the enforcement thereof; that it has no adequate remedy at law to correct the said valuations and assessments and said taxes, or to prevent the enforcement thereof; and that it has no adequate remedy at law to recover the said taxes in case it pays them in order to prevent the sale of said property, as the Legislature of the state of New Jersey has not provided any legal remedy in such cases.

After the filing of the bill, upon a rule to show cause, a preliminary injunction was issued, enjoining and restraining the defendants from selling the said properties, or any part thereof, until after the final determination of the cause, or further order by the court. Defendants having taken no proofs, the case came on to be heard on the allegations of the bill and the evidence adduced in support thereof. A final decree was entered in favor of the complainant. From this decree, the present appeal was taken.

Among other things, it was ordered and adjudged by the said final decree, that complainant should not be required to pay taxes to the

defendants upon the properties mentioned in the bill for the years 1899 to 1907, inclusive, upon a basis of valuation in excess of 70 per cent. of the true value of said properties, as fixed and determined for each of said years by the taxing authorities of the state of New Jersey and as then fixed and determined by the court.

"That the complainant should also be required to pay interest on the whole amount of said taxes (excluding six acres) at the rate of six per centum per annum on said reduced valuation, from the dates that taxes unpaid upon similar properties in Jersey City were due and demandable in such years, respectively."

The total taxes calculated on the above basis upon the properties described in the bill of complaint, amount to the sum of \$374,602.01.

"That upon making the aforesaid payments, or the due and legal tender thereof, the remainder of the taxes assessed by the defendants * * * upon the properties aforesaid, for the years aforesaid, shall be canceled of record by the defendants upon the tax duplicates and other books of said city. And that said defendants, their agents," etc., are "perpetually enjoined from collecting, or attempting to collect, any of said excess of taxes."

The points made by the appellants in the specifications of error are:

First: That there was no evidence to support the finding of fact by the court below, that in assessing the lands in question, there had been discrimination intentionally practiced between the assessments made upon complainant's property and that of other owners in said city, or that the taxes so levied were greater in proportion than taxes contributed by other taxpayers therein.

Second: That the grievances set up in the bill of complaint were fully cognizable before and subject to adequate correction by the established special tribunals and common-law courts of the state of New Jersey, and having been submitted thereto and settled adversely to the complainant, are now *res judicata*.

Third: That for its alleged grievances, the complainant had an adequate legal remedy.

Fourth: That complainant was guilty of laches.

Fifth: That the court was without jurisdiction.

After a careful examination of the evidence disclosed in the record, we have no difficulty in approving the findings of fact made by the court below in its decree, to the effect that for the years 1899 to 1907, inclusive, the taxing authorities of the city of Jersey City assessed the property of the complainant described in the bill of complaint, at or about its true value, and during the same period designedly, intentionally, habitually and systematically assessed all other property in said city, except railroad property, at seventy per centum or less of its true value, and thereby intentionally, habitually and systematically discriminated against the said property of the complainant, to the extent at least of thirty per centum of its true value. Apart from the presumption in favor of a finding of fact by the court of first instance, we are independently of opinion that the evidence abundantly sustains this finding.

[1, 2] As to the second point, it is true that, as to the taxes assessed for 1899, the complainant appealed to the State Board of Taxation of New Jersey, a tribunal which had power to review and ascertain the

true value of all property assessed for taxation throughout the state; that the State Board confirmed the assessment for that year, made by the local assessors; and that on the application of complainant, a writ of certiorari was issued by the Supreme Court of New Jersey, and the legality of the said assessment was reviewed on the single point raised by the complainant, that the defendant corporation had no jurisdiction for the purpose of taxation upon lands of the complainant lying between the middle of the Hudson river or New York Bay and the low-water line on the New Jersey shore.

This question of jurisdiction was decided in favor of the defendants by the Supreme Court, whose judgment was afterwards affirmed by the Court of Errors and Appeals, and the question was finally settled by the Supreme Court of the United States, upon the appeal of the complainant, by a judgment affirming the jurisdiction of the defendants in the premises. See 209 U. S. 473, 28 Sup. Ct. 592, 52 L. Ed. 896. Notwithstanding the pendency of this litigation on the question of jurisdiction over the assessments of 1899 down to the final adjudication of the United States Supreme Court in 1908, the taxes were levied for each year of that period down to and including 1907, and appeals were taken by the complainant to the State Board of Taxation and the State Board of Equalization of Taxes, which succeeded it, and the assessments of the legal assessors were by said boards reduced to amounts adjudged by said boards to be the true value of said properties of complainant, in accordance with the command of the law of New Jersey, requiring all assessments of property for the purpose of taxation to be made at the true value thereof. It is also true that the assessments thus made by these several boards, of the properties at what was considered by them their true value, are final and binding upon the complainant, as a determination of the actual value of the properties so assessed. The gravamen of the complaint, however, as set forth in the bill, is not as to the values determined by these boards for the purpose of assessment, but that, in spite of such determination, the local assessors have intentionally and systematically assessed all other property within the jurisdiction of the defendant upon a basis of 70 per cent. or less of its true value, and thus imposed upon complainant an undue and unjust share of the common burden of taxation.

As found by the court below, complainant's attempt to have this inequality corrected, by requiring all other properties to be assessed at their true value, instead of at 70 per cent. thereof, was futile, because neither the state boards nor the common-law courts of the state had power to raise such assessments from 70 per cent. or less of true value to 100 per cent. thereof, unless all of the 165,000 or more owners of such properties were made parties, collectively or individually, in separate bills to any proceeding for that purpose before either the state boards or the courts. Not only was the futility of such an attempt apparent, but we are of opinion that, as neither of the state boards nor the common-law courts had power to give such relief upon the simple appeal of the complainant, "the grievances set up in the bill of complaint were not fully cognizable before and subject to adequate correction by the established special tribunals and the common-law courts

of the state of New Jersey," and the doctrine of *res judicata* is therefore not applicable to the situation, as contended by the appellant.

From what has been said, it must be apparent that appellant's third point, viz., "that for its alleged grievances the complainant had an adequate legal remedy," cannot be sustained. As we have already said, complainant appealed to the special tribunals above referred to, on the ground that its properties had been assessed to an amount beyond their true value. These assessments were from time to time, in the years included within the period 1899-1907, reduced by the boards appealed to, to an amount determined by said boards to be the true value of such properties. This reduction and fixation of true value, the boards were authorized to make. They had no authority, however, to equalize taxes, by raising the assessments of all the other property in the city from 70 per cent. of true value to full value. From what has been already said, it seems obvious that no *adequate* remedy at law for the grievances mentioned in the bill of complaint was afforded by an appeal to the State Board of Equalization of Taxes; and, as pointed out by the learned judge of the court below, suits for the recovery of such taxes, if paid under protest, would have to be brought against the state, city, and county, to whom they would have been distributed by the collector, thus bringing about a vexatious and unnecessary multiplicity of suits.

[3] As to the fourth point above referred to, we do not find that defendants' charge, that the complainant was guilty of laches in bringing the present suit, is justified by the facts appearing of record. It appears that, after the assessment of 1899, complainant was advised that the lands, so far as they lay under the waters of the Hudson river, were not within the jurisdiction of the defendant corporation or of the state of New Jersey. It accordingly applied, as hereinbefore stated, to the New Jersey Supreme Court for a writ of certiorari, to review said assessments. The writ being allowed, the New Jersey Supreme Court sustained the authority of the city to tax this property. On a writ of error, the Court of Errors and Appeals of that state affirmed the judgment of the Supreme Court, and upon a writ of error sued out of the United States Supreme Court, the judgment of the New Jersey Court of Errors and Appeals was affirmed in June, 1908. Though subsequently to 1899 the defendant corporation annually assessed taxes against these properties, by common consent of the parties nothing was done toward the collection or enforcement of the payment of these taxes until after the decision of the United States Supreme Court. The city then took the matter up and advertised the properties for sale for the arrears of taxes, and it was to restrain these sales that the bill in this case was filed.

[4, 5] Having decided that complainant had no adequate remedy at law for the grievances complained of, and that the Court of Chancery of the state of New Jersey would have had equitable jurisdiction of the bill filed in this cause, we have no difficulty in deciding, as to the fifth point, that the court below properly exercised its equitable jurisdiction in entertaining complainant's suit, on the ground that it involved a determination of the question, whether the acts complained of were in violation of the fourteenth amendment of the Constitu-

tion of the United States. We take it to be well settled, that the inhibition of this amendment, which forbids any state to deprive any person of life, liberty or property without due process of law, or to deny any person within its jurisdiction the equal protection of its laws, is not confined to state action, as expressed by its legislative department, but applies also to such conduct of the responsible ministerial agents of the state as accomplishes what is denounced by the amendment. In other words, a state may do the things prohibited by the constitutional amendment by other means than by legislative enactment.

We think, therefore, the learned judge of the court below was right in deciding that the time which had elapsed between the issuing of the mandate out of the United States Supreme Court, formally ending the litigation concerning the right to tax at all, and the filing of the bill in this cause (about seven months), in view of the then pending negotiations between complainant and the said authorities to effect an adjustment of such taxes, did not constitute laches.

Extended discussion as to these points is rendered unnecessary, in view of the well-considered opinion of the learned judge of the court below. 199 Fed. 237. We therefore content ourselves with the announcement of the conclusions above stated, and hereby affirm the decree that has been entered in this cause.

ALVORD v. RYAN.

(Circuit Court of Appeals, Eighth Circuit. March 5, 1914.)

No. 135.

(Syllabus by the Court.)

1. TRUSTS (§ 35*)—TRUST PROPERTY—PROPERTY OF BANKRUPT.

Where property of one subsequently adjudged bankrupt has, before the filing of the bankruptcy petition, been confided by such person to another for a specific purpose, and where such property is subsequently, and without modification of said original purpose, sold by such second party, the proceeds in the hands of the latter remain characterized by a trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 45-50; Dec. Dig. § 35.*]

2. BANKRUPTCY (§ 326*)—CLAIMS—SET-OFF—TRUST FUNDS.

Such trust funds may not be applied by way of set-off against a debt of the bankrupt to such second person, and this for the reason that in one instance the relation is fiduciary, in the other personal.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. § 326.*]

3. BANKRUPTCY (§ 326*)—CLAIMS — SET-OFF — "MUTUAL DEBITS" — "MUTUAL CREDITS."

Under such circumstances, these do not constitute "mutual credits" and "debits" within section 68a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. § 326.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4648, 4649.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. BANKRUPTCY (§ 326*)—SET-OFF—"MUTUAL CREDIT."

A., within two months of the filing of a bankruptcy petition against him, transferred certain property to B. and C. to indemnify them against suretyship for him upon a bond discharging an attachment issued against him. Subsequently B. and C. sold the personal property, and, after paying certain expenses of up-keep and administration, held the balance. B. had a claim against the bankrupt duly allowed in bankruptcy, and seeks to offset the proceeds of the property against the debt. *Held*, that the money held by B. to the credit of the bankrupt was not a mutual credit within section 68a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]) as against a debt of the bankrupt A. to such creditor B.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. § 326.*]

Petition to Revise Order of the District Court of the United States for the District of Utah; J. A. Marshall, Judge.

Petition by Sarah E. Alvord against T. D. Ryan, trustee in bankruptcy of Joseph L. Alvord, bankrupt, praying for a set-off of a claim against the judgment entered against her and another in the bankruptcy proceedings. Petition for set-off denied, and petition dismissed by the District Court, and she files petition to revise. Order of District Court affirmed, and petition to revise dismissed.

J. D. Skeen, D. A. Skeen, and W. H. Wilkins, all of Salt Lake City, Utah, for petitioner.

C. R. Hollingsworth, of Ogden, Utah, for respondent.

Before SANBORN and HOOK, Circuit Judges, and POPE, District Judge.

POPE, District Judge. The facts of this case are not disputed.

Joseph L. Alvord on February 15, 1910, filed a voluntary petition in bankruptcy. An adjudication followed on February 18, 1910, and the respondent Ryan was duly appointed trustee. During the latter part of the year 1909, Alvord had been engaged in buying cattle, and on December 4, 1909, had in his possession 296 head of cattle which he had bought and for which he had issued checks on one of the Utah banks. These checks, in payment for the cattle, were issued with the specific understanding with the payees thereof that they were not to be presented for 10 days. However, this agreement was not kept. The checks were presented and payment refused by the bank for want of funds. Thereupon the payees of the checks immediately filed suits in the courts of Utah and caused attachments to issue and to be placed in the hands of the sheriff with instructions to attach and hold all property belonging to Joseph L. Alvord. The latter, believing that the cattle along with his other property had been attached, on December 4, 1909, induced the petitioner, Sarah E. Alvord, and one Hugh McLean to execute undertakings for the release from the attachment of the 296 head of cattle. The conditions of the bond were that the sureties would "on demand deliver the attached property so released to the sheriff to be applied to the payment of any judgment that may be recovered or paid to the plaintiff (in the attachment suit) the full value of all property released." By way of indemnity Joseph L. Al-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

vord executed and delivered to Sarah E. Alvord and McLean on the same date a bill of sale of the 296 head of cattle, and gave them immediate possession thereof. Without further arrangement and, so far as appears from the record, without further authority from Joseph L. Alvord, the cattle were subsequently sold by these transferees. On March 8, 1910, petitioner made proof of an unsecured debt against the bankrupt estate for \$3,035.12, which claim was regularly allowed by the referee. On November 10, 1911, Ryan, the trustee of the bankrupt estate, brought suit in the United States District Court for the District of Utah for the return of the 296 head of cattle, or for their value. Upon the trial of the cause the court found the defendants, Sarah E. Alvord and Hugh McLean, jointly and severally liable for \$3,932.82; this being the amount realized from the sale of the cattle less a credit on account of expenditures in caring for the cattle, and a further sum of \$500 attorney's fees allowed by the court as a credit against the proceeds of the sale.

On May 2, 1913, petitioner filed her petition with the referee praying for a set-off of her claim of \$3,035.12, which, as we have seen, had been duly allowed in the bankruptcy proceeding, against the sum of \$3,932.82 for which judgment had been entered against her and McLean jointly and severally. She prayed that she be required to pay to the trustee simply the difference between the two amounts. This petition for set-off being denied by the referee and being likewise, upon review, denied by the judge, and the petition being dismissed, the case is here upon the present petition to revise.

[1, 2, 4] The only question raised by the answer to the petition is whether the sum held by Sarah E. Alvord constitutes a subject of set-off against her claim against the bankrupt estate within section 68a of the Bankruptcy Act. That section is as follows:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

That the sum held by her is not available for that purpose seems to us to be conclusively settled by two decisions of the Supreme Court of the United States. In *Libby v. Hopkins*, 104 U. S. 303, 26 L. Ed. 769, a general creditor of the bankrupt Hopkins claimed the right to apply by way of credit and set-off on his claim against the estate an amount sent him by the bankrupt, before the institution of the bankruptcy proceedings, to be applied on another and secured claim held by such creditor against the bankrupt, and which amount had not been so applied. The court held that, as this amount was in the hands of the creditor for a special purpose, it could not, upon principles of set-off, be used in extinguishment of another and different class of indebtedness. The court upon a review of the English authorities said:

"These authorities make it clear that, even under the Bankrupt Act of 5 Geo. II, the plaintiffs would have no right to the set-off claimed by them. And they lose sight of the controlling fact that the money and the drafts which they turned into money were remitted, with express directions to apply them on a specific debt. Without the consent of Hopkins they could never be changed into a debt due to him from the plaintiffs, and that consent has

never been given. Whether or not he had the right to direct the application is immaterial. There was no legal obstacle to the application as directed. The fact that he gave the direction imposed on the plaintiffs the obligation to apply the money as directed, or to return it to him. They had no better right to refuse to make the application and to retain the money and set off against it the debt due to them from Hopkins, than if they had been directed to pay the money on a debt due from him to another of his creditors, or than they had to apply to the payment of his debt to them money which he left with them as a special deposit. Hopkins sent them the money and drafts, upon the faith and trust that they would be applied according to his instructions. The refusal so to apply them did not change the relations of the parties to this fund, nor make that a debt which before such refusal was a trust. To so hold would be to permit a trustee to better his condition by a refusal to execute a trust which he had assumed."

The court further said:

"But in this case there was no deposit. The relation of banker and depositor did not arise, consequently there was no debt. When A. sends money to B., with directions to apply it to a debt due from him to B., it cannot be construed as a deposit, even though B. may be a banker. The reason is plain. The consent of A. that it shall be considered a deposit, and not a payment, is necessary and is wanting."

Continuing, the court holds as follows:

"The remitting of certain money assets by Hopkins to the plaintiffs, to be applied by them according to his instructions, did not make them his debtors, but his trustees. So that there were in the case no mutual credits or debts. The indebtedness was all on the side of Hopkins. The plaintiffs owed him nothing. They held his money in trust to apply it as directed by him. They refused to make the application as he directed. They held it, therefore, subject to his order. They continued so to hold it until the rights of the trustee in bankruptcy attached, and until he sought to recover it by his counterclaim filed in this case."

The same question was involved in *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 25 Sup. Ct. 339, 49 L. Ed. 571. There one Harrison was adjudged a bankrupt, and among his creditors was the tie company just named. For some years previous Harrison had owned stores in the vicinity of the company's tie camp, and had furnished the laborers engaged in that work with groceries and other supplies. The pay rolls for these laborers, as sent to the tie company from time to time, showed the names of each laborer, the amount he had earned, and the value of the supplies he had received from Harrison. The company was accustomed to deduct from the amount coming to the laborers the sums due Harrison, thereupon sending Harrison a check for the aggregate amount of the supplies which he had furnished the laborers, with the balance of the wages going to such laborers. On the date when the petition was filed Harrison owed the tie company a large amount and the company held some two thousand dollars which was due him for supplies he had furnished the laborers, and which they were under obligation to remit him in the manner above stated. It was sought to hold this amount as a set-off against his indebtedness to the company. This the Supreme Court held could not be done. The matter was disposed of in the following language:

"This leaves only for consideration the question whether the tie company was entitled to prove its claim, as it sought to do, for the balance owing, after

crediting as a set-off the 'deductions from pay rolls,' to which we have referred. Now, as we have seen, from the facts found, it must be that the agreement between Harrison and the tie company obligated the latter, when it made the deductions from pay rolls, to remit to Harrison the amount of such deductions irrespective of the account between itself and Harrison. It follows that as to such deductions the tie company stood towards Harrison in the relation of a trustee, and therefore the case was not one of mutual credits and debts within the meaning of the set-off clause of the bankrupt law. *Libby v. Hopkins*, 104 U. S. 303 [26 L. Ed. 769]."

[3] The parallelism between the present case and those cited is so evident that discussion would tend to obscure rather than to clarify. The property transferred to McLean and Alvord on December 4, 1909, was for a defined purpose. It was to be held by way of indemnity against a possible liability on a bond dissolving attachments upon which they were sureties. With the contingency that they might be liable, removed, as it was removed, the duty to return the property to the bankrupt or to his trustee arose, and this duty existed whether the property was held in its original form or whether, as was done apparently for purposes of economy, it had by Alvord and McLean been converted into cash. In either event it was trust property. It was in no sense a debt due from petitioner to Alvord. He at no time ever agreed to consider her his debtor for the amount. She was always his trustee. Her holding of the money was thus not in the same right as her holding of the claim against him. The latter was personal; the former fiduciary. These were thus not "mutual credits" within section 68a and the right of set-off did not exist.

Some complaint is also made by petitioner because the court did not permit petitioner's dividends coming to her on her claim to be deducted from the amount held by her before requiring the payment of the latter to the trustee. *Page v. Rogers*, 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332, is cited to the effect that such a course would prevent "useless circuitry." But no such request was made of the trial court. The matter there submitted and determined seems to have been purely as to whether the set-off should be allowed, and the court's decision was simply a denial of that. Presumably the court will yet, upon the proper application, follow the practice prescribed in *Page v. Rogers*. This decision, which is upon an entirely different matter, is without prejudice to that.

The order of the District Court denying the right of set-off is approved and confirmed, and the petition to revise is dismissed.

DEAN v. DAVIS et al.†

In re JONES.

(Circuit Court of Appeals, Fourth Circuit. February 11, 1914.)

No. 1194.

1. APPEAL AND ERROR (§ 854*)—REVIEW—AFFIRMANCE—GROUNDS.

A judgment appealed from will be affirmed if the appellate court finds in the record any reason which it considers sound, though such reason may have been rejected by the trial judge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. § 854.*]

2. BANKRUPTCY (§ 303*)—FRAUDULENT CONVEYANCE—INSOLVENCY—EVIDENCE.

In a suit by a bankrupt's trustee to set aside a deed of trust executed by the bankrupt to his brother-in-law for a present advancement of funds to satisfy a pressing creditor, on the ground that such deed of trust was fraudulent as to creditors in violation of Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), evidence held to warrant a finding that the beneficiary in the deed at the time of making the advancement knew that the bankrupt was insolvent and that the effect of the deed, if enforced, would be to deprive other creditors of an equal participation in the distribution of assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

3. BANKRUPTCY (§ 165*)—PREFERENCES—PRESENT CONSIDERATION—PAYMENT OF OLD DEBT.

Where defendant, with knowledge of the bankruptcy of his brother-in-law, in answer to an appeal for aid went to a bank which was pressing the bankrupt for payment of certain notes and advanced funds to take up the notes, receiving them from the bank without their being marked paid, and for such advancement, on the maturity of the first of a series of notes given by the bankrupt for the advancement, took a deed of trust covering all the bankrupt's property, of which the trustee immediately took possession, defendant thereby participated as agent of the bankrupt in paying the bank, taking up the notes and securing the debt, the notes given to him being regarded as mere substitution for those held by the bank, and hence the deed of trust, though given for a present advancement, was an unlawful preference in violation of Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. § 165.*]

4. BANKRUPTCY (§ 178*)—FRAUDULENT CONVEYANCES—DEED OF TRUST.

The deed was also constructively fraudulent as against the bankrupt's other creditors in violation of Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), and was therefore unenforceable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 264-274, 283, 284; Dec. Dig. § 178.*]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond; Henry A. M. Smith, Judge.

Action by R. Beale Davis, trustee in bankruptcy of the estate of R. Crawley Jones, bankrupt, and others, against Claude M. Dean. Judgment for plaintiffs, and defendant appeals. Affirmed.

Wyndham R. Meredith, of Richmond, Va., for appellant.

Bartlett Roper, Jr., of Petersburg, Va., for appellees.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

†Rehearing denied June 13, 1914.

Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

WOODS, Circuit Judge. The property of R. Crawley Jones, bankrupt, was sold by consent, and the proceeds of the sale are now in the hands of the trustees awaiting final decision of the question whether they should be paid to the general creditors of the bankrupt or to Claude M. Dean, who claims under a deed of trust or mortgage alleged by the creditors to be invalid under the terms of the bankruptcy statute.

The District Judge held: First, that Dean was not a creditor when the trust deed was executed, but, on the contrary, took the trust deed as security for money lent at the time, and that therefore the deed of trust could not be annulled as a preference given to an existing creditor under section 60b of the Bankrupt Statute; and, second, that while Dean had no purpose to benefit himself and was guilty of no moral obliquity, yet that when he accepted the deed of trust he had reasonable cause to believe that Jones was insolvent and that its effect would be to defeat the provisions of the Bankrupt Law, and on this ground adjudged the deed of trust fraudulent under section 67e of the act.

The petition of the trustee attacking the trust deed seems to have been framed in main reliance on section 60b, forbidding preferences to antecedent creditors rather than on section 67e declaring void transfers made to hinder, delay, or defraud creditors. But this is not important, since the allegations of fact contained in the petition are sufficient to support a decree annulling the deed of trust under either section.

[1] This court must affirm the judgment of the trial court if it finds in the record any reason which it considers sound, even though the District Judge may have rejected that reason and rested his decree on some other ground. *Erwin v. Lowry*, 48 U. S. (7 How.) 172, 12 L. Ed. 655. We are free therefore to consider whether the deed to Dean should be annulled as an unlawful preference under section 60b, although the District Court held that it was not such a preference.

[2] The material facts may be thus shortly stated: R. Crawley Jones, a merchant and farmer at Darvills, Va., was adjudged a bankrupt on April 25, 1910, under a petition filed by his creditors December 24, 1909. On September 1, 1909, Jones wrote and sent by his father, J. Samuel Jones, the following letter to his brother-in-law, Claude M. Dean, residing in Richmond:

"I am in serious trouble and need your help at once, badly, being charged with a very grave offense under the law and if arrested for same, although I afterwards prove myself innocent, it would be a disgrace to me and my family. If I can get hold of \$1,600 in cash I will be saved, so for God's sake loan it to me and save my wife and child from disgrace. If you will do this I will give you notes for the amount, and a deed of trust on everything I have or possess to secure you. All I need is a little time, for I have enough to more than pay you five times over again. It is absolutely necessary that I have this money at once. As soon as I quiet this matter up I will see you and explain all. Please do this for me and my family at once, for I have no time to lose or explain further. Find notes inclosed for the amount and as soon as you prepare deed of trust I will sign same."

Inclosed with the letter were notes dated September 1, 1909, one being for \$100 and the others for \$500 each, the first due September 10, 1909, and the others at 30, 60, and 90 days after date. The charge against Jones referred to in the letter was the forgery of the indorsements of certain notes held by Virginia National Bank of Petersburg. Dean had no previous knowledge of R. Crawley Jones' embarrassment, and J. Samuel Jones assured him that his son's debts were comparatively small. Actuated entirely by a desire to aid his brother-in-law, with no expectation of benefit to himself, Dean immediately agreed to procure the \$1,600 requested. On September 3d he went with J. Samuel Jones to the bank, furnished the money, which was handed to the cashier by J. Samuel Jones, and received from the cashier by the hand of J. Samuel Jones the notes, some of which had not matured, without mark of payment. The cashier testified the notes were not marked paid because he understood the transaction to be a sale of the notes to J. Samuel Jones, while Dean's explanation was that the stamp was not convenient at the time. R. Crawley Jones was not present, but there can be no doubt that Dean was acting not only on his own behalf, but on behalf of R. Crawley Jones, the debtor, in conjunction with J. Samuel Jones. The deed of trust purporting to secure the four notes which had been sent to Dean with the letter was not executed until September 11th, one day after the first note for \$100 given to Dean had matured; the explanation being that R. Crawley Jones was so engaged in harvesting his crop that he could not spare the time to go to Richmond. The deed of trust covered all the property, both real and personal, of the debtor; and the day after its execution Dean directed his father, E. C. Dean, who was the trustee named in the deed, to seize and sell the property. The trustee took possession on September 13th, for the purpose of foreclosure and sale. There was a senior mortgage on the land which was barely met by foreclosure sale.

The insolvency of R. Crawley Jones at the time of this transaction is admitted; and it is difficult to imagine stronger reasons for Dean to believe him insolvent, short of having an accurate balance sheet of his assets and liabilities. The appeal in the letter to Dean of September 1st signified acute financial distress, and was notice that Jones had exhausted his credit, and had come to the end of his ability to obtain money in the ordinary course of business. True, it appears from Dean's testimony that he had the general opinion or assurance from the debtor and his father that the debtor had ample assets and small liabilities, but this assurance was on its face obviously irreconcilable with the declared condition of pecuniary distress. All men of affairs know that it is probable almost to the point of certainty that a merchant brought to the condition indicated by the letter of Jones to Dean would be owing considerable debts for goods purchased. One who takes a mortgage under such conditions covering a debtor's entire property is charged with the knowledge which due investigation as to debts and incumbrances would have given. A reasonable man must be charged, too, with knowledge that the execution of a mortgage covering the entire property of a merchant usually means a sus-

pension of his business and bankruptcy. The immediate seizure of the property for default in the payment of a small note, assuming it to have been made in good faith, shows that Dean believed that prompt seizure and sale of the entire property was necessary to collect even his secured debt. Without further discussion it seems clear that the conclusion of the District Judge on this point is supported by the great weight of evidence.

[3] We are unable to agree with the District Judge that the mortgage is protected from attack as an unlawful preference on the ground that it was given for a present consideration and not to obtain a preference for a pre-existing debt. It is true that Dean lent the money at the time the mortgage was executed, and the principle is settled by the Supreme Court in *Van Iderstine v. National Discount Co.*, 227 U. S. 575, 33 Sup. Ct. 343, 57 L. Ed. 652, that the mere knowledge of a lender that the money borrowed is to be applied to an existing debt does not make the security given invalid under section 60b as an unlawful preference or under section 67e as a fraud. But Dean has much more to overcome than mere knowledge that the money lent was to be used to pay an existing debt. Charged with notice of the insolvency of the debtor, his purpose was to extricate Jones from embarrassment by acting with and for him in preferring a pressing debt. In pursuance of this purpose, as agent for the debtor and in his behalf, he actively participated in satisfying the pressing creditor, and taking up the pressing debt by means of the secured debt to himself. Even if the bank's notes had been marked paid, the whole transaction showed on its face that there was not that novation that the bankrupt statute contemplates as necessary to the protection of a lender. Looking away from the form to the substance, by his participation as agent of the insolvent debtor in paying the bank and taking up the notes and securing the debt, Dean tied himself to the old debt, and the notes given to him must be regarded mere substitution of new papers for the old.

Where in such a transaction the lender acts as agent for the creditor, the security has been held invalid. In *re Beerman* (D. C.) 112 Fed. 663; *Alexander v. Redmond*, 180 Fed. 92, 103 C. C. A. 446; *Walters v. Zimmerman* (D. C.) 208 Fed. 62; *Van Iderstine v. National Discount Co.*, *supra*. The reason is still stronger for holding it invalid when the lender acts as the agent of the debtor with the distinct purpose of aiding him to prefer a particular debt for his own benefit. If it were otherwise, the purpose of the statute in securing equality among creditors could be defeated at the will of the debtor by the device of substituting a new debt for the old. The application of the principle on which this conclusion rests in the administration of trusts and in other branches of the law is familiar. The deed of trust to Dean must therefore be declared void under section 60b as an unlawful preference.

[4] The mortgage is also obnoxious to condemnation under section 67e, as held by the District Judge. We should not attempt to add anything to his convincing decree on this point but for the strong reliance of counsel for appellant on the case of *Van Iderstine v. Na-*

tional Discount Co., 227 U. S. 575, 33 Sup. Ct. 343, 57 L. Ed. 652, recently decided. That case really holds nothing more than had been previously decided in *Coder v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, namely, that section 67e applies only to actual fraud as distinguished from a mere preference, and that the fact that the lender knew at the time of making the loan and taking the security that the borrowed money would be used to prefer a creditor did not make the transaction fraudulent. But here there was not only knowledge of an intended preference, but actual participation by the lender as agent of the borrower and for his benefit in carrying out the plan of preference which it was obvious would result in closing the business of the debtor. Actual fraud has a large signification, and embraces any undue advantage taken of another. Dean, it is true, had no corrupt motive to benefit himself; on the contrary, he was impelled by a laudable and unselfish impulse to aid his brother-in-law in his troubles, and in the effort actually incurred labor and expense with no gain to himself. But the conclusion cannot be escaped that in his general zeal he lost sight of the rights of the creditors. Having the strongest reason to believe Jones insolvent, he took a mortgage of his entire property in order to enable him to prefer one creditor to the exclusion of all others and enforced the mortgage, with the apparent consent of the debtor, by seizure almost at the instant of execution of the maturity of one small note. As a reasonable man, he must be charged with knowledge that this course would inevitably result in the reduction of the value of the assets of a debtor already insolvent, the payment of his preferred debt and the failure to pay other debts. All this was aiding and acting with Jones to compass the preference of one creditor to the exclusion of others—to take undue advantage of other creditors by depriving them of their rights conferred by the Bankrupt Law to share equally in the distribution of the assets of an insolvent debtor. However innocent Dean may have been of any formed intention to accomplish such a purpose, he must be charged with this purpose and the consequences of his course of conduct, since in the administration of justice all men must be charged with intention to produce the results which the exercise of reason would make perfectly evident as the results to be anticipated. The decree of the District Court must be affirmed, with costs against the appellant.

Affirmed.

PRITCHARD, Circuit Judge. I concur in the result.

DREES v. WALDRON et al.

(Circuit Court of Appeals, Eighth Circuit. February 18, 1914.)

No. 134.

*(Syllabus by the Court.)***1. EQUITY (§ 67*)—LACHES—EXISTENCE DETERMINED.**

The doctrine of laches protects against a proceeding instituted or prosecuted without diligence, and where the delay and thus the fault of one party will result in an unfair advantage over his adversary. The existence of laches is primarily determined, not by lapse of time, but by considerations of justice.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 191-196; Dec. Dig. § 67.*]

2. EQUITY (§ 67*)—DOCTRINE OF LACHES—OPERATION AND EFFECT.

The doctrine operates not only as against the filing of a stale suit, but also against the slothful prosecution of a suit seasonably filed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 191-196; Dec. Dig. § 67.*]

3. EQUITY (§ 84*)—LACHES—DETERMINATION.

Where application is made to a court of equity for aid toward the prosecution of a suit in another court, the court first named will not leave the question of laches to such other court, but will decline the relief where, because of delay in the prosecution of the application, it would be inequitable to grant it.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 84.*]

4. EQUITY (§ 67*)—DOCTRINE OF LACHES—OPERATION AND EFFECT.

The doctrine of laches is to the extent just named available therefore not only in defense but in prevention. It applies both against inceptive and against final relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 191-196; Dec. Dig. § 67.*]

5. BANKRUPTCY (§ 417*)—DISCHARGE—PROCEEDINGS TO REVOKE—LACHES.

A bankrupt was discharged on October 20, 1904. On January 3, 1905, a creditor filed an application to revoke the order of discharge upon the ground that he had had no notice of the hearing on discharge, and in order that he might without prejudice from the discharge prosecute a proceeding in the state court to subject bankrupt's exempt homestead to his debt. This application was not brought on by him for hearing for over seven years, during which time the bankrupt had died. Held that, as against the heirs and legal representatives of the deceased bankrupt, the creditor was barred by his laches from prosecuting his application.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 867-871; Dec. Dig. § 417.*]

Petition to Revise Order of the District Court of the United States for the Southern District of Iowa; Smith McPherson, Judge.

Petition by B. H. Drees against D. E. Waldron, administrator of the estate of Alexander Armstrong, deceased, and others, to vacate an order of discharge in bankruptcy. Petition denied, and petitioner presents petition to revise. Decree below approved, and petition to revise dismissed.

L. H. Salinger, of Sioux City, Iowa, and B. I. Salinger, of Carroll, Iowa, for petitioner.

William R. Lee and Edwin A. Robb, both of Carroll, Iowa, for respondents.

Before SANBORN and HOOK, Circuit Judges, and POPE, District Judge.

POPE, District Judge. On August 6, 1904, Alexander Armstrong was adjudged a bankrupt. The petitioner, Drees, was regularly listed as a creditor with his proper address, Carroll, Iowa, given in the schedules attached to the bankrupt's petition. On September 28, 1904, the bankrupt filed his petition for a discharge, and upon the next day the referee fixed October 15, 1904, as the date for filing any objections thereto. On September 29th, notice of the petition for discharge and of the date for filing objections was mailed to Drees at his address above stated. On September 30, 1904, the trustee in bankruptcy filed with the referee his report setting off to the bankrupt the property exempt to him by the laws of Iowa. Among the latter was a homestead composed of lots 14, 15, 16, and 17 in block 3 in the town of Glidden, Carroll county, Iowa, valued in the report at \$5,000. On October 7, 1904, Drees filed with the referee exceptions to this report, and the hearing of such was set for November 10, 1904. On October 28, 1904, the bankrupt was granted his final discharge. On November 10th the above-mentioned exceptions of Drees were overruled. This action was upon the concession of counsel for Drees—presumably in the light of the law as declared in *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, that the proper method of reaching the homestead property was by a proceeding to subject instituted in the state court. On November 22, 1904, pursuant to this last, Drees filed such a proceeding in the courts of Iowa. This is still pending. On January 3, 1905, Drees filed in the court below his petition for the revocation of the discharge. On November 6, 1909, there was an order of court closing the bankrupt proceedings. In July, 1911, Armstrong, the bankrupt, died in Carroll county, Iowa. In September, 1912, an order was made by the court below on application of Drees for a hearing on his petition to revoke the discharge filed as above stated on January 5, 1905, and upon which up to that time no action had been taken. On November 12, 1912, such notice was given to respondents, the administrator of the estate of Armstrong, and to his heirs. The matter having been heard, the court on January 21, 1913, denied the application to vacate the order of discharge. From this conclusion the present petition to revise has been prosecuted.

The motion to vacate the order of discharge presented by Drees to the court below was upon the ground that such was granted without notice to him. While conceding that the letter containing the notice was duly mailed to him at the proper address shown in the schedule, his contention and proofs were that this letter was never received and that he had no actual knowledge of the application for discharge until December 15, 1904, whereupon he as above stated on January 3, 1905, filed his motion to revoke upon that ground. The opposition to this motion proceeds chiefly upon two grounds: First, that the mailing of the notice to him at his proper address, which was confessedly done, was a sufficient service upon him under section

58a of the Bankrupt Act (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]), whether as a matter of fact it ever reached him or not. Independent of this last, it was in the second place contended that there was such laches by Drees in prosecuting his motion to vacate as to preclude the relief sought. The trial court decided both points in favor of the respondents. We find it necessary to consider only the last of these contentions.

[1, 5] In determining laches, time and circumstance are each material elements. Upon the matter of time it will be noted that the application was filed by Drees in January, 1905, and that he did not call it up for hearing until September, 1912, and thus after a delay of some seven years and nine months. During this interval the estate had been closed and Armstrong died. The importance of Armstrong's death to some extent depends upon the purpose of petitioner's application to revoke the discharge, and necessitates a brief statement of the nature of that application. This was not a motion to revoke under section 15 of the act. That section permits a revocation of the discharge within a year when the discharge has been obtained by fraud and where the actual facts of the case do not warrant the discharge. It is not here contended either that the discharge was obtained by fraud or that Armstrong was not entitled to it upon the merits. The application is rather an appeal to the general powers of the court, as in *Re Bimberg* (D. C.) 121 Fed. 942, to recall an order irregularly granted. The object sought to be attained by securing the setting aside of the discharge is the clearing up of the way for the proceedings in the state court. In this latter there will be among other questions of fact, the following: Was the debt to Drees from Armstrong made before or after the acquiring of the exempted homestead? If before, was the exempted homestead purchased with the proceeds of any former homestead antedating the debt? Was the homestead now involved more valuable than the first, and, if so, what was the difference in value and would petitioner's claim attach to that difference? The result of granting the motion here made will be to leave petitioner free to litigate these questions in the state court.

Should the court have granted the petition for the purposes and under the circumstances above disclosed? The doctrine of laches protects against a proceeding instituted or prosecuted without diligence and where the delay and thus the fault of one party results in an unfair advantage over his adversary. The existence of laches is primarily determined not by lapse of time but by considerations of justice. As was said by the Supreme Court in *Patterson v. Hewitt*, 195 U. S. 309, 317, 25 Sup. Ct. 35, 36 (49 L. Ed. 214):

"The statute (of limitation) frequently works great practical injustice—the doctrine of laches, never. True, lapse of time is one of the chief ingredients, but there are others of almost equal importance."

Assuming that the passing of over seven years would not of itself constitute a barrier to this motion, that interval in the light of the death meanwhile of Armstrong becomes *most important*. The effect of Armstrong's death, of course, was to deprive his side of the controversy of his testimony upon all of the issues above referred to, and

perhaps upon others that might become relevant. This was a very substantial disadvantage to respondents. True, as counsel suggests, there is an Iowa statute which prevents a party and his wife from testifying as to transactions with the opponent where the latter is dead, and this to some extent mitigates the absence of Armstrong's testimony, since, upon these matters, it debars Drees and his wife from the stand. But it is by no means certain that this will fully meet the situation. It is entirely conceivable that parties other than Drees and his wife heard statements by Armstrong upon one or more of the issues in the case, which statements, if proved, must go entirely uncontradicted upon the trial because of Armstrong's absence by death. There may be other respects in which his testimony would upon the trial be found relevant and desirable. We cannot anticipate all of these, nor do we feel called upon to enter into any close calculation as to them. It is sufficient upon this point that within reasonable probabilities based upon human experience there will be highly material matters as to which Armstrong's testimony will be important. It is also urged by counsel that the facts provable by Armstrong could be established by other witnesses. Perhaps so, perhaps not. Whether this would be true or not could be disclosed only by the trial and must remain uncertain until then. Viewing the matter also from the standpoint of human probabilities, however, we are impressed with this fact: Armstrong were he alive would undoubtedly know as to these various matters, he was the actor in them, his absence relegates the respondents to the recollection of third parties or of persons only secondarily interested, a recollection necessarily affected by the seven or more intervening years. On the other hand, had this application been brought seasonably to hearing, the necessity upon respondents to seek their testimony from uncertain and secondary sources would not have existed. To countenance this delay is in our judgment to impose an unjust and unfair disadvantage upon one of the parties and this we cannot do.

But aside from the matter of mere testimony, it is clear that in the trial of any cause the presence of the principal party at interest is desirable. He more than any one else ordinarily knows of his case and if present serves, independently of what he testifies to, to anticipate, to guard against and overcome adverse conditions and evidence. The litigant has the right to be present not only as a witness but as a party, and, when this right is lost by delay of the adverse party, the latter should not be allowed to profit thereby.

[3, 4] Nor is this situation relieved by petitioner's contention that the matter of laches is one to be considered exclusively by the state court on the trial of the merits, and that the only question here is whether or not such proceedings shall go to trial unembarrassed by the order of discharge. We cannot, however, view the matter as so little concerning the bankruptcy court. Substantial relief was sought from that court by petitioner, and it was asked to invest petitioner's case elsewhere with a potentiality which it would otherwise lack. The bankruptcy court, as we have repeatedly had occasion to observe, is a court of equity, and upon an appeal to it for even this inceptive relief

such a court will decline to lend its aid to a proceeding thus manifestly inequitable. Laches is available not only in defense, but in prevention. It may be invoked not only to defeat final decree, but a step opening up the way to such a decree. This delay of over seven years in bringing this application to hearing was entirely without explanation or excuse. The courts of the land are open not only for the seasonable presentation, but for the prompt determination of controversies. Where parties fail for so unreasonable a time even to move the cause for hearing, and meanwhile the adversary dies, and with him pass away material elements of defense, the suitor thus delaying must expect no help from a court of equity. We deem *Lindeke v. Converse*, 198 Fed. 618, 117 C. C. A. 322, recently decided by this court, very close to the present case. There the bankrupt had failed to bring her petition for discharge to hearing for some four years.

[2] In holding, contrary to the ruling below, that a motion to dismiss the petition should have been granted, this court cites *Johnston v. Standard Mining Co.*, 148 U. S. 360, 13 Sup. Ct. 585, 37 L. Ed. 480, and *Willard v. Wood*, 164 U. S. 502, 17 Sup. Ct. 176, 41 L. Ed. 531, to the following effect:

"It has been frequently held that mere institution of a suit does not of itself relieve a person from the charge of laches, and that, if he fail in the diligent prosecution of the action, the consequences are the same as though no action had been begun."

The court, speaking through Judge Sanborn, continues as follows:

"It is obvious that a wise and just administration of this law requires that such issues shall be framed and tried before the memory of the witnesses familiar with the transactions of the bankrupt at and shortly before the time of his adjudication has been dimmed by long delay and before they and the documentary evidence surrounding these transactions have been scattered or lost. The record in this case is so clear and compelling that the court is unable to resist the conclusion that the bankrupt failed to exercise that reasonable diligence in the prosecution of her claim for a discharge which is requisite to call a court of equity into action in her behalf."

These expressions are very pertinent here. Without considering the first point raised, we are of opinion that petitioner's application is barred by his laches, and the decree below is, accordingly, approved, and the petition to revise dismissed.

TOWNSEND v. ASHEPOO FERTILIZER CO.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1914.)

No. 1209.

1. SALES (§ 472*)—CONDITIONAL SALES—UNRECORDED CONTRACT.

An unrecorded agreement whereby the seller of fertilizers to the bankrupt reserved to itself an interest in the fertilizers so sold was within Civ. Code S. C. 1912, § 3740, declaring that every such agreement shall

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 212 F.—7

be void as to subsequent creditors or purchasers for value without notice unless recorded, etc.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1366-1376; Dec. Dig. § 472.*

What constitutes a contract of conditional sale, see note to *Dunlap v. Mercer*, 86 C. C. A. 448.]

2. BANKRUPTCY (§ 184*)—CHOSES IN ACTION—OWNERSHIP—"INSTRUMENT"—"PROPERTY"—RECORD.

Civ. Code S. C. 1912, § 3542, provides that all deeds or instruments in writing conveying real or personal estate and creating a trust in regard to such property or charging or incumbering the same, or instruments in writing in the nature of a mortgage of any property real or personal, shall be valid, etc., only when recorded within ten days from the date of delivery. *Held*, that where a contract for the sale of fertilizers provided that all goods sold to the buyer on credit were to be held by him in trust for the payment of his obligations to the seller for the price provided, that the proceeds of any sale or sales by him whether for cash or credit shall represent the goods sold and be held for the benefit of the seller to be applied in payment of the buyer's obligations, etc., the claims of the buyer against his customers for fertilizers sold to them constituted "property," and the contract an "instrument" within such section, and hence the instrument was invalid for want of record as against the buyer's trustee in bankruptcy to confer on the seller a lien on such debts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*

For other definitions, see Words and Phrases, vol. 4, pp. 3665-3668; vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

Cross-petitions to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. M. Smith, Judge.

Cross-petitions in bankruptcy by W. H. Townsend and another, and by T. P. Meetze, trustee in bankruptcy of the estate of W. P. Roof, and by the Ashepoo Fertilizer Company to superintend and revise, in matter of law, a decree sustaining in part an alleged lien on certain of the bankrupt's assets. Modified.

George B. Timmerman, of Lexington, S. C. (Thurmond, Timmerman & Callison, of Lexington, S. C., on the brief), for petitioners and cross-respondents.

Geo. F. von Kolnitz, of Charleston, S. C., for respondent and cross-petitioner.

Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

WOODS, Circuit Judge. The petitions of the trustee of the bankrupt estate of W. P. Roof, and of Ashepoo Fertilizer Company, claiming to be a lien creditor or owner of assets in the hands of the trustee, involve important questions under the recording statutes of South Carolina.

On February 6, 1912, Ashepoo Fertilizer Company agreed to sell W. P. Roof 265 tons of fertilizers; the form of contract adopted being a written proposition to Roof setting forth prices and terms, duly accepted by him. The second paragraph of the contract contained this stipulation:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"All of the said goods sold to you on credit are to be held by you in trust for the payment of your obligations to Ashepoo Company, for the purchase price thereof, as per above sale, and when the same shall be fully paid then for your own benefit, with full power in you, however, to sell and dispose of the same, or any part thereof, for cash or on credit secured by good note and such other good securities as you require; provided that the proceeds of any such sale and sales, whether cash or credit, shall represent the goods sold and be held by you upon the same terms and for the same purposes as the goods are held and the cash for cash sales to be remitted, when the goods are sold to Ashepoo Fertilizer Company, to be applied to the payment of your obligation to them, whether they have matured or not, until they are paid in full."

All fertilizers shipped to Roof in excess of the 265 tons were to be received by him on the same conditions. He was authorized to collect from his customers the debts contracted for fertilizers, and remit to the company for credit on the purchase price. On March 22, 1912, about six weeks after the execution of the contract, Roof was adjudged a bankrupt. In the meantime he had ordered out and received a number of shipments of fertilizer, all of which he had resold to his customers except a little over a car load which was in his hands when the petition in bankruptcy was filed. The sales to his customers had been charged to them on his books, but no notes or other signed obligations had been taken. Under these conditions the referee held that failure to record the agreement made the reservation of title or lien for the security of Ashepoo Fertilizer Company void under the recording laws of South Carolina, not only as to the fertilizers in the hands of Roof, but also as to the debts of Roof's customers for sales made by him. The District Judge, on review, approved the finding of the referee as to the unsold fertilizer, but held that the recording statutes of South Carolina had no application to mortgages or sales of choses in action, and adjudged the accounts to be the property of Ashepoo Fertilizer Company. Both the trustee and the fertilizer company by separate petitions ask a review of this finding.

It would be difficult to frame statutes more comprehensive than those of South Carolina as to the instruments required to be recorded. Section 3542 of the Civil Code provides:

"3542. All deeds of conveyance of lands, tenements or hereditaments, either in fee simple or for life; all deeds of trusts or instruments in writing, conveying either real or personal estate, and creating a trust or trusts in regard to such property, or charging or incumbering the same; all mortgages or instruments in writing in the nature of a mortgage of any property, real or personal, * * * shall be valid, so as to affect from the time of such delivery or execution the rights of subsequent creditors (whether lien creditors or simple contract creditors) or purchasers for valuable consideration without notice, only when recorded within ten days from the time of such delivery or execution in the office of the register of mesne conveyance or clerk of court. * * *"

To make the law still more comprehensive, section 3740 was enacted:

"3740. Every agreement between the vendor and vendee, bailor or bailee of personal property, whereby the vendor or bailor shall reserve to himself any interest in the same, shall be null and void as to subsequent creditors (whether lien creditors or simple contract creditors) or purchasers for valuable con-

consideration without notice, unless the same be reduced to writing and recorded in the manner now provided by law for the recording of mortgages; but nothing herein contained shall apply to livery stable keepers, innkeepers, or any other persons letting or hiring property for temporary use or for agricultural purposes, or depositing such property for the purpose of repairs or work or labor done thereon, or as a pledge or collateral to a loan."

[1] The unrecorded agreement here was between a vendor and vendee whereby the Ashepool Fertilizer Company, as vendor, reserved to itself an interest in the fertilizers sold to Roof as vendee; it therefore fell under section 3740 and was void as to subsequent creditors. It follows that the fertilizer which remained in the hands of Roof belongs to the trustee as property of the bankrupt, free from any lien in favor of the fertilizer company. *Ludden & Bates Southern Music House v. Dusenburg*, 27 S. C. 464, 4 S. E. 60; *Armour v. Ross*, 78 S. C. 294, 58 S. E. 941, 1135. Even if the contract had provided for a bailment instead of a sale of the fertilizer, the same result would follow, since the South Carolina statute covers bailments as well as sales. The case of *Ludvigh v. American Woolen Co.*, 231 U. S. 522, 34 Sup. Ct. 161, 58 L. Ed. —, has therefore no application.

The status of the debts of Roof's customers for fertilizers sold to them represented by his accounts against them is different from that of the fertilizers in his hands unsold. These accounts were not in existence when the contract was made, which provided that they should be held by Roof in trust for the payment of obligations for the purchase money of the fertilizers; and therefore it cannot be said that the fertilizer company reserved any interest in them. They were not sold to Roof nor were they delivered to him by the fertilizer company, and as to them the fertilizer company and Roof did not sustain to each other the relation of vendor and vendee or bailor and bailee. Hence it seems clear that the written agreement that the accounts should be held by Roof in trust for the payment of his debt to the fertilizer company cannot fall under section 3740, a recording statute relating to agreements for the reservation of an interest in property by a bailor or vendor.

[2] The question remains whether the written agreement providing that these debts should be held in trust for the payment of Roof's debt does not fall under section 3542, above quoted, requiring the recording of mortgages and "all instruments in the nature of a mortgage of any property, real or personal." That the contract is "an instrument in the nature of a mortgage" seems evident. *Herring & Co. v. Cannon*, 21 S. C. 212, 53 Am. Rep. 661. Roof is styled in the contract "buyer" and "purchaser"; he is a debtor because he is to give notes promising unconditionally payment of the purchase money, and the stipulations as to the fertilizer and the proceeds of its sale are to secure his unconditional promise to pay. True, the words used are that he shall hold the accounts "in trust for the payment" of his obligations; but the trust was for no other purpose than to secure the payment of the debt; and it imported these obligations and these only, namely, that the debtor should pay the debt and thus discharge the property from the creditors' claims, or collect the accounts and apply the proceeds to the debt, or failing to collect, turn over the accounts to

the creditor to be disposed of and accounted for according to law. A paper in form a mortgage of the book accounts without the stipulation that they should be held in trust would impose upon the mortgagor precisely the same obligations. It is evident therefore that, as to the accounts owing to Roof, he was mortgagor and the Ashepoo Fertilizer Company mortgagee.

It seems no less evident that the accounts or debts owing to Roof and covered by the instrument were personal property. The word "property" is of the broadest signification, embracing everything that has exchangeable value or goes to make up a man's wealth, every interest or estate which the law regards of sufficient value for judicial recognition. *Earle v. Maxwell*, 86 S. C. 1, 67 S. E. 962, 138 Am. St. Rep. 1012; *Delassus v. United States*, 34 U. S. 117, 9 L. Ed. 71. Nothing is better settled than that a creditor owns debts owing to him as property; and we are unable to see what warrant the court would have to exclude such property from the operation of a statute covering all personal property, on the ground that the property is choses in action and intangible. Secret liens may be valid in the absence of a statute condemning them, *Greey v. Dockendorff*, 231 U. S. 513, 34 Sup. Ct. 166, 58 L. Ed. —, but they are under just condemnation in the business world, and we are not inclined to indulge refinements in the interpretation of the statute in order to protect those who fail to record their papers, and then when disaster comes bring them out against subsequent creditors.

Besides, nothing is more plainly within the mischief at which the statute was directed than an unrecorded mortgage of a merchant's accounts, especially of the accounts of a merchant like Roof doing what is known as an advancing business. All know that the debts owing to such a merchant constitute an important asset, sometimes the chief asset, on which his credit rests, and those who credit him do so on the faith of these debts as his property.

Counsel for the fertilizer company rely on *Chemical Co. v. Johnson*, 98 N. C. 123, 3 S. E. 723, and other like cases decided by the Supreme Court of North Carolina, holding that agreements similar to that now under consideration do not fall under the recording statutes of that state. There are some differences between the statutes of North Carolina and South Carolina. But aside from that, we are unable to yield even to that high persuasive authority, because we cannot help thinking the reasoning of the court is unsound, in this, that it is founded on verbal and technical distinctions, which we have tried to show are unsubstantial, between that which the parties have chosen to call a trust to secure a debt, and a mortgage to secure a debt. The reasons we have stated for holding that the entire instrument falls under the recording statutes seem to us convincing.

In the case of *Millikin v. Second National Bank of Baltimore*, 206 Fed. 14, 124 C. C. A. 148, 30 Am. Bankr. Rep. 477, this court held that, under the amendment of 1910 to the Bankruptcy Act, the trustee by virtue of his appointment became a subsequent lien creditor without notice, holding the property embraced in an unrecorded mortgage for the benefit of all the creditors. It follows that the proceeds of the

property herein involved must be distributed among all the creditors of the bankrupt without distinction.

The opinion of this court is that the judgment of the District Court be modified to conform to the conclusions herein expressed.

Modified.

O'BRIEN v. NORTH RIVER INS. CO. OF CITY OF NEW YORK.

(Circuit Court of Appeals, Fourth Circuit. February 3, 1914.)

No. 1187.

1. INSURANCE (§ 507*) — POLICY — CONSTRUCTION — EXTENT OF LIABILITY — "PROFIT DUE."

Plaintiff, the proprietor of a hotel in a city, contracted to reserve for T. during five consecutive days of a political convention, sleeping accommodations for 400 persons at \$3 per day each, and gave an option to increase the reservation to 650 on notice before a specified date. After two payments had been made on the contract, plaintiff obtained from defendant a policy of "\$10,000. On profit due the assured by reason of advanced paid-up contract for use of rooms during convention week, beginning June 24, 1912." The policy also provided that if the building should be destroyed so as to prevent fulfillment of the contract for the total number of rooms, the insurer should be liable at the rate of \$1,428.57 per day, and, in case of partial damage, the insurer should be liable for that proportion of \$1,428.57 which the reduction bears to the per diem amount. At the time the policy was executed the insurer had not seen the contract, and before the convention the hotel was so damaged that it could not be used for the entertainment of guests, and plaintiff was obliged to cancel the contract and return \$3,000 advance payments made thereon. *Held*, that the words "profit due" in the policy did not mean the amount plaintiff would have collected from the person making the reservation but for the fire, but was rather the gain or benefit which plaintiff expected to derive by reason of the contract, not only from room rent, but from restaurant patronage and other transactions to be expected from hotel guests, the amount of the policy being regarded as a fixed valuation thereof in case of total loss, and hence under such circumstances plaintiff was entitled to recover the face of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1283; Dec. Dig. § 507.*]

2. INSURANCE (§ 146*)—POLICY—CONSTRUCTION.

When a policy of insurance is susceptible of more than one construction, that construction is to be adopted which is most favorable to assured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.*]

3. INSURANCE (§ 495*)—VALUED POLICY—ESTOPPEL.

The principle that insurance is to be regarded as a contract of indemnity is limited by the rule that the parties to the contract may agree on a valuation in advance, not only as to the value of tangible property, but also with reference to expected profits or gains, and, in the absence of fraud, the insurer is estopped to claim that the valuation is excessive, nor will it be made the subject of judicial inquiry.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1270-1272; Dec. Dig. § 495.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. INSURANCE (§ 542*)—PROOF OF LOSS—FORM.

No particular form of proof of loss under a policy is required, so long as the proof is ample to enable the insurer to consider its rights and liabilities.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1340–1346; Dec. Dig. § 542.*]

In Error to the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Action by Frank C. O'Brien against the North River Insurance Company of the City of New York. From a judgment for plaintiff for less than the relief demanded, he brings error. Reversed.

R. Lee Slingluff and German H. H. Emory, both of Baltimore, Md. (Gibson & Smith and Soper & Emory, all of Baltimore, Md., on the brief), for plaintiff in error.

W. Calvin Chesnut, of Baltimore, Md. (Charles Markell, of Baltimore, Md., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. [1] The plaintiff, Frank C. O'Brien, having recovered a judgment in the District Court on a directed verdict for \$6,000 and interest on a policy of insurance issued by the defendant, North River Insurance Company, brings the cause to this court by writ of error, claiming that the District Judge should have directed a verdict in his favor for \$10,000 and interest. The decision depends on the meaning of the contract of insurance, which is to be sought in the words of the policy, considered in the light of the circumstances under which it was issued.

Great importance was attached by the business men of Baltimore to the meeting of the National Democratic Convention in that city on June 25, 1912, and hotel proprietors in anticipation of the convention made contracts for entertainment, from which they expected considerable profit. On February 9, 1912, Frank C. O'Brien, proprietor of the Eutaw House, made a contract with Oscar C. Turner for the Underwood Marching Club to reserve sleeping accommodations for 400 persons for five consecutive days, beginning June 24th and ending June 28th, at \$3 a day for each person—\$1,000 to be paid on signing the agreement, \$1,000 on March 1st, \$1,000 on March 15th, and the remaining \$3,000 on the day before occupancy of the rooms. An option was given in these words:

"And it is further agreed—the option to increase the number of persons from four hundred (400) to as many more as desired up to six hundred and fifty (650) persons, is hereby accorded the said Oscar C. Turner, provided application is made for same not later than April 15th, 1912, at the same rate, per person, and length of term, as herein stated, and payment for the increased number to be made—one-half at time of application and the balance before occupancy of rooms."

The option was extended to May 1st, when O'Brien was notified that the additional accommodations would not be taken. After two of the payments had been made, the defendant on March 5th issued

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to O'Brien its policy of insurance containing the following, which is the provision involved in this controversy:

"\$10,000. On profit due the assured by reason of advanced paid-up contract for use of rooms during convention week, beginning June 24th, 1912. It is a condition of this contract of insurance that if the building shall be destroyed by fire or lightning so as to prevent the assured from fulfilling his contract for the total number of rooms, this company shall be liable at the rate of \$1,428.57 per day and in case the building is so damaged that the assured can partially fulfill his contract, this company shall be liable for that portion of \$1,428.57 which the reduction bears to the per diem amount.

"This insurance shall reduce in amount at the rate of \$1,428.57 per day, after the first day of convention week.

"On property known as the 'Eutaw House,' situate at the northwest corner of Baltimore and Eutaw streets, Baltimore, Maryland, and extending through to Garrett street and to an alley in the rear, and leased for hotel and store purposes.

"It is understood and agreed that the building stands on leased grounds. Subject to revision of rate."

The Eutaw House was so damaged by fire on May 25th that it could not be used for the entertainment of guests, and O'Brien was obliged to cancel his contract with Turner above recited and return \$3,000, the amount of advance payments made thereon.

On the trial of the action on the policy the District Judge in charging the jury sustained and stated forcibly the position of the insurance company that the "profit due" the insured was the gross sum to be paid on the contract between O'Brien and Turner; that the gross sum which O'Brien would have collected but for the fire was \$6,000, and that therefore the recovery must be limited to that sum; that the defendant could not be held liable under the second clause of the contract for \$1,428.57 a day for seven days because that liability was conditioned on the taking of the "total number of rooms," which was held to be 650, of which 250 were not taken.

Analysis of the contract, we think, will clear away the apparent obscurity, and show that this interpretation is not admissible. When the insurance company issued its policy, and up to the time of the fire, it had never seen O'Brien's contract for rooms, and the evidence gives no intimation that it knew anything more definite of its terms than that he had made a contract for a large number of rooms in anticipation of the Democratic Convention. That the insurer in framing the policy did not have in view a certain number of rooms engaged and a certain number under option is shown by the fact that the policy refers to the contract as "advanced paid-up contract for use of rooms," when the only contract in existence was not then, nor at any time, paid up in advance; that it did not have in view making the insurance policy coterminous or coincident with the contract as to time is shown by the fact that the contract for rooms calls for five days' occupancy, while the policy insures for a specific sum for the week, to be paid for each day of seven days; that it did not mean to measure and limit the amount of insurance by the gross amount that the insured was to receive for the rent of rooms is shown by the fact that the insurance is for \$10,000, and it was impossible for the insured to receive that amount for room rent under his contract; that it did not have in view any options or contingencies or oth-

er particulars of the contract is shown by the fact that the policy makes no reference to such particulars, and cannot be made to fit into them; that the policy was not meant to cover gross receipts is shown by the fact that the insurance is limited to profit, and it was impossible that the entire gross receipts from rent of hotel rooms should be profit.

It is true that the word "profit" is sometimes used as synonymous with gross receipts, as in insurance policies on a ship's freight charges. But the words "on profit due the assured by reason of advanced paid-up contract for use of rooms" would be very inapt to express insurance on gross receipts; and such a strained meaning must be rejected when, as here, it is incompatible with the general terms of the instrument. The only meaning of these words which will make the contract consistent in its parts is the plainest meaning, namely, the gain or benefit which it was expected the assured would derive "by reason of" the contract, not only from room rent but restaurant patronage and other transactions to be expected from hotel guests; this gain or benefit being valued at \$1,428.57 a day for seven days. The condition expressed in the second clause of the insurance contract relied on by the defendant strengthens this conclusion; for evidently it is a stipulation as to the contingency of the degree of damage from fire, and not a contingency as to the number of rooms contracted for; and it means that, if the hotel should be so damaged by fire that all or "the total number of rooms" covered by the contract should, *for that reason*, become unavailable for use, then the loss is valued at \$1,428.57 for each day of the week, amounting in the whole to \$10,000, and that the valuation of the loss should be reduced in proportion if the contract for rooms should not be entirely defeated by fire, but a part of the rooms covered by the contract should become unavailable on account of fire.

Comparison of the policy and the contract in the light of the correspondence and other circumstances indicates that the insurer did not take the pains to ascertain precisely what contract the insured had. But, however vague the insurance company's knowledge of the contract may have been, there is no vagueness or uncertainty in the valuation fixed, for it plainly agreed to value the profit on the contract, whatever it might be, at \$1,428.57 a day for seven days, aggregating \$10,000.

[2] This conclusion is fortified by the rule that when a policy of insurance is susceptible of more than one construction, that is to be taken which is most favorable to the assured. *Liverpool, etc., Ins. Co. v. Kearney*, 180 U. S. 132, 21 Sup. Ct. 326, 45 L. Ed. 460. The adoption of the defendant's construction would not only violate this rule, but require that the court reconstruct the policy issued into that which the defendant might have preferred to issue if it had informed itself as to the precise terms of the contract to which the insurance related.

[3] The general principle that insurance is to be regarded a contract of indemnity is limited by the rule that the parties to the contract may agree on a valuation in advance, not only in the insurance

of tangible property, but of expected profits or gains, and that in the absence of fraud this valuation is controlling, and is not subject to judicial inquiry. When the parties fix the value the insurer cannot be heard to say it was excessive. *Barclay v. Cousins*, 2 East, 552; *Marine Ins. Co. v. Hodgson*, 10 U. S. (6 Cranch) 206, 3 L. Ed. 200; *Ins. Co. of Virginia v. Mordecai*, 63 U. S. (22 How.) 111, 16 L. Ed. 329; *Alsop v. Commercial Ins. Co.*, 1 Sumn. 451, Fed. Cas. No. 262; *The Main*, 70 L. J. 247, 13 Eng. Ruling Cases, 681; *Canada, etc., Co. v. Insurance Co. of North America*, 175 U. S. 609, 20 Sup. Ct. 239, 44 L. Ed. 292. The cases of *Cushman v. Northwestern Ins. Co.*, 34 Me. 487, and *Michael v. Prussian Natl. Ins. Co.*, 171 N. Y. 25, 63 N. E. 810, in their facts and in the principles involved are similar to this case, and in them the insurer was held liable for the full valuation.

The defendant strongly relies on cases like *Forbes v. Aspinall*, 13 Eng. Ruling Cases, 673, 13 East, 323, to bring this case within the rule which the court thus states in "The Main," supra, as laid down in *Forbes v. Aspinall*:

"But that case is only an authority for a very well-known proposition, viz., that where both parties contemplate the freight insured to be on a full and complete cargo, and when, in fact, part cargo only is shipped, the freight on the part cargo is all that is at risk, so that there must be what is called an opening of the valuation. In strictness it is not an opening of the valuation, but is merely a reduction in proportion to the amount of cargo shipped; the valuation being held binding as a valuation on that portion which is shipped."

The present case does not fall under this rule, for here the insurance was on the profit derivable from a contract for use of hotel rooms which the insurer agreed to be of the value of \$10,000. As we have seen, the insurer in agreeing to this valuation of the profits could not have had in mind nor issued its policy with respect to any options or contingencies expressed in the contract for use of rooms which might increase or reduce the profit, for it had no knowledge of such particulars of the contract.

No attention has been paid to the usual printed clauses pretending to limit liability to the actual value of the property lost, for the case is controlled by the special contract which was written and pasted on a standard policy.

[4] The position that there was a forfeiture for a lack of adequate proof of loss is untenable. Without going into detail it is enough to say that no particular form of proof of loss is required, that the proof was ample to enable the insurer to consider its rights and liabilities, and that the demand of the insurer as to the form of the proof embraced the demand that the insured should accept the insurer's construction of the policy.

The jury should have been instructed to find a verdict for the plaintiff for \$10,000 and interest.

Reversed.

CRAWFORD v. FAYETTEVILLE LUMBER & CEMENT CO.

(Circuit Court of Appeals, Eighth Circuit. February 16, 1914.)

No. 4022.

(Syllabus by the Court.)

MASTER AND SERVANT (§ 235*)—INJURY TO SERVANT—LIABILITY OF MASTER.

Plaintiff was manager for and the local representative of defendant, a foreign corporation. The buildings in defendant's lumber yard were in process of removal to a new location. One of its employes, other than plaintiff, charged with superintending such removal and in the necessary accomplishment thereof, cut a second story platform in two, supporting the portion left behind by adequate props. Subsequently, but after such employe's connection with the matter had ended, and when the superintendency of the premises had again devolved solely upon plaintiff, one or more of such supports, by some means undisclosed by the proofs, were removed. Plaintiff went upon the platform, and, thus unsecured, it gave way, and he was injured. *Held*, that any negligence in the matter was plaintiff's, since he was the sole representative of the defendant on the ground, and, being charged with the responsibility of its business, any duty of discovering the changed condition of the platform and of guarding against it devolved upon him. *Held*, further, that under such conditions an instruction to the jury to find against him was properly given.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710-722; Dec. Dig. § 235.*]

In Error to the District Court of the United States for the Eastern District of Oklahoma; Frank A. Youmans, Judge.

Action by Joseph F. Crawford against the Fayetteville Lumber & Cement Company, a corporation, for personal injuries. Judgment for defendant, and plaintiff brings error. Affirmed.

Thompson & Smith, of Sapulpa, Okl., for plaintiff in error.

J. E. Thrift, of Bristow, Okl., for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and POPE, District Judge.

POPE, District Judge. This is a suit for personal injuries brought by the plaintiff in error, Crawford, against the defendant company, for injuries sustained in the latter's lumber yard at Sapulpa, Okl. The company's principal place of business was at Fayetteville, Ark., and plaintiff was its local manager and chief representative at Sapulpa when the injury occurred. At the time of the injury the defendant's lumber yard at Sapulpa, including not only the lumber but the buildings, was being moved to another location a few blocks distant. The moving of the building and sheds was under a contract with one Ed Roney, and the moving of the lumber and other stock on hand was given by contract to one Proctor. The old yards from which the buildings were being moved consisted of buildings surrounding what was practically a court. The office building was at the northwest corner of the yard, and had two stories, with two rooms upon the ground floor and one or more rooms on the second floor. The front or west room on the ground floor was used as an office, having two out doors,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

one opening west on Park street and the other south into the court. The east room on the ground floor of the office building was used for the storage of glass, paint, and other material. The room (or rooms) on the second floor was also used for storage, containing sashes, doors, columns, window frames, and similar material, and being also occupied as a bedroom for an employé of the defendant named Lowdermilk. Just outside of the door opening from the first story of the office building south into the court there was a platform from which went an open stairway to the landing at the entrance of the second story of the office building. This landing or platform extended eastward, not only to the east end of the office building, but beyond that into and through the length of a lumber shed which adjoined the office building on the east, and this platform, thus common to both buildings, constituted the upper walking space from which materials were handled in and out of the upper deck of the lumber shed, and was also the means by which access was had to the room on the second floor of the office building. This landing or platform was composed of 2x6 boards lying lengthwise, five abreast, about an inch apart. It was supported by arms projecting underneath at intervals from the lumber sheds, except that the portion which was adjacent to the office building and formed the landing at this place was supported by the ends resting on and being nailed to the top of the stairway proper. In the course of the work of moving the buildings from the old to the new yard it was deemed desirable to move the lumber sheds in advance of the office building, and to that end it became necessary to disconnect such sheds from the office building at the west, and by cutting these sheds into appropriate sections to facilitate their being moved and to preserve them in convenient size for reinstallation at the new site. It thus became requisite, in moving the lumber shed away from the office building, to cut the platform at the junction of the shed and building. The effect of this cutting without more was to leave so much platform as remained adjacent to the office building, a length of some 10 feet, with no support other than the stairway which held up the end of the platform furthest westward from the cutting; the other supports being, as we have seen, a part of the sheds, and being removed by the cutting of the platform. After the disconnection of the shed from the office building by cutting the platform in the manner just mentioned, the office building was placed on rollers and pushed a foot or two west from the shed, so as to clear the way for the exit of the latter. The office building remained on rollers after being so moved until after the injury here involved. The sawing of the two buildings apart was about the 15th day of October, 1911. The actual work of sawing was apparently done by employés of Roney who, as we have above seen, had the contract to move the several buildings from the old location, but the place where it was to be severed was indicated to the contractor by one C. R. Robertson, representing the defendant company, who had been sent from Fayetteville to assist in the removal. Robertson upon this particular occasion arranged for the support of the platform following the severance by the following course: He placed a 2x4 under the end of the platform where it had been

sawed apart and perpendicular to the building. The end of the 2x4 nearest the building was supported by another 2x4 nailed underneath to the building, and the end furthest from the building and corresponding to the outer edge of the platform rested upon and was supported by an upright piece, probably 2x4, which was nailed to the platform at the upper end and rested upon the ground underneath. Thereafter, the office building having, as above stated, been placed on rollers and pushed forward a short distance, the upright was thereby to some extent thrown out of plumb, in view of which Robertson personally nailed the lower end of the upright to the lower platform. Within a few days after this Robertson was recalled to Fayetteville by the company, and the plaintiff Crawford left in sole charge of the yard until after the injury. This latter occurred about 7 o'clock on the evening of October 26, 1911, and about eight days after Robertson left. On the occasion of the injuries plaintiff went up the stairway and onto the platform to close the door of the upper room. The platform gave way, throwing him to the ground.

The court below directed a verdict in favor of the defendant, and three assignments of error are here made. The first and principal one is that the court erred in directing a verdict for the defendant. The other assignments relate to an alleged erroneous exclusion of evidence, and to an alleged untenable ground given by the court below, to wit, the assumption of risk, in instructing a verdict for the defendant. If the court was right as to the first ground the other assignments, even if well taken, would not change the result. The evidence rejected, even if admitted, was not of this degree of materiality, and as to the other ground, even if the court's reason was wrong, the case would still be for affirmance if its conclusion was right.

We proceed, therefore, to consider whether upon the whole case there was any basis for a verdict favorable to the plaintiff. Much of defendant's argument both here and apparently in the trial court was upon the ground that, while the plaintiff's case proceeds upon negligence of Robertson in failing properly to secure the part of the platform left next to the office building, there is no allegation in the petition that it was any duty of Robertson to look after this. It is said that his sole duty as alleged was to superintend the removal and that nothing is alleged as to any duty, in effecting such removal, to leave the premises safe. It is contended that any breach proved is thus of a duty not alleged against him, so that a recovery is being sought outside the pleadings. It is also said that the proofs, equally with the pleadings, fail to show any employment or duty covering the condition of the portion of the platform left behind. To the argument that his alleged principalship in this particular matter receives support in the fact that he actually attempted to make such part of the platform safe by placing the supports above mentioned, it is answered by the defendant that what he did was, according to plaintiff's own testimony, upon the express request of plaintiff, and that the latter thereby recognized a joint responsibility with Robertson in the matter.

We do not find it necessary, however, to consider the question of how far the pleadings allege or the proofs show Robertson to have

been the representative of defendant in making the platform secure after the lumber shed had been cut from the office building. We assume for all purposes of the case that Robertson was the defendant's representative in this very matter. But, this much conceded, we still find the plaintiff not entitled to recover because of the following state of facts, which we deem conclusive against plaintiff's case.

As has been above stated, Robertson at the time of the severance of the platform provided for its being upheld by personally nailing a timber at right angles to the office building and underneath the platform and supporting this on the side next the office by an upright nailed thereto and on the side away from the house by an upright, which was nailed to the lower platform. We state these to be the facts as proved for the reason that we deem them substantially uncontroverted in the proofs. Robertson and Barnes, witnesses on behalf of the defendant company, so testified, as did Roney, who was a witness for the plaintiff. These three witnesses show definitely that this was done when the two buildings were separated. There is no testimony by the defendant contradicting this. It is true that there is a general statement by the plaintiff Crawford in his testimony to the effect that there never were any uprights under the platform. But this was viewed by the court below, and we believe properly in the light of all the testimony of Crawford, as referring to conditions prior to the separation of the buildings, and not during the 10-day interval between that separation and his injuries. Indeed, as to this latter interval Crawford testified quite clearly that he had no knowledge of the surrounding conditions. In the brief filed for him in this court it is stated:

"He, plaintiff, states that he did not see any brace or support there. *That in fact he never looked.*"

We adopt this as a fair statement of plaintiff's testimony, which is the only testimony in the record that has a semblance of making an issue upon the placing of this support under the platform by Robertson. We are of opinion that the negative statement of plaintiff that he did not see this support, diluted even further as that is by the statement that he never looked, does not make a substantial issue against the positive testimony as to the existence of this upright. We must therefore assume as undisputed that an upright was placed under the platform and nailed by Robertson at the time the platform was cut. We next come to the further undisputed fact that this platform was, at the very time of its being thus secured, used, according to the testimony of the plaintiff's witness Roney, by a man who was sent up on the roof to tear the flue down, and that it was thereafter used daily by the employé Lowdermilk, who occupied the upper room as a bedroom. There is further uncontradicted testimony that when the platform fell, causing plaintiff the injuries sued for, there was no support thereunder upon the corner away from the house. We have thus, even assuming Robertson to have been the representative of the company, the following situation: A support was placed under the platform; that support, as shown by the use to which it was subjected, was reasonably safe for the purposes of upholding the platform; such support was, by some means not disclosed by the evidence, thereafter removed, and plaintiff

was hurt. To whom is the responsibility for not discovering this changed condition to be attributed? Certainly not to Robertson, for the utmost that can be or is claimed against him is that he was charged with the duty of securely fastening the platform after disconnecting it from its old support. There is no contention, either upon pleadings or upon proofs, that he was charged with maintaining this in a safe condition, for, as we have seen, his employment was special and temporary, and had no connection with the regular business of the company. But if Robertson was not charged with this duty, the only other person on the ground who was charged was Crawford, for, as we have seen, he was the local manager and representative of the company. This becomes impressively clear when we learn from the record that Robertson, almost immediately after this cutting of the platform, was recalled from Sapulpa to Fayetteville, leaving Mr. Crawford as the sole representative of the company in Sapulpa. This summoning of Mr. Robertson was by letter from the president of the company at Fayetteville to Mr. Crawford, the plaintiff, dated October 18, 1911, in which he says (*italics ours*):

"I have written Mr. Robertson to come to Fayetteville at once as I learn that the moving business is going rather slow. And that as it is Mr. Robertson will not be able to do anything soon in the way of permanent work on the finishing of the shed. So I thought it best that he come to Fayetteville, as we are having a good business here. And the millwork is getting behind. And I also thought that as it now is at Sapulpa with the business dropping off that you would be able to give this moving matter all of the attention that it would likely need, and when the sheds are moved and loaded as the contract calls for with the parties that are doing the moving then it will be a small job to get someone to fix the roof of the shed. *So I will now leave this matter in your hands.*"

It resulted from this letter that, not only by reason of his position as local manager, but by express terms, the whole business was upon Robertson's withdrawal left in plaintiff's hands. If, therefore, as necessarily followed from the proofs above outlined, there was a removal of the support to the platform by some unknown cause during the 10 days intervening between Robertson's withdrawal and plaintiff's injury, the duty of knowing that such existed was upon the plaintiff as the company's responsible representative upon the ground. The platform was within a few feet of the office where plaintiff was conducting the business of the company, and within a short distance of the door through which plaintiff was repeatedly passing in the performance of that duty. If, as must necessarily have been the case, it was during this interval that the platform became unsafe, plaintiff, as the representative of the company present for the purpose of keeping its affairs in proper shape, was the one charged with ascertaining and remedying such condition. Upon him, and upon no other employé, rested the duty of inspection in order that life and limb of himself and of others going upon this platform might not be jeopardized. That he instead of another received the injuries renders him the unfortunate victim of his own oversight. Certainly to hold that a representative of the company, who has failed to discover an easily ascertained defect contrary to a duty resting upon him to so discover, can recover for injuries resulting

therefrom would be to overlook the ancient principle, founded alike in morals and in law, that no one may profit by his own wrong.

It should be said in conclusion that this disposition of the case is not upon any principle of assumed risk. We accept plaintiff's position that he had not noticed the absence of this support placed there by Robertson on or about October 15th, and that he thus did not realize the danger involved in his going upon the upper platform thus unsupported. Thus viewing the matter, the doctrine of assumed risk does not apply, since that involves, not only knowledge of the situation, but appreciation of the danger. We hold, however, against plaintiff upon the ground that it was his duty to have known of the removal of this support, and his failure so to know made his injury, in effect, self-inflicted, and he cannot subject his principal, the defendant company, to an action of damages for his own wrong.

The judgment is accordingly affirmed.

BIRGE-FORBES CO. v. HEYE.†

HEYE v. BIRGE-FORBES CO.

(Circuit Court of Appeals, Fifth Circuit. February 17, 1914.)

No. 2540.

1. FACTORS (§ 45*)—REIMBURSEMENT OF FACTORS FOR PAYMENTS TO BUYERS.

An agent for a seller of cotton, under the rules of a cotton exchange by which he became a guarantor to the buyers, could recover from the seller only the amount paid by him as guarantor to buyers pursuant to arbitration under the rules of the exchange, and not the amount for which he had become liable but had not paid.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 60, 63, 64; Dec. Dig. § 45.*]

2. ARBITRATION AND AWARD (§ 74*)—VACATION OF AWARD BY NEW AGREEMENT.

An award on the arbitration, under the rules of a cotton exchange, of disputes and controversies between a seller and buyers, was not waived or vacated by a subsequent agreement between the seller and its agent, who, under the rules of the exchange, was a guarantor to the buyers to submit the matters covered by the awards to another arbitration, which agreement was never carried into effect; it being between different parties than those to the awards.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 342; Dec. Dig. § 74.*]

In Error and Cross-Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Action by Carl R. Heye against the Birge-Forbes Company. Judgment for plaintiff, and both parties bring writs of error. Affirmed.

H. O. Head and Jesse F. Holt, both of Sherman, Tex., for plaintiff in error and defendant on cross-writ.

Robert Harrison and R. M. Rowland, both of Ft. Worth, Tex., for defendant in error and plaintiff on cross-writ.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

†Rehearing denied March 12, 1914.

PER CURIAM. This case is clearly stated in the oral charge given to the jury on the trial as follows:

"This case was filed by the plaintiff, Carl R. Heye, based upon the claim that he had paid out something over \$76,000, or had become liable for that sum of money, on account of certain findings of the Bremen board of arbitration of the Bremen Cotton Exchange in ascertaining the differences in the staple, grade, and quantity of certain cottons sold by him as the agent of the defendant company on the Bremen market. The claims that he acted as the agent of the defendant company, and made sales of cotton between the 1st of October, 1910, and May 1, 1911. He alleges that it was agreed that the cotton he sold as the agent of the defendant company was to be sold under the rules of the Bremen Cotton Exchange, and among those rules was a stipulation that all differences as to grade and quality were to be arbitrated by the board of arbitrators provided for by the rules which have been introduced in evidence in this case. He claims that between the dates I have indicated, viz., October 1, 1910, and May 1, 1911, something over 15,000 bales of cotton were sold by him as the agent of the defendant company to certain buyers in Bremen, Germany, and, after the sales were made, reclamations were made by those buyers, and disputes and controversies arose as to the quality, grade, and staple of the cotton, and that those disputes and controversies, under the rules of the Bremen Cotton Exchange, were submitted to the board of arbitrators; that those arbitrators acted in accordance with the rules of the Bremen Cotton Exchange and made their award; that thereafter that award was appealed from to the board of appeal, also provided for by the rules of the Bremen Cotton Exchange, and the board of appeal made its award; and that by virtue of these rules and these awards he became liable to the buyers of the cotton in about the sum of \$74,333.33. He alleges that, in addition to this item of award, he paid out on the cotton so sold for the defendant company the sum of \$1,730.16 for losses and deficiencies in the weight of the cotton. As far as the latter sum, \$1,730.16, is concerned, which the plaintiff alleges that he paid out for losses and deficiencies in the weight of the cotton, there is no controversy whatever in the testimony. The plaintiff alleges that he paid those amounts, and there is no testimony in behalf of the defendant company contradicting the evidence of the plaintiff on that point. Therefore it would be my duty to instruct you to render a verdict for the plaintiff, Heye, for the sum of \$1,730.16, being the amount of losses and deficiencies in the weights of the cotton in controversy in this suit.

"As to the other part of the controversy, the defendant, Berge-Forbes Company, claims that it is not liable to the plaintiff for the amount of the awards for the reasons set out in its amended original answer filed in this case January 6, 1913. Without attempting to make an elaborate statement of the reasons set out in the answer, the defense revolves around two propositions named in that answer. One of them is that the plaintiff, Heye, cannot recover on the awards made by the Bremen board of arbitration, for the reason that on the 27th day of January, 1911, the findings of the Bremen board of arbitration were set aside and annulled by an agreement made between the parties to this suit on that date. The defendant alleges that it became dissatisfied with the findings of the Bremen board of arbitration, and that there were various negotiations between the defendant company and the plaintiff, Carl R. Heye, prior to the 27th of January, 1911, which culminated on that date in the agreement which has been read in evidence, and which is attached as an exhibit to the answer of the defendant company, and the defendant company claims that that agreement amounted in law to a setting aside and annulling of the findings of the Bremen board of arbitration.

"It is in evidence that the agreement of January 27, 1911, was never carried out. The arbitrators, who were agreed upon in that agreement of January 27, 1911, refused to act because of the fact, as is alleged, that they claimed that there was not sufficient data upon which they could reach a conclusion at Liverpool, the place where the arbitration provided for in the agreement was to occur.

"There was some testimony one way and the other as to whether the plaintiff or the defendant company was chargeable with the blame for not carrying

out the agreement of the 27th of January, 1911, but I do not believe there is any testimony sufficient upon which to base a finding that either the plaintiff or the defendant company was at fault for failing to carry out that agreement. In other words, it was an agreement attempted to be made to arbitrate which was never executed, and this through no fault of either of them, as the court believes from the testimony.

"The question for the court to decide is whether the agreement of January 27, 1911, amounted to an abandonment and annulment of the findings of the board of arbitration and the appeal board of arbitration.

"The court has come to the conclusion in this case that the plaintiff's cause of action rests upon the finding of the board of arbitration provided for by the rules of the Bremen Cotton Exchange; that that finding by the board of arbitration constituted his cause of action. If the Bremen board of arbitration had found nothing in favor of the parties to whom the cotton was sold, and who have claims for reclamation, then plaintiff would have nothing to pay, and would have no cause of action against the defendant company, so that the basis of this suit, which constitutes his cause of action, is that he had been compelled, under the rules of the Bremen Cotton Exchange, to pay out certain sums found against the defendant company by the board of arbitration of that Cotton Exchange.

"Now when, for any reason, the agreement of January 27, 1911, failed to become operative, it remitted the plaintiff to his original cause of action, which was the finding of the Bremen board of arbitration, and upon that he sues, and therefore the court is of opinion that the agreement of January 27, 1911, while it would have been effective, if it had been carried out, but not having been carried out, and without the fault of either party, the plaintiff was remitted to his original cause of action, which is the finding of the board of arbitration of the Bremen Cotton Exchange.

"The other proposition that was raised was that the rules of the Bremen Cotton Exchange were modified by the instructions given by the defendant company on the 21st of August, 1908, together with the reply thereto made by the plaintiff on the 14th of December, 1908, and, that the record may be as complete as possible on this particular phase of the case, I call the attention of the jury to the statements contained in the letter which the defendant company wrote to the plaintiff on the 21st of August, 1908, and which letter I quote in full as follows: 'Replying to yours of the 3d inst., as you seem to think you will be able to do a large business for us, and as our relations have always been very pleasant, we will drop the question of reducing expenses by employing an agent for the present, and continue our present relations for the coming season. However, it must be understood that you will push our sales as much as possible. We would like to have all sales made with the understanding that arbitration differences for grades and a staple will be those in effect (the actual differences made on cif and six cotton sold by us) at the time of the sale instead of the last day of landing.'

"The defendant company had the right to ingraft that change on the rules of the Bremen Cotton Exchange so far as the liabilities and obligations of the plaintiff in this case were concerned, if the proposition in that letter matured into a contract (that is, if the minds of the parties met, as to that particular phase which the defendant company sought to ingraft on the rules of the Bremen Cotton Exchange), so that the court must look to the testimony in the record to determine whether the minds of the parties met and agreed upon any change of the rules of the Bremen Cotton Exchange. Now the letter of the defendant company of August 21, 1908, reached the plaintiff, and on December 14, 1908, the plaintiff replied to it, and I now quote his reply: 'Thanking you for your favor of August 21, I am glad to note that you are willing to continue our agreeable relations and beg to assure you once more I always shall use all ability and activity to push business, and to make same as extensive and satisfactory as possible. I note you wish it to be understood that all arbitrations buyers should demand are to be based on those grades and staple differences in force on date of sale, and I shall govern myself accordingly in future. However, I find it necessary to mention I fear we often shall meet some objections as to this condition, for Bremen buyers principally wish to buy exactly on Bremen rules. They are hard to be had for

any exceptions; nevertheless, I shall try and also in this point do my best for you. If, however, later on the resp. conditions shall prove to hinder business, I shall let you know.'

"The statement which the plaintiff appears to acquiesce in and agree to be bound by is the statement contained in this letter that 'all arbitrations buyers should demand are to be based on those grade and staple differences in force on date of sale, and I shall govern myself accordingly in future.'

"It is conceded in the argument in the case by the attorneys on both sides that subsequent to the writing of the letter of December 14, 1908, the arbitration buyers did demand were based on those grade and staple differences in force on the date of the sale, and therefore whatever there was in the proposition contained in the letter of August 21, 1908, by the plaintiff has been carried out and complied with in the transactions which occurred between the parties subsequent to that date, and there is nothing in the finding of the Bremen board of arbitration of the Bremen Cotton Exchange which contravened that particular phase which the defendant company proposed and which the plaintiff accepted. They went along subsequent to that time and arbitrated the differences under the rules of the Bremen Cotton Exchange, simply asking that one modification as contained in the request of the defendant company of August 21, 1908, and answered in the letter of the plaintiff of December 14, 1908.

[1] "This being so, the court is of opinion that the plaintiff in this case is entitled to recover, not only the amount paid for the deficiencies in weight, but for whatever amount he paid as the guarantor of the defendant company's contract of sale with the buyers at Bremen. There is an issue in the case as to whether the plaintiff should recover the amount of \$85,000, being the total amount of money which he paid and claims to be liable for, plus the seventeen hundred and some odd dollars which he paid as deficiencies in weight, or whether the liability of the defendant company to the plaintiff is covered by the amount of money which he actually paid out on account of those contracts as such guarantor and surety.

"The court is of opinion that the measure of liability at present which the defendant company is under to the plaintiff is the amount of money he actually paid out, and not the amount of money which he may be liable to pay, but which has not yet been paid. It is undisputed that the amount of money he has paid out on account of the finding of the board of arbitration of the Bremen Cotton Exchange, and which has been in evidence to you, is \$36,610.96, and therefore I direct the jury to return a verdict in favor of the plaintiff for the sum of \$1,730.16 for deficiencies in weight, etc., of the cotton, and the further sum of \$36,610.96 being the amount of the award of the board of arbitrators of the Bremen Cotton Exchange which the plaintiff has paid."

[2] As to the contention stressed in this court that the awards made under the rules of the Bremen Cotton Exchange were waived and vacated by the subsequent agreement to submit matters covered by said awards to another arbitration, it is only necessary to point out that the awards under the rules of the Bremen Cotton Exchange were between Birge-Forbes & Co. and the various purchasers of cotton, and that the subsequent agreement to arbitrate was between different parties, to wit, Birge-Forbes & Co. and their selling agent, Carl R. Heye.

We find no error in the charge given by the trial judge, nor reversible error in any of the rulings of the court as to the admission of evidence, and therefore that none of the assignments of error are well taken.

The judgment of the District Court is affirmed on both writs; the costs of this court, including the transcripts, to be equally divided.

UNITED STATES v. HOLLAND-AMERICA LINE.

(Circuit Court of Appeals, Second Circuit. February 10, 1914.)

No. 121.

1. ALIENS (§ 53*)—IMPORTATION—SUPPORT PENDING EXAMINATION—CONTRACT.

The immigration commissioners having threatened to cause the alien immigrants arriving at New York to be inspected on board their respective vessels in order to compel defendant steamship company to comply with a rule requiring it to pay expenses of aliens pending examination and entry or deportation, defendant wrote the commissioner that "until the matter was decided differently by proper authority it would continue to pay the cost of maintenance pending examination." After this the question was submitted to the Secretary of Commerce and Labor in another case, and he decided in favor of the steamship company and against the United States. *Held*, that such determination was a different decision by proper authority within defendant's letter, and it was therefore under no contract liability to continue to pay such expenses.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 53.*]

2. ALIENS (§ 53*)—IMMIGRATION—EXAMINATION—COST OF MAINTENANCE—LIABILITY OF STEAMSHIP COMPANIES—STATUTES—CONSTRUCTION.

Immigration Act Feb. 20, 1907, c. 1134, § 16, 34 Stat. 903 (U. S. Comp. St. Supp. 1911, p. 508), provides that steamship companies importing aliens shall be liable for the detention and maintenance of immigrants landed temporarily for examination at places where they remain in the company's charge, and then declares that, when the government uses a suitable building for detention and examination, the immigration officers shall take charge of them and the company shall be relieved of responsibility thereafter for their detention unless the immigrants are returned for deportation. Section 19 provides that in case of immigrants brought to the United States in violation of law the steamship company shall pay the cost of their maintenance while on land as well as the expense of their return, and makes the master or owner of the vessel guilty of a misdemeanor if he shall make any charge for the return of such aliens or shall take any security from him for the payment of such charge. *Held*, that suitable buildings having been constructed at Ellis Island in New York Harbor for the examination of incoming aliens, which buildings are supported by the immigration head tax, where aliens are landed at such island and are detained for treatment either in hospitals there or in private hospitals on shore pending determination of their right to enter and are subsequently admitted, the aliens during such time are not "in charge" of the steamship companies, which are not liable for their maintenance during such period.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 53.*]

In Error to the District Court of the United States for the Southern District of New York.

Action by the United States against the Holland-America Line. Judgment for defendant (205 Fed. 943), and the United States brings error. Affirmed.

H. Snowden Marshall, U. S. Atty., and A. S. Pratt, Asst. U. S. Atty., both of New York City.

L. H. Beers, of New York City, for defendant.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WARD, Circuit Judge. The United States brought this action to recover expenses incurred for maintenance and medical care and treatment of certain alien immigrants afflicted with diseases not warranting deportation, brought to this country by the defendant, while held for examination as to their right to enter. All of them were properly brought here and were subsequently admitted. As at that time there was no hospital for contagious diseases at Ellis Island, such of them as were so afflicted were sent to state hospitals under contracts with the government. The others were sent to the hospital at Ellis Island. The cause was tried before Judge Mayer upon an agreed statement of facts, a jury being waived, and he entered judgment in favor of the defendant, dismissing the complaint. The government takes this writ of error.

The complaint rests the right to recover upon two grounds: First, that these expenses are imposed upon the defendant by the Act of February 20, 1907; second, that the defendant has agreed to pay them. Taking up the latter cause of action first: The immigration authorities, under section 22 of the act authorizing them to make rules "not inconsistent with law," adopted a regulation to the effect that these expenses should be paid:

"(4) By steamship companies.—Aliens not falling within any of the foregoing classes whom it is necessary for any reason to hold or to treat in hospital pending determination of right to land, or awaiting deportation under order of rejection of a board of special inquiry or of the department (sec. 19).

"(d) Covering cases of the character mentioned in class 4 of the preceding paragraph, bills for hospital treatment and maintenance shall be rendered monthly by hospitals against the steamship companies responsible, through the office of the commissioner of immigration or inspector in charge, the latter's approval to be attached to the bills, if found correct, before forwarding them to the companies for settlement. Officers of the immigration service will in all such cases look to the steamship companies for settlement of the hospital bill. If any steamship company refuses to pay such bills rendered with the approval of the immigration officials, it will, of course, be necessary to require thereafter that all aliens brought by the vessels of such company shall be held on board ship until their applications for admission have been finally adjudicated."

[1] The steamship companies always protested against this rule as not consistent with law and finally refused to pay. Thereupon the immigration commissioner wrote a letter dated July 21, 1894, to the defendant, the last clause of which is:

"It now becomes my duty to execute the departmental instructions above recited, and I hereby give notice that on and after Monday, July 23, 1894, I shall cause all alien immigrants arriving at this port to be inspected on board their respective vessels, or at the docks, as expeditiously as possible, causing as little delay and inconvenience as the proper discharge of my duties will admit of, instead of bringing such alien immigrants to Ellis Island for inspection, as heretofore. But passengers by such lines as have complied with the law and the rules and regulations of the Treasury Department will be received at Ellis Island and there inspected in accordance with the practice heretofore prevailing.

"I should be glad to receive an early reply stating the attitude which you desire to assume with reference to the subject of this letter."

This was followed by further correspondence, resulting in a letter from the Netherlands-American Steam Navigation Company, the predecessor of the defendant, dated July 25th, as follows:

"In reply to your yesterday's favor I now beg to inform you, that the Netherlands-American Steam Navigation Company will, until the matter is decided differently by proper authority, continue to pay the cost of maintenance, pending examination at Ellis Island, of all immigrants brought by their steamships to the port of New York, and that we are ready to give bond to that effect.

"Please inform me, if this meets your requirements, so as to secure the examination of immigrants arriving by our steamers at Ellis Island as heretofore and oblige."

The government being satisfied with this letter, no bond was ever given.

Early in 1909 the Cunard Line, by an appeal from a decision of the commissioner of immigration at New York, submitted the question to Mr. Straus, then Secretary of Commerce and Labor, in the case of expenses incurred in connection with a family named Toth. Just before leaving office he decided in favor of the company, but none of his successors has followed his decision.

September 16, 1909, the companies, relying upon this decision of Mr. Straus, notified the immigration authorities that they would not longer "be responsible for such expenses except for a period long enough to enable the examining medical officer to determine definitely the nature of the alien's affliction." This we think was quite in accordance with the defendant's undertaking in its letter of July 25th. The matter had been "decided differently by proper authority," viz., Secretary Straus, and the United States cannot sustain its claim upon the second cause of action.

To escape the alternative presented by the rule, of having all immigrants detained aboard for examination, a course which would have turned its steamers into hospital ships, broken up its sailing schedules and destroyed its business, the defendant continued to pay these bills, leaving the United States to collect in this action at law the bills rendered, but not paid, in the brief interval from August 1 to September 16, 1909.

[2] This leaves us to consider the first cause of action and to inquire whether the act does impose the obligation to pay these expenses upon the steamship companies. Concededly it does not do so expressly, and the United States has to rely upon necessary implication.

Congress has made it perfectly clear in section 19 that in the case of immigrants brought to this country in violation of law the company shall pay "the costs of their maintenance while on land as well as the expense of the return of such aliens." It has gone farther and made the master or owner guilty of a misdemeanor if "he shall make any charge for the return of any such alien or shall take any security from him for the payment of such charge." The plain intent of these stringent provisions is to compel the companies to be vigilant in examining intending passengers before embarkation with a view of refusing such as are excluded by the act. There can, of course, be no inference from these precise provisions that the companies are to pay for the expenses in question, about which nothing at all is said in the act.

The legal fiction that the immigrants were not landed until they had been admitted did not leave the defendant "in charge" of them or

make it liable for their maintenance and care. It only negated any presumption that, because of actual landing, they had been admitted or that the defendant's obligation to return them if ordered to be deported was at an end.

Section 16 of the act recognizes these considerations in disposing of the custody of the immigrants before admission:

"Sec. 16. (Inspection by immigration officers—on shipboard—at immigrant stations.) That upon the receipt by the immigration officers at any port of arrival of the lists or manifests of incoming aliens provided for in sections twelve, thirteen, and fourteen of this act, it shall be the duty of said officers to go or to send competent assistants to the vessel to which said lists or manifests refer, and there inspect all such aliens, or said immigration officers may order a temporary removal of such aliens for examination at a designated time and place, but such temporary removal shall not be considered a landing, nor shall it relieve the transportation lines, masters, agents, owners, or consignees of the vessel upon which said aliens are brought to any port of the United States from any of the obligations which, in case such aliens remain on board, would, under the provisions of this act, bind the said transportation lines, masters, agents, owners, or consignees: Provided, that where a suitable building is used for the detention and examination of aliens the immigration officials shall there take charge of such aliens, and the transportation companies, masters, agents, owners, and consignees of the vessels bringing such aliens shall be relieved of the responsibility for their detention thereafter until the return of such aliens to their care."

The section holds the companies liable for the detention and maintenance of immigrants landed temporarily for examination at places where they remain in the companies' charge. Then it goes on to provide that, where the government uses a suitable building for detention and examination, the immigration officials shall take charge of them, and the companies shall be relieved of responsibility thereafter for their detention until the immigrants are returned for deportation. The buildings on Ellis Island are just such suitable buildings, erected, indeed, by means of the head money tax of \$4 paid by the companies on each alien immigrant as required by the act. So also the state hospitals where immigrants having contagious diseases were at that time sent until they could be removed to Ellis Island for examination were suitable buildings, and the expense so incurred was defrayed by the government out of the same source. We think the immigration officials, and not the defendant, were in the language of the act in charge of the immigrants in question at both places, for all purposes.

This construction appeals to our sense of fairness. The companies are required to pay head money on the passengers they bring here to provide moneys for defraying the expense of regulating immigration under the act and no use of such funds could be more appropriate than to apply them to the expenses of aliens pending examination who are rightfully brought here and are eventually admitted. It is stipulated by the parties that these moneys are more than enough in amount to do so after payment of all other expenses. If Congress had thought it just that the companies should pay these charges, we think it would have said so in express terms, as it did in the case of immigrants brought here in violation of law. It seems to us that the rule adopted by the immigration authorities was not consistent with law and was

oppressive because it compelled the companies to pay in order to escape the alternative of having their steamers turned into hospitals and houses of detention. Such payments were not voluntary. They could not in the nature of things have been resisted.

Judgment affirmed.

BETTS et al. v. GAHAGAN et al.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1914.)

No. 1193.

1. ADVERSE POSSESSION (§ 72*)—"COLOR OF TITLE"—BOND FOR TITLE.

Where a bond for title is unconditional and calls for no future payment, the presumption, in the absence of any evidence to the contrary, is that the price was paid before or at the time of the signing, so that it is "color of title" to support adverse possession within the seven-year statute of limitations. Revisal N. C. 1905, § 382.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 430-434; Dec. Dig. § 72.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1264-1273; vol. 8, p. 7606.]

2. ADVERSE POSSESSION (§ 115*)—COLOR OF TITLE—BOND FOR TITLE.

Where the purchaser in a bond for title which failed to definitely describe the several tracts, excepting one procured six years later, a conveyance from a third person, and the papers did not refer to each other, and the descriptions in the bond and conveyance did not correspond in area, the court could not hold, as a matter of law, that the bond was merged in the conveyance so as not to constitute color of title, but the question was for the jury.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 314, 691-701; Dec. Dig. § 115.*]

3. ADVERSE POSSESSION (§ 75*)—COLOR OF TITLE—INSTRUMENTS CREATING.

A deed by the heirs of a deceased owner of land for partition thereof is not color of title within the seven-year statute of limitations. Revisal N. C. 1905, § 382.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 448-450; Dec. Dig. § 75.*]

4. ADVERSE POSSESSION (§ 71*)—COLOR OF TITLE—INSTRUMENTS CREATING.

A deed by a grantee in a deed of partition by heirs of the deceased owner to a third person of the land conveyed to the grantee in the partition is color of title within the seven-year statute of limitations, where the third person had no interest in the land outside of the deed.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 415-429; Dec. Dig. § 71.*]

5. ADVERSE POSSESSION (§ 57*)—ACTS CONSTITUTING.

Proof that land was cultivated under one claiming title and that timber was cut thereon as needed, unaccompanied by any evidence of the length of time of the occupancy by cultivation, did not establish title by adverse possession without color of title under the 20-year statute of limitations. Revisal N. C. 1905, § 384.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 277, 278, 655, 667, 687; Dec. Dig. § 57.*]

6. APPEAL AND ERROR (§ 930*)—VERDICT—PRESUMPTIONS.

Where the pleadings raised two issues, and on the trial one was supported by evidence, and the other not, a favorable verdict will be sus-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tained on appeal on the presumption that the jury based its verdict on the issue supported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755-3761; Dec. Dig. § 930.*]

7. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—ERRORS IN INSTRUCTIONS.

Where, in an action for the recovery of land, defendant relied on the 7 and 20 year statutes of limitations, and the evidence justified a finding in his favor under the 7-year statute, but there was no evidence to support a verdict under the 20-year statute, the error in refusing to charge that defendant could not hold under the 20-year statute was not reversible, since it could not be inferred that the verdict was based on a finding of adverse possession for 20 years merely because the court refused to charge that there was no evidence of adverse possession for 20 years.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.*]

8. EVIDENCE (§ 274*)—DECLARATIONS—ADMISSIBILITY.

Where, in an action for the possession of land, defendant relied on color of title, and that a poplar was on the line of the true location of the tract as described by the papers, constituting his color of title, and a plat showed that the line called for would run near the poplar, testimony that the deceased owner of the adjacent land had pointed out the poplar as on the line was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1121-1134; Dec. Dig. § 274.*]

In Error to the District Court of the United States for the Western District of North Carolina, at Asheville; James E. Boyd, Judge.

Action by Harriet L. Betts and another against Ben W. Gahagan and others. There was a judgment for defendants, and plaintiffs bring error. Affirmed.

See, also, 205 Fed. 890, 124 C. C. A. 203.

Zebulon Weaver and Alf S. Barnard, both of Asheville, N. C. (Duff Merrick, of Asheville, N. C., on the brief), for plaintiffs in error.

Julius C. Martin, of Asheville, N. C. (Martin, Rollins & Wright, of Asheville, N. C., on the brief), for defendants in error.

Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

WOODS, Circuit Judge. This is one of the many perplexing cases depending on location and adverse possession of lands long regarded of such small value that their boundaries and even their titles were considered of little consequence. The action is for the recovery of possession of a small strip of land on which is situated a baryte mine operated by the defendants. The verdict and judgment was in favor of the defendants, and the plaintiffs ask for a reversal, alleging error in the admission of testimony and in the charge to the jury, and insisting that the District Judge should have directed a verdict in favor of the plaintiffs.

There is no dispute as to the regularity of the plaintiffs' claim of title commencing with a grant from the state of North Carolina to John Gray Blount, dated November 29, 1796, for 300,000 acres, and running through successive conveyances to the plaintiff Harriet L.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Betts, who conveyed after the commencement of the action to the plaintiff Laurel River Logging Company.

After proof of their own title, the plaintiffs, for the purpose of showing that the defendants' title was derived from the same source and did not cover the land in dispute, introduced a bond for title from John Gray Blount, from whom plaintiffs claimed, to James Allen, his heirs and assigns, dated October 25, 1828, covering 7,000 acres, and a deed of conveyance from Blount's executors to George W. Gahagan, the ancestor of the defendants, dated January 29, 1835. The evidence of Garrett, the surveyor appointed by the court on behalf of plaintiffs, was to the effect that the location by survey of this conveyance from Blount's executors to Gahagan excluded the land in dispute; and the plaintiffs contended that while the conveyance to Gahagan did not expressly refer to the bond, and there was no direct evidence of its assignment, yet the circumstances led inevitably to the conclusion that the deed was given to Gahagan as assignee of Allen in performance of the bond.

The circumstances mainly relied on to support this position are: (1) That Allen gave to George W. Gahagan his bond for title dated February 11, 1828, covering several tracts of land in the same vicinity, the description of one of the tracts corresponding in a general way with one of those conveyed by Blount's executors to George W. Gahagan; and (2) that the conveyance to George W. Gahagan by Blount's executors excepts all the lands conveyed away before October 25, 1828, the date of the bond from Blount to Allen. Upon the inference of fact thus arrived at, that the conveyance to George W. Gahagan of January 29, 1835, was in satisfaction of the bonds from Blount to Allen and from Allen to Gahagan, the plaintiffs rest the legal proposition that both bonds were merged in the conveyance and any claim by the defendants under either of them as color of title or otherwise could not extend beyond the land covered by the deed.

The defendants denied that the conveyance from Blount's executors to their ancestor, George W. Gahagan, did not cover the land in dispute, and relied also on the claim of adverse possession for 20 years without color of title, and adverse possession for 7 years with color of title, under the following sections of the Revisal of North Carolina of 1905:

"382. Seven years' possession under color. When the person in possession of any real property, or those under whom he claims, shall have been possessed of the same, under known and visible lines and boundaries, and under colorable title for seven years, no entry shall be made or action sustained against such possessor by any person having any right or title to the same, except during the seven years next after his right or title shall have descended or accrued, who in default of suing within the time aforesaid, shall be excluded from any claim thereafter to be made; and such possession, so held, shall be a perpetual bar against all persons not under disability."

"384. Twenty years' adverse possession. No action for the recovery of real property, or the possession thereof, or the issues and profits thereof, shall be maintained when the person in possession thereof, or the defendant in such action, or those under whom he claims, shall have possessed such real property under known and visible lines and boundaries adversely to all other persons for twenty years; and such possession so held, shall give a title in fee to the possessor, in such property, against all persons not under disability."

[1] We consider first whether the trial judge should have instructed the jury as requested by counsel for plaintiffs that the evidence was not sufficient to bring the defendants' possession under the protection of section 382. The plaintiffs contend that the defendants produced no color of title. Against this contention the defendants relied on several papers, the first being the bond for title from Allen to George W. Gahagan above mentioned. By this paper Allen undertook to make title to George W. Gahagan within 12 months from February 11, 1828, to several tracts of land all of which were very indefinitely described, except the last, which was to run "with the road one hundred rods wide so as to let the said road be in the middle." The survey of this location shows that a tract of land laid off by measuring 50 rods on each side of the road referred to, as it varies its course, will cover the land in dispute.

[2] Since the bond is unconditional and calls for no future payment, the presumption is that the purchase price was paid before or at the time the bond was signed; and, after payment of the purchase money, a bond for title is "color of title" to support adverse possession even against the vendor. *Avent v. Arrington*, 105 N. C. 377, 10 S. E. 991. It follows that this bond for title could be relied on as color of title unless it was merged in a conveyance from Blount's executors to George W. Gahagan. If, as contended by plaintiffs, the conveyance made in 1835 was given and accepted as a performance of the bond, then the bond could not be relied on against the vendor or his grantees, as color of title to land beyond the limits of the conveyance, for the conveyance would be a satisfaction of all rights of the vendee under the bond. Although there is reason to infer that the conveyance in this instance was in satisfaction of the bond, it would not be safe to say that the evidence admits of no other reasonable inference. Against such an inference are the considerations that the papers do not in any way refer to each other, that they are more than six years apart in date, that the bond and the conveyance were executed by different persons in a remote period when little attention was given to exact locations or sources of title, and that there was evidence that they did not correspond in area. From these facts it would not be unreasonable to infer that George W. Gahagan entered and held under the Allen bond, and afterwards to strengthen his claim to this land and to acquire title to other lands took an independent conveyance from the executors of Blount. The District Judge was therefore right in refusing to hold the Allen bond for title unavailable to the defendants as color of title.

The plaintiffs were entitled, however, to the instruction requested that, if the jury found that the conveyance to George W. Gahagan was made for the purpose of carrying out the terms of the bond from Allen, then the defendants could not rely on the bond as color of title; but this principle was made sufficiently clear in the general charge.

[3] The paper next relied on as color of title was an agreement or deed made by the heirs of George W. Gahagan for the partition of the lands inherited from him. This paper did not purport to evidence an acquisition of any rights in land, but only the assignment of a right already existing. It was not available, therefore, as color of title. *Carson v. Carson*, 122 N. C. 645, 30 S. E. 4.

[4] The deed from W. W. Gahagan to R. M. Gahagan and B. F. Gahagan dated June 10, 1890, covering the land received by W. W. Gahagan in the division of his father's estate, stands on a different footing. It purports to convey the land to grantees who had no interest, and is good as color of title to the land it calls for. One of the boundaries named in this deed is the land then held by John Landers; and there was evidence that a poplar tree was on the line between Landers and Gahagan, and that the disputed land was on the Gahagan side of this line. There was also evidence that the Gahagans opened the mine in 1894 or 1895, and had claimed and worked it as their own since that time. It seems clear therefore that, on the issue of adverse possession under color of title for seven years, there was strong evidence to go to the jury under both the Allen bond for title and the conveyance from W. W. Gahagan to R. M. and B. F. Gahagan.

[5] The District Judge also refused to charge the jury as requested by plaintiffs that there was no evidence sufficient to warrant a finding that the defendants were protected by adverse possession without color of title for 20 years, under section 384 of the statutes. As already stated, there was evidence from which the inference might reasonably be drawn that there was a defined line recognized and observed by the Gahagans and the owners of the adjacent lands for 30 or more years as the eastern boundary of the Gahagan lands, which leaves the disputed land on the Gahagan side. The testimony of R. M. Gahagan, James M. Landers, and Wade Gahagan tended to establish this line and a known poplar as one of its marks. But careful consideration of the record leads to the conclusion that there was no evidence of the adverse possession required by the law for 20 years before the commencement of the action. It is true that B. W. Gahagan testified that the Gahagans had been in possession as far back as he could remember, but the facts upon which he based this conclusion were that at one time some of the disputed land was cultivated under the Gahagans, and that they cut timber occasionally as they needed it. There is no evidence how long the occupancy by cultivation continued, and the occasional cutting of timber could not sustain a claim of adverse possession. *Shaffer v. Gaynor*, 117 N. C. 15, 23 S. E. 154; *Rowe v. Lumber Co.*, 128 N. C. 301, 38 S. E. 896.

[6, 7] But it does not follow that there must be a new trial for the refusal to charge that the jury could not find a verdict for the defendants on the claim of adverse possession for 20 years. Juries, it is true, do sometimes find verdicts without any evidence, and the entire lack of evidence proves caprice; but, in the absence of a showing of caprice, courts should attribute to jurors fair intelligence and presume that they have acted on evidence and not without it. Hence when in the pleadings two vital issues are made, and on the trial one is supported by evidence and the other not, a favorable verdict should be sustained on the presumption that the jury based its verdict on a favorable decision of the issue supported by evidence. Applying this rule, it must be inferred here that the jury reached their negative verdict on the issue, "is the plaintiff the owner of and entitled to the possession of the land in controversy," either on a finding that the true location of defendants' title embraced the land in dispute, or a finding that the

defendants had held the land in dispute adversely for 7 years with color of title, or on finding both these issues in favor of the defendants; for there was evidence justifying a finding favorable to the defendants on both. It cannot be inferred that the verdict was rested on a finding without evidence to support it that the defendants had held the land in dispute adversely for 20 years. It is true that the refusal to charge as requested indicated the absence of a clear conviction on the part of the District Judge that there was no evidence of adverse possession for 20 years; and from this the inference may be drawn that the jury, either independently or under the influence of the refusal of the trial judge to charge as requested, might not have had a clear conviction that there was no evidence in favor of the defendants on the point. Assuming this to be so, nevertheless, an appellate court should not do the technical thing of setting aside a verdict obtained after a long and expensive trial, on the possibility that the jury might have done the unreasonable thing of basing their verdict on testimony which is so shadowy that this court considers it no evidence, and which received no more consideration from the trial judge than was implied in the mere fact of submitting it to the jury. The bald technical nature of such a decision is more apparent when it is observed that the two issues of adverse possession for 20 years, and adverse possession for 7 years with color of title were independent, and that there was strong evidence supporting the defendants' side of the latter issue. For this reason, the error of refusing to charge that the defendants could not hold the land under the claim of adverse possession for 20 years cannot be allowed to result in a new trial.

The point has been expressly decided in *City, etc., R. Co. v. Svedborg*, 194 U. S. 201, 24 Sup. Ct. 656, 48 L. Ed. 935. In that case the trial judge refused to instruct the jury that the verdict must be for the defendant unless they found negligence on the part of a motorman, and instructed that the verdict must be for the defendant unless the jury found negligence on the part of the motorman "or conductor, or both." The court disposes of the matter in this language:

"It is contended that it was error prejudicial to the railway company to have added these words to the instruction asked, because by so doing the jury were, in effect, told that there was sufficient evidence upon which to base an inquiry whether the conductor was guilty of negligence; whereas, the company insists there was not the slightest proof showing negligence on the part of the conductor.

"We need not review the evidence as to the conductor; for if, as the defendant insists, there was no evidence whatever showing negligence upon the part of the conductor, then the modification made by the court could not have so misled the jury as to prejudice the defense."

[8] The remaining assignment of error relates to the admission of the testimony of W. W. Gahagan that John Landers, deceased, who owned the adjacent land, had pointed out a poplar as being on the Gahagan line. The claim of the defendants was that this poplar was on the line of the true location of the papers on which the defendants relied as title and color of title, and the plat introduced shows that the line of the land called for by the Allen bond for title, relied on as color of title, would run very near the poplar. Under these circumstances,

the evidence came clearly within the rule of admissibility of such evidence, thus stated in *Mendenhall v. Cassells*, 20 N. C. 45:

"We receive it in regard to private boundaries, but we require that it should either have something definite to which it can adhere, or that it should be supported by proof of correspondent enjoyment and acquiescence. A tree, line, or water course may be shown to have been pointed out by persons of a bygone generation as the true line, or water course, called for in an old deed or grant. A field, house, meadow, or wood may be shown to have been reputed the property of a particular man or family, and to have been claimed, enjoyed, and occupied as such."

This rule has been restated and affirmed in cases too numerous for citation. The judgment of the District Court is affirmed.

Affirmed.

EASTERN OIL CO. v. HOLCOMB et al.

(Circuit Court of Appeals, Eighth Circuit. February 23, 1914.)

No. 3963.

1. COURTS (§ 356*)—FEDERAL COURTS—DECISIONS REVIEWABLE—JUDICIAL CHARACTER OF TRIBUNAL.

Under Rev. St. § 649 (U. S. Comp. St. 1901, p. 525), providing that issues of fact in any Circuit Court may be tried by the court without a jury when the parties in writing waive a jury, and Judicial Code, § 291 (Act March 3, 1911, c. 231, 36 Stat. 1167 [U. S. Comp. St. Supp. 1911, p. 243]), providing that, when in any law any reference is made to or any power conferred upon the Circuit Courts, it shall be deemed to refer to and confer such power upon the District Courts, issues of fact in the District Court may be tried without a jury, and the former rule that the decision upon such a trial by consent is the decision of an arbitrator and not reviewable no longer applies.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356.*]

Orders, decrees, and judgments reviewable in the Circuit Court of Appeals, see notes to *Salmon v. Mills*, 13 C. C. A. 374; *Taylor v. Breese*, 90 C. C. A. 566.]

2. JURY (§ 31*)—TRIAL BY COURT WITHOUT JURY—POWER OF COURT.

Rev. St. § 649 (U. S. Comp. St. 1901, p. 525), authorizing trials of issues of fact by the court without a jury when the parties so stipulate in writing, made applicable to the District Courts by Judicial Code, § 291, is not repugnant to Rev. St. § 566 (U. S. Comp. St. 1901, p. 461), providing that with certain exceptions issues of fact in the District Courts shall be tried by jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 204-219; Dec. Dig. § 31.*]

3. APPEAL AND ERROR (§ 761*)—BRIEFS—FORM AND REQUISITES.

Under Rev. St. § 700 (U. S. Comp. St. 1901, p. 570), providing that when an issue of fact is tried without a jury the rulings of the court in the progress of the trial, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed on writ of error or appeal, it is the rulings in the progress of the trial excepted to at the time that may be reviewed, and it is not proper to combine the assignments of error and argue them as if the court had power to retry the case on the merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3096; Dec. Dig. § 761.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. APPEAL AND ERROR (§ 500*)—RECORD—PRESENTATION OF GROUNDS OF REVIEW.

Where, though appellant excepted to appellee's proposed findings of fact, the record showed no ruling thereon, and the court made findings of its own, the appellate court would not search the record and ascertain for itself whether or not the objections were overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295-2298; Dec. Dig. § 500.*]

5. APPEAL AND ERROR (§ 1078*)—ASSIGNMENTS OF ERROR—WAIVER BY FAILURE TO URGE.

Questions presented by the record, but not argued by counsel, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

6. APPEAL AND ERROR (§ 274*)—RESERVATION OF GROUNDS OF REVIEW.

Exceptions to the findings in a case tried without a jury present nothing for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1591, 1592, 1605, 1606, 1607, 1624, 1631-1645; Dec. Dig. § 274.*]

7. APPEAL AND ERROR (§ 761*)—BRIEFS—FORM AND REQUISITES.

Though appellant, instead of arguing rulings excepted to, combined the assignments of error and presented the case as if the appellate court could retry it on the merits, the sufficiency of the findings to support the judgment would be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3096; Dec. Dig. § 761.*]

8. MINES AND MINERALS (§ 74*)—LEASES—ASSIGNMENT—ACTIONS—FINDINGS.

In an action for the agreed consideration for the assignment of an oil and gas lease covering land subject to a prior lease, which provided that it should be null and void unless a well was commenced within one year or unless \$160 a year was paid in advance, defended on the ground of mutual mistake and breach of warranty, where the trial court found that no well was commenced under the prior lease and that the stipulated payment was not made a judgment for plaintiffs, was supported by the findings.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 202; Dec. Dig. § 74.*]

9. MINES AND MINERALS (§ 74*)—LEASES—ASSIGNMENT—IMPLIED WARRANTY.

Where, on the assignment of an oil and gas lease covering land subject to a prior lease which provided that it should be void unless a well was commenced within one year or unless \$160 a year should be paid in advance for the delay in commencing a well, the assignors did not represent as a fact that no well had been commenced or that the payment had not been made, but merely stated that they were so informed by the lessors, and the bank in which the payment was to be deposited and the agent of the assignee had all the information that the assignors had, there was no warranty by the assignors with respect to the prior lease.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 202; Dec. Dig. § 74.*]

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Action by M. A. Holcomb and another against the Eastern Oil Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

John H. Carter, of Tulsa, Okl. (Robert J. Boone, of Tulsa, Okl., and George C. Butte and Sam H. Lattimore, both of Muskogee, Okl., on the brief), for plaintiff in error.

George S. Ramsey, of Muskogee, Okl. (C. L. Thomas, of Muskogee, Okl., on the brief), for defendants in error.

Before SANBORN and CARLAND, Circuit Judges, and RINER, District Judge.

CARLAND, Circuit Judge. Holcomb and Hall brought suit against the oil company to recover the sum of \$3,200 alleged to be due them as the purchase price of an oil and gas mining lease. The suit was commenced in the United States Circuit Court for the Eastern District of Oklahoma, February 9, 1911, and tried in the United States Circuit Court for said district, June 12, 1912. By stipulation in writing the case was tried and determined by the court without the intervention of a jury. The court heard the evidence and made special findings of fact and conclusions of law which resulted in a judgment in favor of Holcomb and Hall. The oil company has removed the case here by writ of error.

[1, 2] It is urged by counsel for Holcomb and Hall that this court has no power to review the errors assigned, for the reason that section 566, R. S. U. S. (U. S. Comp. St. 1901, p. 461), provides that "the trial of issues of fact in the District Courts, in all causes except * * * shall be by jury," and that no authority has ever been given said courts to try issues of fact without the intervention of a jury. It is true that prior to January 1, 1912, there had been no provision made by law for the trial of issues of fact in the District Court, by the court, without the intervention of a jury. Therefore it has been uniformly decided that if the parties to a civil action in the District Court, by agreement, submitted the questions of fact in dispute to a judge for decision upon the evidence, he did not exercise judicial authority in deciding, but acted rather in the character of an arbitrator, and no review of his decision could be had. *Rogers v. United States*, 141 U. S. 548, 12 Sup. Ct. 91, 35 L. Ed. 853; *United States v. Cleage*, 161 Fed. 85, 88 C. C. A. 249 (8th Ct.); *United States v. Louisville & N. R. Co.*, 167 Fed. 306, 93 C. C. A. 58 (6th Ct.); *St. Joseph Stockyards Co. v. United States*, 187 Fed. 104, 110 C. C. A. 432 (8th Ct.). It is claimed that this is still the law in the District Courts, for the reason that section 649, R. S. U. S. (U. S. Comp. St. 1901, p. 525), which provides that issues of fact in civil cases in any Circuit Court may be tried and determined by the court, without the intervention of a jury, does not apply. We think counsel are in error in this contention. Section 291 of the Judicial Code reads as follows:

"Wherever, in any law not embraced within this act, any reference is made to, or any power or duty is conferred or imposed upon, the Circuit Courts, such reference shall, upon the taking effect of this act, be deemed and held to refer to, and to confer such power and impose such duty upon, the District Courts."

This section clearly confers upon the District Courts the power to try issues of fact by the court as provided in section 649. It is claimed, however, that if this be so section 649 and section 566, which has not

been repealed, are repugnant to each other. This is not so. Section 648, R. S. U. S. (U. S. Comp. St. 1901, p. 525), provided for trial by jury in the Circuit Courts in practically the same language as 566 did in the District Courts, but section 649 has never been considered as repugnant to section 648. Section 566 or 648, when read in connection with section 649, must be construed as declaring that the trial of issues of fact in the District Courts shall be by jury, except where the parties shall stipulate in writing to waive a jury. Section 649 provides that where a jury is waived, as was done in this case, "the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." Section 700, R. S. U. S. (U. S. Comp. St. 1901, p. 570) which is applicable to this court, as well as the Supreme Court, provides as follows:

"When an issue of fact in any civil cause in a Circuit Court is tried and determined by the court without the intervention of a jury, according to section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

[3-7] We thus see that it is the rulings of the court in the progress of the trial of the cause, if excepted to at the time, that we have the power to review. No rulings to which counsel for the oil company excepted during the trial appear in the record, except certain rulings in relation to the admission and exclusion of evidence and the ruling of the court in overruling in part the demurrer of the oil company to the complaint. These rulings, although assigned as error, have not been argued either orally or in the brief; but the 57 assignments of error have been combined together and argued to the court under the heads of "Mutual Mistake," "Implied Warranty of Title," and "Breach of Warranty." In other words, the case is presented to us as if we were a court of original jurisdiction empowered to try the case upon its merits as was the District Court. Counsel for the oil company did object as is shown by the record to the proposed findings of fact requested by counsel for Holcomb and Hall; but the record shows no ruling of the court upon the same, and whether the objections were sustained or overruled nowhere appears. The court subsequently made findings of its own, and this court could not be expected to go through the record and ascertain for itself whether or not the court sustained or overruled the objections to the proposed findings. Another reason why the objections to the proposed findings do not call upon us to consider the same is that nowhere in the brief is the point made or argued that the findings of the court are not sustained by the evidence. The rule in such cases is that, if counsel declines to argue questions presented by the record, the court will not further consider them. The findings of the court under the statute had the same effect as the special verdict of a jury, and mere exceptions to a special verdict of a jury would present nothing for review; neither does the exception to the findings in the present record. It is plain therefore that there is no question open to review on the present record, except whether the facts found by the trial court support its judgment. Sec-

tion 700, R. S. U. S.; *United States Fidelity & G. Co. v. Board of Commissioners*, 145 Fed. 144, 76 C. C. A. 114 (8th Ct.); *Gibson v. Luther*, 196 Fed. 203, 116 C. C. A. 35 (8th Ct.); *Felker v. First National Bank*, 196 Fed. 200, 116 C. C. A. 32 (8th Ct.); *Keeley v. Ophir Hill Consolidated Mining Co.*, 169 Fed. 598, 95 C. C. A. 96 (8th Ct.); *York v. Washburn*, 129 Fed. 564, 64 C. C. A. 132 (8th Ct.); *Chicago G. W. Ry. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 176 Fed. 237, 100 C. C. A. 41, 20 Ann. Cas. 1200 (8th Ct.); *Allen v. Knott*, 171 Fed. 76, 96 C. C. A. 180 (8th Ct.); *Barnard v. Randle*, 110 Fed. 906, 49 C. C. A. 177 (8th Ct.). This presents a question of law to which such argument, as has been made, may be properly addressed. *Guaranty Trust Co. of New York v. Koehler*, 195 Fed. 669, 115 C. C. A. 475 (8th Ct.). Following the argument of counsel for the oil company, the questions to be considered may be arranged as follows: First, do the findings of the trial court show that there was such a mutual mistake of fact on the part of both Holcomb and Hall and the oil company, when the contract for the purchase of the lease was made, as would allow the oil company to avoid the contract; second, if the contract was a valid one, was there an implied warranty of title; and, third, if there was an implied warranty of title, was there such a breach thereof as would allow the oil company to rescind the contract. In order to make plain the contentions of counsel, it will be necessary to briefly state the nature of the transaction between the parties.

[8, 9] On November 8, 1909, Charles M. Brian and Hettie Brian, for themselves, and Charles M. Brian, as guardian of Mary Ellen Brian, executed and delivered to James Brann an oil and gas mining lease covering a tract of land in Okmulgee county, Okl. This lease contained the following clause:

"In case no well be commenced on the above premises within one year from the date hereof, this lease shall become null and void and without any further effect whatever, unless the lessee shall pay for the delay at the rate of one hundred sixty (\$160.00) dollars in advance for each and every year hereafter until a well is commenced or his lease surrendered as hereinafter provided. Such payments may be made in hand or deposited in Citizens' National Bank at Okmulgee, Oklahoma."

November 12, 1910, Hettie E. Brian, Charles M. Brian, and Charles M. Brian, as guardian of the estate of Mary Ellen Brian, a minor, made, executed, and delivered to Holcomb and Hall for the sum of \$900 an oil and gas mining lease covering the same property as the lease by the same parties to Brann. On the same day Holcomb and Hall assigned their lease to the Eastern Oil Company for the agreed consideration of \$3,200, and the further sum of \$3,200 on condition that oil should be found on the land in paying quantities. There is no dispute but what the assignment of the lease was made to the oil company and that the oil company agreed to pay therefor, the consideration above mentioned. The oil company refused to pay the \$3,200 cash for the alleged reason that the lease to Brann had been continued by the payment by Brann of the \$160 mentioned in the paragraph that we have hereinbefore quoted; no well having been commenced on the land as provided in the lease. The whole controversy, therefore, was over the question as to whether the Brann lease had

been continued in force and as to whether Holcomb and Hall had represented to the agent of the oil company that the Brann lease as a fact had been rendered void by the failure of Brann to pay \$160 in advance to the lessors or deposit the same in the Citizens' National Bank, Okmulgee, Okl., on or before the expiration of one year from date of the lease. If the payment of the \$160 was not made within the time provided for in the lease, the lease, according to its terms, became null and void, and the oil company would have no defense against the claim of Holcomb and Hall. If the payment of the \$160 was made in accordance with the terms of the lease, then the lease was continued in force; and the oil company claims that both Holcomb and Hall and itself, having believed that the Brann lease had not been continued in force by the payment of the \$160; that there was such a mistake of fact by both parties that the oil company could avoid the contract for the assignment of the Holcomb and Hall lease to it; and that, if the contract was valid, then, the lease being personal property, there was an implied warranty accompanying its sale, and, that warranty having been breached, it can avoid the contract for that reason. Under the findings made by the court, we do not think that either of the defenses of counsel for the oil company can be maintained.

The trial court found as a fact that no well was commenced on the land described in the Brann lease within one year from the date thereof, and that Brann did not pay for the delay, the sum of \$160, in advance, either to the lessors or deposit the same in the Citizens' National Bank at Okmulgee, Okl., on or before November 8, 1910. This finding in itself would defeat the claim of the oil company; but the court proceeded further and found that Holcomb and Hall did not represent as a fact that no well had been commenced upon the land or that the \$160 for the delay had not been paid to the lessors or deposited in the bank, but their statements were that they were informed by the lessors and the bank that the payment had not been made, and the court further found that the agent of the oil company, who negotiated the assignment of the lease, had all the information as to what Brann had done or not done in complying with the terms of his lease that Holcomb and Hall had. These findings compel a judgment in favor of Holcomb and Hall against the oil company, as under these findings the Brann lease had become null and void, or, if that is not so, there was no warranty.

Judgment affirmed.

**ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA v.
YOUNG.**

(Circuit Court of Appeals, Eighth Circuit. March 2, 1914.)

No. 3986.

1. INSURANCE (§ 755*)—FRATERNAL INSURANCE—AUTHORITY OF LOCAL OFFICERS.

The secretary treasurer of a local council of a fraternal insurance order has no authority to waive the constitution and by-laws of the order stipulating for payment to a beneficiary a specified sum on the death of a member in good standing, but that members shall be deemed in good standing so long only as they pay dues and assessments as they become due, and that any member failing to pay them at maturity shall, by virtue thereof, forfeit his good standing, and a practice between the local officer and a member thereof for the payment of dues and assessments after maturity is not binding on the order unless authorized or ratified.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.*]

2. APPEAL AND ERROR (§ 750*)—QUESTIONS REVIEWABLE—EXCEPTIONS.

Where, in an action against a fraternal insurance order, defended on the ground that the member was not in good standing at his death, the court over the objection of the order admitted evidence of a custom between an officer of a local council of the order and the member, for payment of dues and assessments after maturity, and defendant excepted before the jury retired to a charge that there had been testimony as to the custom, and that such testimony was withdrawn except as to the question of payment, on the ground that it failed to specify with sufficient particularity the evidence intended to be withdrawn, and the portion of the charge was assigned as error, the ruling on the evidence was reviewable, though not assigned as error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3074-3083; Dec. Dig. § 750.*]

3. APPEAL AND ERROR (§ 1053*)—REVIEW—ADMISSION OF EVIDENCE—CURING OF ERROR BY INSTRUCTIONS.

In an action against a fraternal insurance order, defended on the ground that the member was not at his death in good standing, because of his failure to pay dues and assessments at maturity, the error in admitting evidence of the custom, between the secretary of the local council and the member, permitting the payment of dues and assessments after maturity, was not cured by an instruction withdrawing the testimony as to custom, except as to the question of payment, since all the evidence as to custom related to the issue of payment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.*]

In Error to the District Court of the United States for the Southern District of Iowa; Smith McPherson, Judge.

Action by May Baker Young against the order of United Commercial Travelers of America. There was a judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

Lowry F. Sater, of Columbus, Ohio (James J. Smith, of Ottumwa, Iowa, and Vorys, Sater, Seymour & Pease, of Columbus, Ohio, on the brief), for plaintiff in error.

R. L. Parrish, of Des Moines, Iowa (Gilmore & Moon, of Ottumwa, Iowa, and A. L. Hager, of Des Moines, Iowa, on the brief), for defendant in error.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before SANBORN and CARLAND, Circuit Judges, and RINER, District Judge.

CARLAND, Circuit Judge. This action was brought by May Baker Young, as plaintiff, against the Order of United Commercial Travelers of America, as defendant, to recover as beneficiary the sum claimed to be due her upon the death of her husband, Lew H. Young, a member of the order. Section 5 of article 6 of the constitution and by-laws of the defendant provides:

"If any member of the order (other than a social member) who has paid, when due, all fees, fines, costs, dues and assessments charged or levied against him, shall sustain, during the continuance of his membership, and while in good standing, bodily injury effected through external, violent and accidental means, which alone and independent of all other causes shall occasion death immediately or within six months from the happening thereof, the Order of United Commercial Travelers of America, within ninety days of receipt of satisfactory proof of said accidental death, shall pay to the person or persons entitled thereto the sum of five thousand (\$5,000.00) dollars, and shall also pay to the person or persons entitled thereto, as aforesaid, thirteen hundred (\$1,300.00) dollars in weekly installments of twenty-five (\$25.00) dollars each, the first of such weekly installments to be paid within ninety days from the receipt of such proof of death."

Section 4 of article 4 of the constitution of defendant provides:

"All members of the order shall be considered in good standing so long only as they pay, when and as the same become due and payable, all fees, fines, costs, dues and assessments charged or levied against them, and support the principles of the order, and faithfully observe its constitution, by-laws, rules and edicts approved by the Supreme Executive Committee or the Supreme Council, as such constitution, by-laws, rules and edicts now exist, or as they may hereafter be added to, revised, altered or amended."

Section 7 of article 4 provides:

"Any member who fails to pay the fees, fines, costs, dues or any assessment charged or levied against him, when and as same become due and payable, shall immediately on the happening of such default and by virtue thereof forfeit his good standing in the order, and he and every person or persons claiming under him and by virtue of his membership shall likewise, at the time such default occurs and by virtue thereof, forfeit all right to indemnity and benefits of whatsoever character; while he thus continues in bad standing, the sending to him of notice of any assessment or the making of demand on him for any fees, fines, costs, dues or assessments shall not constitute or be a waiver of such forfeiture."

As a defense the defendant pleaded as follows:

"The defendant further alleges that the said Lew H. Young, at the time of his death, had failed to pay assessment No. 105, which became due and payable on the 24th day of April, 1911, and that by reason of said default, and by virtue thereof, he forfeited his good standing in the defendant order, and continued to be in default up to and including the 10th day of May, A. D. 1911, the date of his death, and that by reason of his negligence, refusal, and failure to pay said assessment on or before the 24th day of April, 1911, and within the time as provided for by the provisions of the constitution and by-laws of the defendant order, the said Lew H. Young forfeited any and all rights to indemnity, or death benefits, to which he, the plaintiff, or any other person or persons, might claim under and by reason of his membership in said defendant order."

On the trial of the action the defendant called as a witness, C. C. Porter, secretary treasurer of Ottumwa Council No. 169, who testified

on direct examination that Lew H. Young, at the time of his death on May 10, 1911, had not paid assessment No. 105, due April 24, 1911, nor his quarterly dues which were due and payable April 1, 1911. On cross-examination counsel for the plaintiff, for the purpose of showing that there was a practice or custom prevailing with reference to the payment of dues and assessments by some members of Ottumwa Council No. 169, among whom was Lew H. Young, which permitted those members to pay their dues or assessments at any time prior to the date that the secretary treasurer was obliged to report the same to the Supreme Council, propounded the following questions to the witness:

"Q. Didn't you frequently, when he failed to pay his dues, didn't you pay them yourself?

"Mr. Sater: I object to that as incompetent, irrelevant, and immaterial.

"The Court: He may answer.

"A. Occasionally. Q. Occasionally paid them yourself? A. Yes, sir. Q. Didn't you have an understanding with Mr. Young that he would not be obliged to pay his dues until the time you had to pay them to the company? A. No, sir. Q. Do you remember conversation I had with you, Mr. Moon and I had with you? Along last summer in this city? A. Perhaps. Q. Didn't you at that time say to me and Mr. Moon that there were 15 or 20 of these members that you were carrying along in this way? A. Perhaps. Q. Didn't you say you were interested in carrying them along? A. Perhaps. Q. Didn't you say to us that time that if Lew Young had been living when you sent in your money you would have sent in the money and reported him in good standing?

"Mr. Sater: We object to that as not binding upon the company. (No ruling).

"A. Perhaps. Q. Isn't it true. A. It may be true. If you and Judge Moon would say that I said so, then I would confirm that I said so. Q. Isn't it true that you paid these dues whether you paid them in or not?

"Mr. Sater: I would like to make one general objection here, your honor, as incompetent and immaterial, and anything done by this witness was not binding upon the defendant.

"The Court: Objection overruled and defendant excepts.

"Q. You are acquainted with Mrs. Young? A. Yes, sir. Q. She frequently called you upon the phone regarding Mr. Young's dues? A. Never, to my knowledge. Q. When Mr. Young's dues would become due and they were not paid, would she not call you up on the phone, and you said, 'That is all right until I have to send off the money?' A. Never, to my best knowledge and belief."

[1] It was clearly error to permit the witness to be interrogated as to the custom and practice existing in regard to the collection of dues from Lew H. Young, as Porter had no authority whatever to waive the provisions of the constitution and by-laws of the order, and it was not claimed or shown that the order had ever authorized or ratified any such practice. *Northern Assurance Co. v. Grandview Bldg. Assoc.*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213; *Modern Woodmen of America v. Tevis*, 117 Fed. 369, 54 C. C. A. 293; *Supreme Council of Royal Arcanum v. Taylor*, 121 Fed. 66, 57 C. C. A. 406; *Scottish Union & Nat. Ins. Co. v. Encampment Smelting Co.*, 166 Fed. 231, 92 C. C. A. 139; *New York Life Ins. Co. v. Slocum*, 177 Fed. 842, 101 C. C. A. 56; *Locomotive Engineers' Mut. Life & Acc. Ins. Assoc. v. Thomas*, 206 Fed. 409, 124 C. C. A. 291; *Slocum v. New York Life Ins. Co.*, 228 U. S. 374, 33 Sup. Ct. 523, 57 L. Ed. 879.

The ruling of the court in overruling the objection of counsel, however, is not assigned as error. This omission undoubtedly was caused by the fact that when the court came to charge the jury, it used the following language:

"There has been a good deal of testimony in this case with reference to the habit or custom at Ottumwa between Mr. Young and the witness Porter who was secretary of the local organization. That testimony is withdrawn from your consideration except as to one phase; as to the question of payment."

[2, 3] Laying aside the question as to whether the court could have cured the error committed in the admission of evidence as to a custom and practice between the witness and Lew H. Young, by merely saying to the jury that it was withdrawn, we think that the language of the court wholly failed to accomplish the purpose that the court had in view. The court withdrew from the consideration of the jury the testimony with reference to the habit or custom at Ottumwa between Mr. Young and the witness Porter, except on the question of payment. All of the evidence as to the habit or custom between Lew H. Young and the witness Porter was on the question of payment. So far as the jury were concerned nothing was withdrawn, and the jury may have found that by the custom and practice existing between the witness and Lew H. Young, the payment of assessment and dues at the time they were required to be paid by the constitution and by-laws of the order, was not necessary. Counsel for the defendant, before the retirement of the jury, excepted to the language above set forth, on the ground that it failed to specify with sufficient particularity the evidence intended to be withdrawn, and this portion of the charge of the court is assigned as error. So we think that the court's attention, both at the time the evidence was admitted and at the time the charge was given to the jury, was sharply called to the contention of counsel for the defendant in regard to this character of evidence. We, therefore, are of the opinion that the error committed by the court in the admission of evidence as to the custom existing between Lew H. Young and Secretary Porter was not cured by what the court said to the jury, and that in the case at bar the error was very prejudicial for the reason that the record presents a very serious question as to whether the assessment due April 24, 1911, or the quarterly dues which became due and payable April 1, 1911, were ever paid; and the evidence in regard to the custom might have been all that saved the case for the plaintiff. We do not, however, express any opinion as to whether the evidence as to payment did or did not require the case to be submitted to the jury. There was nothing stated by the court to the jury upon the question of waiver, for the reason, undoubtedly, that the trial court thought the evidence on that question was withdrawn. So the jury was not instructed upon the subject of waiver, and under the charge of the court the jury might well consider all the evidence that was admitted upon the question of payment.

For the error in admitting the evidence as to the custom and practice in regard to the payment of dues and assessments existing be-

tween Secretary Porter and Lew H. Young, the judgment below must be reversed and the case remanded, with instructions to grant a new trial; and it is so ordered.

ILLINOIS SURETY CO. v. UNITED STATES, to Use of MILLER et al.

(Circuit Court of Appeals, Second Circuit. February 10, 1914.)

No. 147.

1. ACTION (§ 22*)—CONTRACTORS' BONDS—CREDITORS' ACTION—FORM.

Under Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1911, p. 1071), requiring contractors with the United States on any public work to furnish a bond, and providing that any person furnishing labor or materials may intervene in any action thereon by the United States, or may sue thereon if no action is brought by the United States, and that in such suit other creditors may file their claims and be made parties thereto, it is intended that there shall be one suit in which all creditors shall be given notice, and an opportunity to intervene and share ratably in the fund, and this distinctly marks the proceeding as an equitable one, and hence, where the action was brought at law, it should have been transferred to equity.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 124-139, 143, 145; Dec. Dig. § 22.*]

2. ACTION (§ 37*)—FORM—OBJECTIONS—MANNER OF RAISING.

While the better way to have raised the objection that an action brought at law should have been brought in equity would have been by a motion to transfer it to the equity calendar, it was sufficiently raised by objections that the causes of action were in equity and that the court had no jurisdiction.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 311-319; Dec. Dig. § 37.*]

3. PRINCIPAL AND SURETY (§ 104*)—DISCHARGE—EXTENSION OF TIME OF PERFORMANCE.

A surety on the bond of a contractor with the United States, conditioned for the performance of the contract according to its true intent and meaning, "as well during any period of extension of said contract that may be granted on the part of the United States as during the original term," was not discharged by an extension of the time of performance granted without the surety's consent, as the quoted provision could only be given effect by applying it to extensions granted by the United States without consulting the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 186-190, 193-195, 197-199, 200; Dec. Dig. § 104.*]

4. UNITED STATES (§ 67*)—CONTRACTORS' BONDS—STATUTORY PROVISIONS.

The bond of a contractor with the United States, conditioned for the performance thereof during any period of extension of the contract, granted by the United States, as well as during the original term, was not inconsistent with Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1911, p. 1071), requiring contractors to execute the usual penal bond with the additional obligation to promptly make payment to all persons supplying labor and materials.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*]

In Error to the District Court of the United States for the Eastern District of New York.

Action by the United States, to the use of Frank Miller and others, against the Illinois Surety Company. Judgment for the usees, and defendant brings error. Reversed, with directions.

Nelson L. Keach, of New York City (L. Laflin Kellogg and Alfred C. Pette, both of New York City, of counsel), for plaintiff in error.

George W. Bristol, of New York City (Woolsey Carmalt, of New York City, of counsel), for defendants in error Hazell and others.

George R. Coughlan, of New York City, and Arthur M. Allen, of Providence, R. I. (Henry W. Goodrich, of New York City, of counsel), for defendant in error J. S. Packard Dredging Co.

King & Booth, of New York City (Frederick P. King, of New York City, of counsel), for defendant in error Miller.

Carpenter & Park, of New York City (Henry E. Mattison, of New York City, of counsel), for defendant in error E. S. Belden & Sons.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. October 13, 1909, Mitchell & Co., entered into a contract with the United States for certain work at Ft. Terry. They gave a bond in the sum of \$28,000 with the Illinois Surety Company, the defendant, as surety, providing:

"Now, therefore, if the above-bounden Mitchell & Co., their heirs, executors, or administrators, shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions, and agreements in and by the said contract agreed and covenanted by said Mitchell & Co. to be observed and performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same, and shall promptly make full payments to all persons supplying them labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise to remain in full force and virtue."

The contract required the work to be completed on or before September 10, 1910, and 20 per cent. of the price was to be retained by the United States until final completion. Time of performance was extended to January 13, 1911, with the written consent of the surety company. The contractors, however, being unable to complete by that date, the United States, without consulting the surety company, permitted them to complete at any time beyond that date. The contract was completed March 2, 1911, on which date the United States paid the contractors the reserved 20 per cent., amounting to \$10,947.81.

[1] September 20, 1911, the Frank Miller Lumber Company, a sub-contractor which had furnished to Mitchell & Co. materials which were used in the work, began a suit on the bond. September 28th the District Judge made an order requiring notice to be sent by mail on or before October 7th to all known creditors of Mitchell & Co. and published in the Brooklyn Daily Eagle to the effect that the suit had been brought and that all creditors might intervene therein. Thereafter petitions of various creditors were filed, asking leave to intervene as parties plaintiff and to have such other and further relief

as to the court may seem just and proper. Upon these petitions the District Judge made orders of intervention, and thereafter the petitioners served complaints as intervening plaintiffs. The Illinois Surety Company having answered the complaints, the cause came on for trial on the law calendar in the Eastern District of New York. When the cause was reached, the Illinois Surety Company objected that the causes of action in the complaints were in equity and not at law and that the court had no jurisdiction to try the suit. This motion was overruled and an exception taken. After the testimony was in, the court directed a verdict in specific amounts for the various parties plaintiff, to which the Illinois Surety Company excepted.

The act of August 13, 1894, entitled "An act for the protection of persons furnishing materials and labor for the construction of public works," did contemplate separate actions at law upon the bond by any and all creditors in the name of the United States but for their own use. Parties obtaining judgment would be paid in the order in which actions were brought. Congress subsequently amended the statute by the act of February 24, 1905, under which the suit in question was instituted, so as to read as follows:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, that where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: And provided further, that where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made

party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond shall be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: Provided further, that in all suits instituted under the provisions of this act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the state or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor."

We see in this amendment an intent on the part of Congress to substitute, for a number of independent actions at law in which vigilant had a priority over nonvigilant creditors, a suit in which all creditors shall be given notice and an opportunity to intervene and share ratably in a fund intended for the equal protection of all. This provision, which is not adapted to nor indeed available in actions at law, distinctly marks the proceeding as equitable. We are not convinced by the able presentation of the contrary view in *United States v. Stannard* (D. C.) 207 Fed. 198, which is the only case in which the question has been raised down to the present time. In the First circuit, where under the act of 1894 a large number of actions at law had been begun by creditors upon such a bond, an application by the surety to a court in equity to restrain the proceedings at law and bring all the creditors into court for an accounting was sustained. *American Surety Co. v. Lawrenceville Cement Co.* (C. C.) 96 Fed. 25.

[2-4] The better way to have raised the question would have been by moving to have the cause transferred from the law to the equity calendar, but it has been sufficiently raised. As the cause will have to be tried again, we think it proper to express our opinion on a question not actually necessary to this decision, but which is sure to arise again. The defendant contends that the indefinite extension of the contract given by the United States without its consent has discharged it as surety. But the provision in the bond that the obligation of the surety shall continue "as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same" leads to a contrary conclusion. If extensions with the surety's consent had been contemplated, the clause would be one of pure supererogation. It can only be given effect by applying it to extensions granted by the United States without consulting the surety. The statute does not prescribe the form of the bond, but only that the surety shall be bound for, first, the faithful performance of the contract, and, second, for the prompt payment of all persons who shall have furnished labor and materials in the prosecution of the work, provided for in the contract. The provision in the bond as to extensions is in no way inconsistent with the statute and must be given effect.

The judgment is reversed, and the court below directed to transfer the cause to the equity calendar for hearing.

Modification of Mandate.

The mandate may be modified so as to provide that the judgment be reversed, without prejudice to a motion in the District Court to transfer the cause to the equity calendar.

FIRST NAT. BANK OF CAPITOL HILL v. MURRAY, Comptroller of the Currency.

(Circuit Court of Appeals, Eighth Circuit. February 16, 1914.)

No. 3901.

1. BANKS AND BANKING (§ 234*)—NATIONAL BANKS—ORGANIZATION.

There is no right to organize and carry on the business of a national bank except on the conditions and in the manner prescribed by the acts of Congress regulating national banks (Rev. St. U. S. §§ 5134, 5190, 5191 [U. S. Comp. St. 1901, pp. 3454, 3486]; Act March 14, 1900, c. 41, 31 Stat. 48 [U. S. Comp. St. 1901, p. 3461]; Act May 1, 1886, c. 73, 24 Stat. 18 [U. S. Comp. St. 1901, p. 3462]; Act June 20, 1874, c. 343, 18 Stat. 123 [U. S. Comp. St. 1901, p. 3487]; Act March 3, 1887, c. 378, 24 Stat. 559 [U. S. Comp. St. 1901, p. 3490]), of which all must take notice.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 879-967, 970-1127; Dec. Dig. § 234.*]

2. BANKS AND BANKING (§ 235*)—NATIONAL BANKS—CONTROL—COMPTROLLER OF CURRENCY—ACTS—REVIEW.

Acts of the Comptroller of the currency within the National Banking Law conferring on him extensive powers of control and visitation over national banks are not subject to review by the courts.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 879-887; Dec. Dig. § 235.*]

3. BANKS AND BANKING (§ 239*)—NATIONAL BANKS—ORGANIZATION—CHANGE OF LOCATION—CONDITIONS—COMPTROLLER OF CURRENCY.

The National Banking Acts require the Comptroller's certificate of organization of a national bank to state the place where its operations are to be carried on, and declares that its business shall be transacted at an office or banking house at the place specified. The reserve required of a national bank in a nonreserve locality is but 15 per cent. of its deposits, while 25 per cent. is required in a reserve city. A national bank in a city of more than 50,000 is required to have a capital of \$200,000, but with the approval of the Secretary of the Treasury, it may, in a place of 3,000 inhabitants or less, have a capital of \$25,000. Such banks may change their place of business from one place to another in the same state not more than 30 miles distant with the approval of the Comptroller, but such change is not valid until the Comptroller has issued his certificate of approval. *Held*, that where a national bank located in a suburb outside the corporate limits of Oklahoma City, having a population of not to exceed 3,000, was chartered with a capital of \$25,000, and, after the suburb had been included in the city, the Comptroller refused permission to move the bank's place of business into the business section of the city unless it increased its capital to at least \$200,000 and agreed to comply with the law regulating reserves in reserve cities, of which Oklahoma City was one, the alteration of the city's boundaries did not entitle the bank to so remove without compliance with the Comptroller's conditions, and, it having removed without fulfilling such conditions, the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Comptroller was entitled to maintain a suit for the forfeiture of its charter.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 893; Dec. Dig. § 239.*]

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Action by Lawrence O. Murray, as Comptroller of the Currency, against the First National Bank of Capitol Hill. Judgment for plaintiff, and defendant brings error. Affirmed.

C. B. Stuart and A. C. Cruce, both of Oklahoma City, Okl., and W. I. Gilbert, of Los Angeles, Cal., for plaintiff in error.

Isaac D. Taylor, Asst. U. S. Atty., of Guthrie, Okl. (Homer N. Boardman, U. S. Atty., of Oklahoma City, Okl., on the brief), for defendant in error.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. The First National Bank of Capitol Hill, Okl., complains of a judgment in a suit by the Comptroller of the Currency forfeiting its charter because its directors knowingly violated the national banking laws. Section 5239, Rev. St. (3 U. S. Comp. St. 1901, p. 3515).

The bank was chartered in 1909 with a capital of \$25,000 to do business in the village of Capitol Hill, Okl., a suburb outside the corporate limits of Oklahoma City. Less than a month afterwards, by proceedings under the local laws, the limits of the city were enlarged to include the village. Capitol Hill had not exceeding 3,000 inhabitants; Oklahoma City a population of over 50,000. Thereupon the bank, desiring to remove its banking house to the business section of Oklahoma City within its original limits, applied to the Comptroller for permission to do so. The Comptroller refused to permit the change unless the bank increased its capital stock to at least \$200,000, changed its name to Capitol Hill National Bank of Oklahoma City, and agreed to comply with the provisions of the law relating to reserves to be held by banks in reserve cities, Oklahoma City being of that character. The bank having declined to comply with these conditions and having removed its place of business to the location desired, the Comptroller brought action with the result above indicated.

The statutes relating to the situation provide as follows: The organization certificate of a national banking association must state the name adopted which is subject to the approval of the Comptroller. It must also state the place where its operations of discount and deposit are to be carried on, and its usual business shall be transacted at an office or banking house in the place so specified. The reserve required to be maintained by a national bank in a nonreserve locality is 15 per cent. of its deposits, while in a reserve city it is 25 per cent. Generally a national bank cannot be organized with a capital less than \$100,000, nor, in a city of more than 50,000 inhabitants, with a capital less than

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

\$200,000; but, with the approval of the Secretary of the Treasury, it may, in a place of 3,000 inhabitants or less, have a capital of at least \$25,000, and in a place of not exceeding 6,000 inhabitants a capital not less than \$50,000. A national bank may change its name or the "place" where its operations of discount and deposit are carried on to any other "place" in the same state not more than 30 miles distant with the approval of the Comptroller, but no such change shall be valid until the Comptroller has issued his certificate of approval. Sections 5134, 5190, Rev. St. (U. S. Comp. St. 1901, pp. 3454, 3486); Act of March 14, 1900, c. 41, 31 Stat. 48 (U. S. Comp. St. 1901, p. 3461); Act of May 1, 1886, c. 73, 24 Stat. 18 (U. S. Comp. St. 1901, p. 3462); section 5191, Rev. St. (U. S. Comp. St. 1901, p. 3486); Act June 20, 1874, c. 343, 18 Stat. 123 (U. S. Comp. St. 1901, p. 3487); Act March 3, 1887, c. 378, 24 Stat. 559 (U. S. Comp. St. 1901, p. 3490).

[1] There is no right to organize and carry on the business of a national bank except upon the conditions and in the way prescribed by the acts of Congress, of which all must take notice. *McCormick v. Market Bank*, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817.

[2, 3] Extensive powers of control and visitation have been confided to the Comptroller of the Currency, and his acts within the law are not subject to review by the courts. The above provisions of the acts of Congress were intended to secure uniformity, efficiency, and safety in the conduct of the business authorized, and they should be construed in the light of that purpose. It is important that there should be a due proportion between the capitalization and the amount of deposits which may reasonably be expected in a village, town or city in which a bank is located. The value of a bank as an aid to business is affected by the amount it is authorized to lend its customers, and a national bank is prohibited from lending a single borrower more than a prescribed per cent. of its paid capital. The larger or more populous the locality, the greater, ordinarily, may be the needs of customers. Again, the maximum limit of the required surplus which makes for financial soundness of such institutions is also proportioned to the amount of capital. The reserve required by the law was 15 per cent. in Capitol Hill; it is 25 per cent. in Oklahoma City. We do not think the Capitol Hill Bank acquired, through the action of the local authorities, immunity from those requirements of the Comptroller which could have been imposed had it first sought a certificate of authority to do business in Oklahoma City. It insists upon carrying its meager equipment just acquired into the larger and more important field of action solely because of a local occurrence foreign to the spirit and intent of the federal statutes and in which no one charged with the administration of those statutes participated. If it should prevail in this, a way is pointed out by which interested persons advised of impending changes of municipal limits may evade the commands and prohibitions of Congress on a subject peculiarly within its exclusive jurisdiction. Had the bank sought authority at first to do business in the city on village conditions, it would certainly have been refused as contrary to law; it should not be indirectly secured in the way shown. Though the separate identity of the village has been by the action of

the local authorities and for local governmental purposes merged in that of the city, the city is not in the circumstances of this case the same "place" as the village within the meaning of the federal statutes and the action of the Comptroller sought and obtained by the organizers of the bank.

The judgment is affirmed.

THULLEN v. TRIUMPH ELECTRIC CO.

(Circuit Court of Appeals, Third Circuit. March 30, 1914.)

No. 1817.

INJUNCTION (§ 143*)—PRELIMINARY INJUNCTION—RIGHT TO WRITE—EQUITY RULES.

Where, in a suit to compel specific performance of a contract to assign to complainant any patents obtained on inventions conceived by defendant while in complainant's employ, the bill charged that defendant had obtained a specific patent on an electric motor controller, but had refused to assign the same, and was endeavoring to sell the patent to others, and, if he succeeded in transferring the same to innocent third parties, complainant would be remediless, it sufficiently showed that in that event complainant would suffer immediate and irreparable loss, so as to entitle it to a preliminary injunction without notice against such transfer, under equity rule 73 (33 Sup. Ct. xxxix), providing that no restraining order shall be granted without notice, unless it clearly appears from specific facts that immediate or irreparable loss or damage will result from the refusal thereof.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 315; Dec. Dig. § 143.*]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Suit by the Triumph Electric Company against Louis H. Thullen. From an interlocutory decree, granting complainant a preliminary injunction (209 Fed. 938), defendant appeals. Affirmed.

E. H. Fairbanks and Furth, Singer & Bortin, all of Philadelphia, Pa., for appellant.

Henry N. Paul, Jr., of Philadelphia, Pa., and Lawrence K. Sager, of New York City, for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. This is an appeal by the defendant below from an interlocutory decree granting a preliminary injunction, upon a bill of complaint, duly sworn to, alleging that by virtue of certain agreements between complainant and defendant, complainant is the owner of letters patent No. 1,070,638, issued to defendant August 19, 1913, and asking for a decree establishing such ownership and compelling the defendant to execute a proper transfer of the same to plaintiff. From the allegation of the bill, the moving affidavits, and the opinion of the court below, granting the motion for a preliminary injunction, the following statement of facts is summarized:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The complainant, the Triumph Electric Company, is a corporation engaged in the manufacture of electric apparatus and machinery of various general types, including electric motors for various purposes. The defendant was employed by the complainant from about December, 1909, until April, 1913, as its chief electrical engineer. Just before the time of his employment, the parties made an agreement in the form of a letter, dated November 22, 1909, which is set forth in the bill of complaint. By subsequent letters, this agreement was kept in force until February 1, 1913, with the exception of a change in the amount of compensation and terms of payment not here material.

The making of these agreements is not in controversy, and it is conceded that the particular part of the agreement involved is contained in the second and third paragraphs of the letter of November 22, 1909, as follows:

"It is mutually understood and agreed that you will devote your entire time and attention to the interests of this company, that, while in its employ, in the event of any design being capable of being made the subject-matter of a patent application, such application and patent shall be assigned to the company, they paying the necessary attorney and Patent Office fees.

"It is understood that this does not apply to any patentable design you may discover, not applicable to the line manufactured by this company."

While the defendant was employed under this agreement, he invented a "control system for electric motors" and applied for a patent upon said system on December 11, 1912. The patent was granted to defendant August 13, 1913, after his employment had terminated. Complainant alleges that, upon learning of the granting of this patent, and that defendant was endeavoring to dispose of the same to other parties, it promptly brought the suit in the case now before us, on November 20, 1913. The bill alleges that the plaintiff was engaged in the manufacture and sale of electrical apparatus of all types and classes for many different purposes, and that the defendant has acted as its chief electrical engineer and had supervision of the design and manufacture of electrical apparatus and systems of all kinds, including control systems for electric motors, and that in pursuance of his duties as such electrical engineer, defendant made experiments and research work, particularly on the design of control systems for electric motors, in the factory and at the expense of the complainant, these experiments and research work leading to the development and invention by the defendant of improved designs in various types and classes of apparatus and electrical systems.

The bill further alleges that, while in the employ of the plaintiff, the defendant invented and applied for the patent here in controversy, for "control system for electric motors," that the invention of this patent was made by the defendant in the course of his regular duties, under the terms of the agreement, and that the apparatus embodying the patented system was built at plaintiff's factory, at the expense of the plaintiff, for one of its customers, in the regular course of plaintiff's business. It is further alleged, and the allegation is supported by the moving affidavits, that the device of the said patent was applicable to the class or line of goods manufactured by complainant.

Motion was made for a restraining order, upon the affidavit of the

president of the complainant company setting forth that he had been informed and believed that defendant was about to dispose of the title or rights under the patent, and that he is continuing the endeavor to make such disposal. The affidavit further states that the only recourse which plaintiff has for protecting its rights under the patent and to prevent an innocent third party from obtaining the rights thereunder, without notice of plaintiff's claim, is to resort to this action and obtain a restraining order, preventing transfer of such rights without notice. Appellant objects to the granting of the restraining order, on the ground that it was *ex parte*, without notice to defendant and without any averment of "immediate and irreparable loss or damage," contrary to the requirement of the seventy-third equity rule of the Supreme Court (33 Sup. Ct. xxxix). As that rule only requires that no restraining order shall be granted without notice to the opposite party, unless it shall clearly appear from specific facts that immediate and irreparable loss or damage will result to the applicant, it is only necessary to point out what is very obvious from the record, that the specific facts shown by affidavit make it appear that such irreparable loss to the complainant will occur unless it may have the restraining order and preliminary injunction appealed from, if at final hearing the complainant establishes his title to the property which is the subject matter of the suit.

Defendant does not deny that he was attempting to dispose of the patent, and it is apparent that if such transfer were made to innocent third parties, for value, without notice, complainant would be remediless, so far as any enforcement of its right to a transfer of the patent from the defendant is concerned, should that right be established by final decree.

There could hardly be a better illustration of the office and necessity of a restraining order than is presented by the case before us.

The preliminary injunction as decreed is the ordinary one issued for the purpose of preserving the subject matter in dispute, until time and opportunity is afforded for a judicial investigation of the rights in controversy. The learned judge of the court below has carefully discussed the moving papers for the preliminary injunction and the counter affidavits of the defendant, and has found a *prima facie* case in favor of the complainant, justifying him in the exercise of his judicial discretion in granting the preliminary injunction asked for. He has, moreover, carefully safeguarded the defendant's rights, by requiring that the complainant shall give bond in \$5,000 to secure defendant from loss, in the event of complainant's failing at final hearing to establish its right to the ownership of the patent.

From a careful examination of the record and the opinion of the court below, we think that neither the restraining order nor the preliminary injunction was improperly or unwisely issued. The decree of the court below is therefore affirmed.

ARCHARD v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 5, 1914.)

No. 3961.

(Syllabus by the Court.)

1. INDIANS (§ 38*)—INTRODUCING LIQUOR INTO INDIAN COUNTRY—SUFFICIENCY OF EVIDENCE.

The testimony upon the charge of introducing liquor into a county of Oklahoma which was formerly a part of the Indian Territory (Act March 1, 1895, c. 145, 28 Stat. 693) examined, and *held* sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 22, 64, 66; Dec. Dig. § 38.*]

2. INDIANS (§ 35*)—INTRODUCING LIQUOR INTO INDIAN COUNTRY—ELEMENTS OF OFFENSE.

Where, in a prosecution for introducing liquor into a county of Oklahoma which was formerly a part of Indian Territory, the proofs showed that the plaintiff in error drove a buggy which contained, and which he knew to contain, intoxicating liquors, from the state of Texas into the portion of Oklahoma which was formerly Indian Territory, he is guilty of introducing such liquor, and this whether his purpose in so transporting it was to aid the owner of the liquor, who was in the buggy with him, or not, and this also whether he had a financial interest in such liquor or not.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 61, 62; Dec. Dig. § 35.*]

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

John Archard was convicted of introducing liquor into what was formerly a part of the Indian Territory, and brings error. Affirmed.

Guy H. Sigler, of Ardmore, Okl., for plaintiff in error.

C. C. Herndon, Asst. U. S. Atty., of Muskogee, Okl. (D. H. Linebaugh, U. S. Atty., of Atoka, Okl., and Frank Lee, Asst. U. S. Atty., of Shawnee, Okl., on the brief), for the United States.

Before SANBORN and SMITH, Circuit Judges, and POPE, District Judge.

POPE, District Judge. Archard was prosecuted in the trial court for introducing liquor into a county of Oklahoma which was formerly a part of the Indian Territory. The case made by the testimony is briefly stated. On Saturday, May 25, 1912, one Bill Willis, a shoemaker, and the defendant Archard, each living at Madill, Okl., started from Madill at 4:30 in the morning for a trip by buggy to Denison, Tex., a distance overland of about 35 miles. The buggy was hired by Willis at a livery stable owned by Archard's brother, and Archard was sent by his brother as driver and as caretaker of the team. There was a railroad running direct from Madill to Denison. Reaching Denison about 11 in the morning, Archard put up his team and went to call on some friends. Willis meanwhile obtained from one of the railroads at Denison a consignment of whisky there held and addressed to him, and, by some method not disclosed by the evidence, this whisky reached

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the buggy in which Archard and himself had come. They started on the return trip to Madill about 3:30 in the afternoon of the same day. They crossed the Red river, which is at that point the boundary line between Texas and that part of Oklahoma formerly Indian Territory, at a place called Thompson's Ferry, and proceeding farther on their journey reached Kinston, a settlement some 10 or 12 miles from the crossing, between 1:30 and 2:00 o'clock Sunday morning. Here the city marshal, Thompson by name, who had been advised of their movements and who was awaiting their arrival at a house on the roadside, commanded them to halt. At this particular moment Archard, although seated on the right-hand side of the buggy, was not driving, having, it seems, gone to sleep about two miles out of Kinston. The buggy was headed west; Archard was on the right-hand or north side thereof; Willis on the left-hand or south side. The officer approached the vehicle from and upon the latter or south side. As he did so, Archard holding a pistol across the lap of Willis fired upon the officer. The team instead of being halted was thereupon driven more rapidly westward and as it disappeared a further shot was fired from it. The officer, who was now behind the buggy, also fired, and Willis was killed. The buggy, however, continued westward for about half a mile but after about 15 minutes Archard returned with it, reporting that Willis was dead. Being asked "where the whisky was," he replied it was "there in the buggy." An examination revealed 27 quart bottles of whisky loose on the floor of the buggy, some of them without wrappings and on the front part of such floor. Archard was intoxicated.

[1] It is said first that this carrying of the whisky into Oklahoma was not contrary to any law. But the introduction was admittedly from Texas into a county of Oklahoma which was formerly a part of the Indian Territory and thus within the Act of March 1, 1895, 28 Stat. 693. *United States v. Wright*, 229 U. S. 226, 236, 33 Sup. Ct. 630, 57 L. Ed. 1160; *Ex parte Webb*, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248. There is nothing in *Clairmont v. U. S.*, 225 U. S. 551, 32 Sup. Ct. 787, 56 L. Ed. 1201, or *Evans v. Victor*, 204 Fed. 361, 122 C. C. A. 531, contrary to this.

But it is said, passing this, that defendant had nothing to do with the matter, being simply a hired driver connected neither by interest nor by purpose with the alleged introduction and without knowledge of the presence of the liquor in the buggy. The undisputed facts of the case left a very restricted margin of inquiry. There was confessedly an introduction. The only question left was as to whether it involved Archard. He was undoubtedly connected as a physical agency, for he drove the buggy which carried the whisky across the state line. He thus physically introduced it. Did he do so knowingly? If not, he simply drove a buggy from one state to another, and that, of course, was no violation of law. We are of opinion that upon this issue of knowledge there was sufficient evidence to sustain the finding. The enterprise was an unusual one: A long overland trip with a hired team when the speedy and presumably cheaper facilities of a direct railroad route were available; a journey beginning and ending in the dead of night and thus affording a cloak for a secret exit from and entrance into the prohibited territory. There was also the improbability of a load being

placed in the buggy which defendant had in his charge, without his knowing it; the improbability of his traveling ten hours over a country road without hearing the rattling of the bottles; the improbability of not seeing such bottles as they lay scattered about him on the floor, some of them in the front part of the buggy; the fact that at the conclusion of this ten-hour trip he was intoxicated, indicating that he had not only been transporting but using whisky on the way; his resistance of the officer and his firing upon him; his flight; his answer to the question as to where the whisky was, that it was "in the buggy"—all of these circumstances taken together made, in our judgment, a case for the prosecution on the issue of knowledge. We, of course, do not overlook the fact that the defendant testified in denial of much of this. But the jury had the right to believe the witnesses for the prosecution rather than him. That they did so affords no ground of legal exception.

[2] There remain to be dealt with two criticisms upon the charge of the court. One is that the court should have charged, as requested, that there could be no conviction unless what was done by defendant was "for the purpose of aiding, abetting or assisting the said Bill Willis in bringing whisky" into the prohibited territory. But this was no necessary element of the offense. If Archard knew that his buggy was loaded with whisky and so knowing drove it across the line, he was guilty of introducing it. It was immaterial whether such act resulted from a purpose to aid Willis in the matter or a desire to earn for his brother the hire of the team or from some other cause. The act knowingly done itself speaks and independent of the cause sought to be aided constituted a violation of law. Equally untenable is the second contention, embodied in one of the requests to charge, that an interest in the whisky introduced was essential to guilt. From the standpoint of the law and its purposes it was immaterial whether Archard was introducing his own liquor or that of somebody else. It is sufficient that he introduced.

The judgment is affirmed.

LARKIN et al. v. BURKE.

(Circuit Court of Appeals, Second Circuit. February 10, 1914.)

No. 85.

MASTER AND SERVANT (§ 182*)—LIABILITY FOR INJURIES—NEGLIGENCE OF FELLOW SERVANT.

Labor Law N. Y. (Laws 1909, c. 36) § 200, as amended by Laws 1910, c. 352 (Consol. Laws, c. 31), providing that when personal injury is caused to an employé by reason of the negligence of any person in the employer's service intrusted with any superintendence or authority to direct, control, or command any employé in the performance of his duty, the employé or his executor or administrator shall have the same right of compensation and remedy as if he had not been an employé, abolishes the fellow-servant rule whenever the injury is caused by the negligence of a person having authority over any employé, even though he had no authority over the employé injured; and hence, where the foreman of a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

shovel gang was injured by the negligence of a blasting foreman, the employer was liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 371, 372; Dec. Dig. § 182.*]

In Error to the District Court of the United States for the Western District of New York.

Action by Annie M. Burke, as administratrix, against Hubert E. Larkin and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Roger, Locke & Babcock, of Buffalo, N. Y. (T. H. Lord, of New York City, of counsel), for plaintiffs in error.

Dudley, Gray & Noonan, of Niagara Falls, N. Y. (A. W. Gray, of Niagara Falls, N. Y., of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The defendants, composing the firm of Larkin & Sangster, were contractors with the state of New York for excavating the Erie Canal basin at Lockport. Burke, the plaintiff's intestate, was employed by them as foreman of the shovel gang. His duty was to superintend the removal, by a steam shovel, of the rock and débris thrown into the bed of the canal by blasting the sides of the basin, into dump cars. He was killed while in the bed of the canal by a blast fired by Forsythe, the blasting foreman, and this action to recover damages for his death was brought by his administratrix under chapter 352, Laws of 1910, amending chapter 36, Laws of 1909 of the state of New York, entitled "An act relating to labor." The ground of recovery set forth in the complaint is the negligence of Forsythe, the defendants' blasting foreman, in firing the shot before giving the plaintiff's intestate an opportunity to seek a place of safety. The jury having rendered a verdict in favor of the plaintiff, Forsythe's negligence and Burke's freedom from contributory negligence are both established as a matter of law. The only assignment of error that need be considered is the third, as follows:

"(3) The court erred in its charge to the jury that the jury might find in this case that as to the plaintiff's intestate Forsythe was a superintendent or person intrusted with authority to direct, control, or command another employé in the performance of his work, within the meaning of the Employers' Liability Law of the state of New York."

The relevant portion of the law is section 200, which is as follows:

"When personal injury is caused to an employé who is himself in the exercise of due care and diligence at the time: * * *

"2. By reason of the negligence of any person in the service of the employer intrusted with any superintendence or by reason of the negligence of any person intrusted with authority to direct, control or command any employé in the performance of the duty of such employé. The employé, or in case the injury results in death, the executor or administrator of a deceased employé who has left him surviving a husband, wife or next of kin, shall have the same right of compensation and remedies against the employer as if the employé had not been an employé of nor in the service of the employer nor engaged in his work."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

A stranger could of course have recovered against the defendants, and the plaintiff contends that by virtue of this act the decedent, Burke, is to be treated as if he were a stranger and not an employé. On the other hand, the defendants contend that if Forsythe, who fired the shot, was not the superior of Burke, who was killed, and had no authority to control him, they are not liable. We are bound to follow the construction, if any, given by the Court of Appeals of New York, but none has been called to our attention. The Appellate Division for the Third Department has considered the act in *Famborille v. Atlantic Gulf & Pacific Co.*, 155 App. Div. 833, 140 N. Y. Supp. 529. It was there said:

"It must be held, therefore, that under the amendment of 1910 the master is liable for an injury to a servant caused by the negligence of a superintendent or any person intrusted with authority; the servant himself being free from contributory negligence."

The case then under consideration involved the act of a vice principal, though not while engaged in superintendence. Judge Hazel charged the jury:

"Stress, I think, may properly be placed upon the provision of the statute which makes the employer liable to an employé for the injuries caused by the negligence of one who is intrusted with authority to direct, control, or command any employé in the performance of the work."

It seems to us that the Legislature intended to abolish the fellow-servant rule whenever the negligence of a person having authority over any employé caused the injury. Forsythe certainly had control of the blast and of all persons connected with the blasting operation. He was therefore, a person who did have authority over some of the employés, and the defendant is liable for his negligence causing Burke's death.

The defendants contend that the Legislature could not have intended to make the master liable to a superior servant for injuries caused by the negligence of an inferior servant. It is true that servants claiming indemnity are generally those injured by the negligence of their superiors, but it is quite conceivable that the Legislature purposed to protect servants when injured by the negligence of any employé having authority over any other servant, though not over the one injured. Certainly it used language aptly fitted to that end. Before the amendment the law read:

"200. Employer's Liability for Injuries. When personal injury is caused to an employé who is himself in the exercise of due care and diligence at the time: * * *

"2. By reason of the negligence of any person in the service of the employer intrusted with and exercising superintendence whose sole or principal duty is that of superintendence, or in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer," etc.

Under the law as it then stood, the master was liable only for the negligence of a superintendent actually exercising superintendence. The amendment extended the master's liability to the negligence of superintendents when not superintending, and extended the class of vice principals to persons having authority over any employé.

The judgment is affirmed.

CHILDS et ux. v. WILLIAMS et al.

(Circuit Court of Appeals, Eighth Circuit. February 16, 1914.)

No. 4035.

1. DEEDS (§ 208*)—DELIVERY—EVIDENCE.

Evidence held insufficient to show that a finding of nondelivery of a deed was the result of a serious mistake of the trial judge in considering the evidence or of an obvious error in the application of the law.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625-632; Dec. Dig. § 208.*]

2. APPEAL AND ERROR (§ 731*)—OPINION OF TRIAL COURT—EFFECT—ASSIGNMENT OF ERROR.

An opinion of the trial judge is not a ruling on which error may be assigned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3017-3021; Dec. Dig. § 731.*]

3. DEEDS (§ 194*)—DELIVERY—RECORD—REBUTTABLE PRESUMPTION.

Presumption of delivery of a deed from recording thereof is a rebuttable one, and hence is not a fact and may be overthrown by facts tending to show the contrary.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 574-583, 623, 634; Dec. Dig. § 194.*]

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Suit by Sarah C. Williams, as administratrix of the estate of John Williams, deceased, and others, against Walter A. Childs and wife. Decree for complainants, and defendants appeal. Affirmed.

George W. Day, of Kansas City, Mo., for appellants.

Guy B. Park, of Platte City, Mo. (A. D. Gresham, of Platte City, Mo., on the brief), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and RINER, District Judge.

CARLAND, Circuit Judge. This was an action brought by appellees against appellants to cancel a warranty deed made by John Williams and wife, December 2, 1904, whereby for the expressed consideration of \$2,900 the grantors purported to convey to Walter A. Childs certain real estate situated in the county of Platte, state of Missouri, subject to a mortgage of \$600, which the grantee by the terms of the deed assumed. There is much irrelevant and immaterial evidence in the record, but the following facts are established beyond dispute: John Williams and wife on December 2, 1904, executed a warranty deed for the land in controversy, and according to the allegations of the bill filed it for record December 5th, following, with the recorder of deeds of Platte county, Mo. The deed remained at the recorder's office until March 2, 1905, when it was mailed to John Williams, who received it and retained the custody thereof until his death on July 8, 1910, when the same was found among his papers. No consideration ever passed between grantor and grantee; but the grantee, having ob-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tained possession of the deed after the death of the grantor, offered to pay to the heirs and next of kin of Williams the consideration named in the deed. From the date of the deed till his death the grantor remained in possession of the land described therein and received the rents and profits thereof. The grantor also made repairs upon buildings on the land, and purchased wire for fencing purposes. The evidence concerning which there is a conflict was introduced on the issue of whether the deed was ever delivered to the grantee and accepted by him during the lifetime of the grantor. Ellen Noland, James Brown, Belle Williams, and Sarah Williams testified that subsequent to the death of the grantor, Walter A. Childs, the grantee, declared that he knew nothing of the deed until it was found among the papers of the deceased grantor. This testimony is denied by Childs. Mrs. Childs and her daughter, Mrs. Brink, testified that in July, 1905, the grantor, John Williams, at his home, produced the deed and gave it to the grantee, Childs, and the latter accepted it, but immediately returned it to the grantor, saying that if it would be all right he would leave it there.

[1] Upon the foregoing evidence, and such other testimony as was material, the trial court found there had been no delivery of the deed and entered a decree canceling the same. We are not prepared to say that the trial court made a serious mistake in the consideration of the evidence, nor do we find that an obvious error intervened in the application of the law; therefore the decree appealed from must be considered as presumptively correct. *Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co. et al.*, 104 Fed. 243, 43 C. C. A. 511 (8th Circuit); *United States v. J. Horace Marshall, Administrator, etc., et al.* (8th Circuit) 210 Fed. 595, 127 C. C. A. 231.

[2] The principal errors assigned relate to what the trial court said in its opinion. The opinion is not a ruling of the court upon which error may be assigned. It is not a part of the record so far as determining whether the judgment rendered should be affirmed or reversed. We look to the rulings made and excepted to for error or otherwise, and in a case like this to the evidence and the decree, and, if there is evidence to support the finding of the trial court, we do not interfere unless, as above stated, we find that a serious mistake in the consideration of the evidence has been made or an obvious error has intervened in the application of the law. The trial court in its opinion used the following language:

"It is true that, generally speaking, the recording of a deed takes the place of livery of seisin, is cogent evidence of delivery, and may, perhaps, in the absence of opposing evidence, justify a presumption of delivery."

[3] Counsel for appellant cited this language as showing that the trial court misconceived the law as established by the Supreme Court of Missouri, in this, that the registry of a deed in Missouri always gives rise to a presumption of delivery. But counsel conceded that this presumption is a rebuttable one. A rebuttable presumption is not a fact. When the facts appear, they may entirely overthrow this presumption, and that was the meaning that the trial court intended to convey. It would not be claimed, if the evidence showed, that John

Williams when he received the deed from the recorder's office, publicly destroyed the same by burning it, that there was still a presumption of delivery arising from the recording thereof. We do not desire to pursue the subject further. We are satisfied that there is evidence from which the court could find that there was no delivery, and, as there was no serious mistake in the consideration of the evidence and no misapplication of the law, the decree must be affirmed.

K. C. LUMBER CO. v. MOORES.

(Circuit Court of Appeals, Fifth Circuit. March 17, 1914.)

No. 2513.

1. PUBLIC LANDS (§ 35*)—HOMESTEAD—SALE OF TIMBER.

Under the provisions of the homestead law, a transfer of standing timber by the entryman prior to the grant of a patent is against public policy and void.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 72-77; Dec. Dig. § 35.*]

Rights acquired by homestead settlements and entries, see note to *McCune v. Essig*, 59 C. C. A. 434.]

2. PUBLIC LANDS (§ 35*)—HOMESTEAD—TRANSFER OF TIMBER.

After the issuance of a patent to a homestead entryman, he is invested with full legal title and may transfer the timber thereon to another, who is entitled to recover for the cutting and conversion of the timber by one to whom the entryman had illegally conveyed the same before patent.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 72-77; Dec. Dig. § 35.*]

3. PUBLIC LANDS (§ 35*)—HOMESTEAD—TRANSFER OF TIMBER—RELATION.

The doctrine of relation may not be invoked to validate a conveyance of timber on an entryman's homestead before patent, which is illegal as against public policy.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 72-77; Dec. Dig. § 35.*]

In Error to the District Court of the United States for the Southern District of Mississippi; H. C. Niles, Judge.

Suit by J. H. Moores against the K. C. Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This suit was brought by the defendant in error, J. H. Moores, against the K. C. Lumber Company, plaintiff in error, to recover the value of trees cut and removed from a tract of land situated in Jackson county, Miss. A jury having been waived by the parties, the cause was submitted to the court upon the following stipulation as to the facts, to wit: "That John W. Smith made homestead entry No. 34,329 on July 12, 1899, for the lands in controversy, to wit, the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 9, and the S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 10, all in township 2 S., range 6 W., Jackson county, Miss. And the said Smith made his final proof on the _____ day of _____, A. D. 1904, and final certificate No. 18,721 issued to him August 25, 1904, followed by patent to him dated March 30, 1905. That on September 4, 1901, John W. Smith and his wife, by warranty deed conveyed to Joseph Grisham all the pine timber on the above-described lands. Said deed was filed December 13, 1904, and recorded December 27, 1904, in the Deed Records of said Jackson county. That on February 1, 1902, Joseph Grisham by war-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ranty deed conveyed said pine timber to the K. C. Lumber Company, defendant. Said deed was filed and recorded on February 3, 1902, in the Deed Records of said Jackson county. That on April 12, 1906, said John W. Smith and wife, by warranty deed, conveyed to Frank Dickens the S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 9, and the S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 10. Also all the pine timber on the W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 10. All in township 2 S., range 6 W., Jackson county. Said deed was filed on May 15th, and recorded May 24, 1906, in the Deed Records of said Jackson county. That on April 14, 1906, Frank Dickens by warranty deed conveyed said last-described land and timber to L. R. Collins. Said deed was filed on April 23d, and recorded April 26, 1906, in the Deed Records of Jackson county. That on April 14, 1906, L. R. Collins by warranty deed conveyed said land and timber to J. H. Moores, plaintiff herein. Said deed was filed on April 23d, and recorded on April 26, 1906, in the Deed Records of said Jackson county. That neither said Dickens, Collins, nor Moores had any actual notice of the said deed from Smith and wife to Grisham, nor from Grisham to the K. C. Lumber Company, and had no notice thereof except the constructive notice arising by operation of law from the fact that said deeds were placed on record. That some time between the 26th day of April, 1906, and the filing of this suit, the K. C. Lumber Company, defendant herein, cut and removed the pine timber from all of said above-described lands, without the knowledge, consent, or permission of plaintiff herein. That the pine timber so cut and removed from said lands by defendant amounted to 3,700 trees, making a total of 1,005,000 feet, at \$3 per M., of the total value of \$3,015."

Upon the evidence submitted, the court rendered judgment in favor of Moores for \$3,015, with interest at the rate of 6 per centum per annum. Being dissatisfied with the judgment, the lumber company brings the cause here on writ of error.

J. I. Ford, of Pascagoula, Miss., for plaintiff in error.

E. J. Bowers and V. A. Griffith, both of Gulfport, Miss., and Edward Cahill, of Lansing, Mich., for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge (after stating the facts as above). It will be observed that Smith made the entry for the land as a homestead July 12, 1899, and that the conveyances of the standing timber by Smith and wife to Grisham, and Grisham to the lumber company, were executed not only prior to the date of the issuance of the patent, March 30, 1905, to Smith, but they also antedated the final certificate, issued to him August 25, 1904. It will be further noted that Moores claims the land direct from Smith, through mesne conveyances, which were executed subsequent to the date of the patent.

Applying the law to the facts, our conclusions are as follows:

[1] 1. Under the provisions of the homestead law, to which the views expressed by us are limited, the conveyances of the standing timber, executed by Smith and wife to Grisham, and by Grisham to the lumber company, were against public policy and void. *Anderson v. Carkins*, 135 U. S. 483, 10 Sup. Ct. 905, 34 L. Ed. 272; *Hartman v. Butterfield Lumber Co.*, 199 U. S. 337, 26 Sup. Ct. 63, 50 L. Ed. 217.

[2] 2. Upon the issuance of the patent to Smith, he was invested with the full legal title to the land, and he could make such disposition of it as he deemed proper. *Hartman v. Butterfield Lumber Co.*, supra.

After the issuance of the patent, Moores acquired Smith's title through mesne conveyances, and Moores, thus being the owner of the land, had the right to bring suit against the lumber company for cutting and converting the timber standing thereon.

[3] 3. The doctrine of relation, relied upon by counsel for the plaintiff in error, may not be invoked to validate a conveyance which is illegal as against public policy.

We are of the opinion that the judgment rendered by the trial court is right, and it is therefore affirmed.

MOWLES v. LORIMER.

(Circuit Court of Appeals, Third Circuit. May 24, 1913.)

No. 1711.

1. BILLS AND NOTES (§ 452*)—ACTIONS—DEFENSES—WANT OF CONSIDERATION.

If, as claimed, a note given by a party to the promotion of a corporation to the owner of mining rights, which such corporation was to acquire, was given with the understanding that payment was conditioned on the successful promotion of the plan, and that, if this occurred, it was to be paid from the proceeds of stock sales, it was without consideration, the promotion having fallen through, and this defense was therefore not an equitable one, inadmissible in an action on the note, nor an attempt to reform the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1303, 1352-1364, 1367-1376; Dec. Dig. § 452.*]

2. TRIAL (§ 228*)—IMPROPER REMARKS OF JUDGE.

In an action on a note given in connection with the promotion of a corporation, there was nothing objectionable in the trial judge alluding to the transaction as a "scheme," where he used the words "transaction," "scheme," and "proposition" synonymously to characterize the business in hand and in reference to the acts of both parties.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 509-512, 526; Dec. Dig. § 228.*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; John B. McPherson, Judge.

Action by James F. Mowles against Edward D. Lorimer, otherwise known as E. D. Lorimer. Judgment for defendant, and plaintiff brings error. Affirmed.

Bamberger & Moise, of Philadelphia, Pa., for plaintiff in error.

J. H. Brinton and Louis M. Stiles, both of Philadelphia, Pa., for Lorimer.

Before GRAY and BUFFINGTON, Circuit Judges, and ORR, District Judge.

BUFFINGTON, Circuit Judge. [1] In the court below the plaintiff, James F. Mowles, a citizen of Arizona, sued Edward D. Lorimer, a citizen of Pennsylvania, to recover on a note given to him by the latter. Both parties, with some others, were interested in the promotion of an Arizona corporation, which was to become the owner of mining rights controlled by Mowles. The deeds for these mining rights from Mowles to the Arizona Company were deposited in escrow

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

with one Pusey by Mowles, with instructions not to deliver them until the note was paid. The company had no actual capital. The working capital for its development was to be provided from 70 per cent. of its stock, which Lorimer and his associates were to get. The other 30 per cent. went to Mowles and his associates. The deeds were never delivered to the company, and the promotion fell through. Mowles then sued Lorimer on the note. The case turned on a question of fact. Lorimer averred that he never received any consideration for the note, but that it was given with the understanding that its payment was conditioned on the successful promotion of the plan, and that, if this occurred, then the note together, with the cost of development of the property, were to be paid from the proceeds of the 70 per cent. of the stock. In support of this contention there was the testimony of Lorimer, of Pusey, the holder of the deeds in escrow, and the correspondence between the latter and Mowles. On the other hand, Mowles contended the note was given and received in consideration of the deeds being placed in escrow, and that it was to be paid by Lorimer before the deeds were delivered. The original note was for 60 days. No interest was paid upon it, and at its maturity, owing to the pendency of the prospective promotion, the present note was substituted for the original one. Under these proofs, and the suit being between the original parties, the case resolved itself into a question of consideration. If Mowles' contention was right, the note was given for consideration, and he was entitled to a verdict; if Lorimer's contention was right, the note was without consideration, and he was entitled to a verdict. The case is quite similar to *Marsh v. Bennett*, 22 Ill. 313. To this issue of fact, namely, the want of consideration, the court confined the jury and properly refused to hold that the defense was equitable, inadmissible in an action at law in the federal court, or was an attempt to reform the note.

[2] Owing to the great stress laid by counsel in the argument before us on the fact that the judge below had, in charging the jury, alluded to the transaction as a scheme, we deem it proper to say that, assuming the question of the use of this word is before us under the assignments, we fail to see anything objectionable. The charge as a whole shows that the words "transaction," "scheme," and "proposition" were synonymously used to characterize the business in hand and in reference to the defendant's as well as the plaintiff's acts.

Finding no error in the submission of the case, the judgment is affirmed.

W. S. TYLER CO. v. LUDLOW-SAYLOR WIRE CO.

(Circuit Court of Appeals, Second Circuit. March 14, 1914.)

COURTS (§ 385*)—INFRINGEMENT—UNFAIR COMPETITION.

Where, in a suit for infringement of a trade-mark and for unlawful competition, the court sustained pleas to the jurisdiction as to the causes based on trade-mark and unfair competition, but allowed a replication to the plea as to the cause of action for infringement, as was authorized by old equity rule 33, then in force, the court was then au-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

thorized to try the issue on the plea and dismiss the bill by new equity rule 29 (198 Fed. xxvi, 15 C. C. A. xxvi), which decree was appealable to the Supreme Court, as provided by Judicial Code (Act March 3, 1911, c. 231, §§ 128, 238, 36 Stat. 1133, 1157 [U. S. Comp. St. Supp. 1911, pp. 193, 228]), and not to the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1022–1025, 1031; Dec. Dig. § 385.*]

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

Appeal from the District Court of the United States for the Southern District of New York; Julius M. Mayer, Judge.

Suit by the W. S. Tyler Company against the Ludlow-Saylor Wire Company. Judgment for defendant, dismissing the bill, and complainant appeals. Dismissed.

James Negley Cooke, of Pittsburgh, Pa., and D. Anthony Usina and C. C. Linthicum, both of New York City, for appellant.

Augustus N. Hand, of New York City, and James P. Dawson, for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. The District Court sustained the pleas to the jurisdiction as to the causes of action based on trade-mark and unfair competition, but allowed a replication to be filed to the plea in respect to the cause of action on infringement. This was the proper practice under old rule in equity 33, then in force. The issue on the plea was tried, and the court sustained the plea and dismissed the bill. This is the proper practice under new rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi). From that decree an appeal was taken to this court, but it should have been taken to the Supreme Court. See sections 128 and 238 of the Judicial Code. *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 30 Sup. Ct. 125, 54 L. Ed. 272; *Herndon Co. v. Norris & Co.*, 224 U. S. 496, 32 Sup. Ct. 550, 56 L. Ed. 857.

The appeal is dismissed.

WRIGHT v. BROWNLEE et al.

(Circuit Court of Appeals, Third Circuit. April 2, 1914.)

No. 1815.

1. PATENTS (§ 81*)—VALIDITY—PRIOR USE—DEGREE OF PROOF.

One who attacks a patent on the ground of prior use must establish his contention by a high degree of proof.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 104; Dec. Dig. § 81.*]

2. PATENTS (§ 328*)—VALIDITY—PRIOR INVENTION—GAS HEATED SADIRON.

In a suit for the infringement of Wright patent, No. 1,001,331, for a gas heated sadiron, evidence held insufficient to establish invalidity on the ground of prior invention.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit in equity by George H. Wright against James H. Brownlee and another. From a decree for defendants (205 Fed. 526), plaintiff appeals. Reversed with directions.

R. M. Barr, John Monaghan, and C. N. Anderson, all of Philadelphia, Pa., for appellant.

D. J. McBride, of Philadelphia, Pa., for appellees.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. [1, 2] A reference to the opinion of the District Court reported in 205 Fed. at page 526, will disclose that the decision of this controversy turns wholly upon a question of fact. Wright's patent is based upon a caveat filed on November 2, 1909, and unless Brownlee has proved his asserted priority of invention the patent must stand. Brownlee contends that the invention is his, that it was made several months at least before the caveat was filed, that Wright gained all his knowledge of the device from seeing Brownlee's patterns and castings, and that he fraudulently used such knowledge for his own private ends. The District Court sustained Brownlee's contention, but we are unable to agree with this view of the evidence. An examination of the record has led us to believe that sufficient weight was not given to the rule that requires a high degree of proof from one who attacks a patent upon the ground of prior use. As it seems to us, the evidence will readily support either of two opposing accounts; each practically depends upon the recollection of witnesses after a lapse of several years without much corroboration from other sources, and in such a situation we think it wise to follow the rule, founded on excellent reason, that regards such testimony with disfavor and requires it to reach a high degree of probability before a court will accept it as fulfilling the measure of proof. The District Court has given us one account of the events referred to, and the other account appears in the opinion of the Board of Examiners in Chief of the Patent Office, which was brought to our attention after we had independently reached the same conclusion. The examiners were deciding an interference proceeding between Wright and Brownlee involving the claims now in dispute, but the interference depended substantially on the same evidence as is now before us. We append the examiners' opinion as a full and careful statement of our view of the testimony:

"The testimony of neither party conforms very closely to the dates alleged in their preliminary statements. It is shown by the record of both parties that Brownlee had been for a long time experimenting in the construction of gas heated sadirons, which form the subject of the interference. As to when these experiments commenced, the testimony is very conflicting. Brownlee states that he began his experiments in 1887, and again he fixes the date of one of his exhibits in January, 1889, which date he finally changes to 1907, and in his answer he states that for two years after 1907 he did very little in the gas iron business. In his further examination in regard to the times at which certain of the exhibits filed by him were made, he testifies to dates in 1907 and 1908. Also, he fixes the date of Exhibit 3 in January, 1909, and finally he states that he does not know when any of these irons were made.

"The decision of the court and of the examiner of interferences was based principally upon the testimony in regard to Exhibit A of Brownlee, which corresponds exactly to the drawing of the application involved in this interference, and on Exhibit E, which is supposed to have been made at a somewhat later date than Exhibit A.

"Brownlee states that Exhibit A was cast at Bernstein's foundry, and similar castings at other places; that Wright, the senior party, was the foreman at Bernstein's foundry, and he believes and is sure that he gave the pattern from which the castings were made to Wright; that this was about the time that Wright was leaving Bernstein's employ; that he is not sure that Wright was there when the castings were finished; that this was the first time that Wright saw the pattern of or the idea of Exhibit A; that he showed an iron like Exhibit A to Wright in the presence of a party Moseley, about six months after he became acquainted with Wright; and that this was about April, 1909. It will be noted that the date alleged for the disclosure to Moseley is not fixed with relation to any established date or with relation to any important circumstance which could tend to fix it in the mind of the witness, but purely as an act of memory. The only attempt to fix a date for this exhibit with relation to any other circumstance, the date of which it is possible to ascertain, is found in the statement that Exhibit A was made about the time that Wright left the employ of Bernstein. On this point Wright testifies that his time at Bernstein's expired on Thursday evening, between the 1st and 3d of November, 1909; that he engaged with the Philadelphia Iron Foundry Company on Friday morning after leaving Bernstein's. Bernstein states that Wright left his employ November 5, 1909, and Smith, one of the proprietors of the foundry company to which Wright went upon leaving Bernstein's, states that Wright was in his employ from November, 1909, to June, 1910. It may be considered therefore established that Wright left the Bernstein foundry somewhere from the 1st to the 5th of November, 1909, and the making of the castings for Exhibit A, according to Brownlee's own testimony, is fixed at about this time.

"Brownlee further testifies that the patterns for Exhibit A were made by a patternmaker, Lyons, who was called as a witness on his behalf. Being shown Exhibit A and asked if he made the pattern for it, Lyons testifies as follows:

"That's the same pattern; this is made off of that (pointing to Exhibit B. Witness is looking at Exhibit A). Now, the only difference is these lugs (witness pointing to three lugs projecting upward from the bottom of Exhibit A), in the corner is a lug taken out of each corner (witness pointing to the screw lugs in Exhibit B).

"Q. 15. Did you make those changes?

"A. No, sir.

"Q. 16. Then the pattern which you made was the same from which both of these irons were cast with the exception of these changes.

"A. Yes, sir.

"Upon an inspection of Exhibits A and B, it will be seen that Exhibit A is practically the same as Exhibit B, except that a number of lugs upon the bottom of the iron have been added and there are no screw lugs in the corners. This is as stated by the witness. Exhibit A therefore appears to represent a further development of Exhibit B, although Brownlee testifies that Exhibit B was made after Exhibit A. It seems doubtful whether he is correct on this point, and in our opinion the nature of the exhibits indicates that B was first in order. In this view we are supported by the above quotation from the testimony of Lyons, from which it clearly appears that he made the pattern for Exhibit B and that Exhibit A, which has the lugs, was made afterwards, and that he does not know when the changes were made. Brownlee states that he added something himself, but does not say what it was nor when it was added. Lyons therefore fails to establish any date for Exhibit A.

"The decision of the court states that the patterns for Exhibit A were made by a party, Turner, who is also a witness on behalf of Brownlee. It appears from the testimony of Turner that he did considerable work in the making of patterns for gas irons for Brownlee between the dates June 2,

1909, and December 15, 1911; but there is nothing in his book by which it can be ascertained just what work was performed upon any specific date. Testifying from memory, he states that on June 2, 1909, he was employed by Brownlee to alter a pattern for a burner which he says was to be attached to Brownlee's Exhibit A; that he made the alterations in the burner, which consisted in the addition of a lug upon the side of the burner which was to serve as a means of attaching the same to the body of the gas iron; that this change in the burner necessitated a change in the body of the iron by the addition of a loop and set screw which clamped upon the lug on the burner. Turner also states that when the burner was brought to him, as near as he can remember, the iron body pattern was in the foundry, and in order for him to get the same it meant the lapse of a couple of days between orders, which would place the order with the alteration on the body of the iron June 9, 1909. As before stated, there is nothing upon his books by which he can identify the nature of the work; but he describes the burner and the means for clamping it in place in the iron, as shown in Exhibit A, and in the application drawing of Brownlee. Upon being shown Exhibit A and asked if he made any of the patterns for this iron, he states that he duplicated some of the parts of the iron and also made alterations on the body and other parts that had already been made by another patternmaker; that he made a new pattern which was a duplicate of the old burner, the same as in the iron now; and that he did not make the pattern for the body of the iron, which was made by another patternmaker prior to the time he worked on the same. When asked when he first saw the pattern of this Exhibit A, and what was its interior construction when he first saw it, he replied:

"The first time I saw the defendant's Exhibit A, as a complete iron, was on June 14, 1909. The interior construction was identically the same as now. Inside these two wings, projecting forward in the middle of the iron, was another rib. Also, in the interior of the iron forward were little projecting lugs on the bottom of the iron. These ribs and lugs were used to guide the flame. There was also a flame plate as is now in the iron which was used to deflect flame downward on the bottom of the iron. There was also a burner as now seen. This burner was held in position by a backward projecting lug through a cored hole on the side of which was a set screw to hold the burner in position. The alteration I made on the iron and burner pattern was to put the present lug on the burner and also on the back part of the body of the iron which now holds the burner in position."

"He further testifies:

"Q. 10. Did or did not Mr. Brownlee at that time show you and Mr. Wright this pattern of defendant's Exhibit A and explain the same to you?"

"A. I was working on this work for Mr. Brownlee at this time. The work I was doing—some slight change in the deflector pattern. When Mr. Wright and Mr. Brownlee came into my place of business, we all examined the iron which is defendant's Exhibit A, and talked about the practicability of the same. There really was no need to talk about this matter from the fact of the point of view, for the iron at that time had been tested and found true."

"Q. 11. Did or did not Mr. Wright make any comments on this iron at that time?"

"A. Mr. Wright said the iron would be no good as it then stood and advised Mr. Brownlee not to spend any more money to cover his claim on same."

"In his answer above quoted, Turner would appear to fix the date when he saw Exhibit A as a completed iron as June 14, 1909; but it should be noted that this testimony, of the description of the interior construction of the exhibit and the alteration which he was called upon to make in the patterns, was given with the exhibit in his hands, and it would be very easy to supply from the exhibit itself any construction as to which his memory might be in fault."

"Bearing in mind that the work which Turner was called upon to perform at this time was to add a lug, which is numbered 36 in the application drawings, to the upper side of the burner 32, and to place upon the body of

the iron a loop, numbered 38, with an opening for the set-screw 39 for clamping the burner upon the iron, attention may be called to the fact that this same construction is found in Exhibit B and also in Brownlee's patent No. 969,033, August 30, 1910, granted upon an application filed September 20, 1909, very shortly after the making of the patterns about which Turner is testifying. In the Brownlee patent the loop and set screw are on the rear end of the deflector *J* instead of upon the rear end of the body, but the deflector is attached to the inside of the body, and the rear end projects to the rear surface of the body bringing the loop on the outside and in the same relation to the body of the iron as in Exhibits A and B. It would therefore be very easy for any one testifying several years after the event, and with Exhibit A in his hands at the time, to testify as Turner did, when, as a matter of fact, the iron shown in the Brownlee patent may have been the one upon which the work was done instead of Exhibit A. There is also another statement made by Turner which may indicate that this was the fact, for, in his answer above quoted, it should be noted that at the time Wright and Brownlee came to his shop the work he was doing was some slight change in the deflector pattern, and as the work which he was doing at this time related to the burner attachment, this statement somewhat strengthens the possibility that his entire testimony relates to the iron shown in the Brownlee patent. Without holding whether this is so or not, it appears to us that in view of the possibilities of confusion as to which of these irons Turner was working upon at this time the force of his testimony is completely destroyed as an identification of Exhibit A and the time at which it was made. Turner also testified, as above quoted, that it was at this time that Wright said that the iron would be no good as it then stood and advised Mr. Brownlee not to spend any more money to cover his claim on the same. Brownlee says that this statement was made after Wright left Bernstein's. The castings for Exhibit A were said by Brownlee to have been made at the foundry of Bernstein and at other places. Bernstein, being called as a witness and shown the various exhibits of Brownlee and Wright, states that he cannot identify these as being cast at his foundry, but can identify them as being the same as being cast at his foundry. He states that Exhibit A, or something similar, was made there; that an iron similar to Exhibit E was made; and that he remembers very well a casting like Exhibit C. He does not fix the date when any of these castings were made, merely testifying that the first castings which were made for Brownlee were made in the year 1907, or early in 1908, and that the last casting was made just prior to Mr. Wright leaving his employ, and that he did not see that iron here at all. Here he is in conflict with Brownlee, who says that Exhibit A was the last iron made prior to that time. Upon being shown Exhibit A and asked if he had ever seen it before, he stated that he had seen a casting 'the same as this' in his foundry. He did not know for whom that casting was made, but states that 'this iron was brought to us later changed, then I knew that it was Mr. Brownlee's iron.' Here, again, we find slight indication that it was probably not Exhibit A which he saw, but Exhibit B, for Exhibit A was apparently made from the same patterns as Exhibit B with the addition of certain lugs in the bottom of the iron. There is no further attempt by Bernstein to fix any date for Exhibit A.

"The party Moseley, to whom Brownlee alleges that he showed Exhibit A in the presence of Wright in April, 1909, was called as a witness for Brownlee. He produced books from which it appeared that under the dates of July 6 and July 15, 1909, he made certain castings for flatirons for Brownlee, and, upon being shown Exhibit A, he states that 'this is the pattern that Mr. Brownlee showed to Mr. Wright and myself.' Upon being asked to describe the interior construction of the iron without looking at it, he gives a very superficial description of the same, leaving out the lugs in the bottom of the iron, which are an element of the issues in the interference, and his description would apply to Exhibits B or C, or the Brownlee patent, No. 992,334, or the still earlier Brownlee patent, No. 969,033. In attempting to fix the date of the meeting at Mr. Brownlee's house, when Exhibit A was shown to Wright, he is unable to do so by any documentary evidence, but states that 'it was in the spring, for the flowers were very pretty in the

garden; I remember that it was light evenings.' This may as well have been in the spring of 1910 as in the spring of 1909. We are unable to satisfy ourselves that this testimony is sufficient to establish any date for Exhibit A, or of the time at which Exhibit A was shown to Wright, or that it ever was so shown.

"Exhibits B and C do not satisfy the terms of the issue, but Brownlee testifies that they were made after Exhibit A. He testifies that Lyons made the patterns for Exhibit B and Bernstein the castings, and that the castings were made while Wright was with Bernstein, and some after that time. Lyons testifies that he started to make patterns for Exhibit B in the fall of 1907 and spring of 1908, yet Brownlee, in his preliminary statement, does not allege conception of the subject-matter of Exhibit A prior to January, 1909, and alleges that the castings for Exhibit A were made about the time Wright left the Bernstein foundry. These statements are entirely inconsistent. Brownlee testifies that the patterns and castings for Exhibit C were made in 1907 or early in 1908; that the patterns were made by Lyons and the castings by Bernstein about a month after Exhibit B; and that at that time Wright was out of employment. As Wright did not leave Bernstein's until November, 1909, these dates are also entirely inconsistent. Lyons states that he made the patterns for Exhibit C in the spring of 1908 and shows an entry of \$12.75 in his book, which was filed as Exhibit D, and yet we find Turner working on patterns, which he alleges related to Exhibit A, as late as June, 1909. It seems clear that neither Brownlee, Lyons, nor Turner are able to distinguish clearly between the patterns for the several irons and fix correctly the dates at which they were made.

"Exhibit E satisfies the terms of the issue. Brownlee does not testify in regard to this exhibit, but Lyons states that he made the pattern for the same in the spring of 1909, but the only way in which he fixes this date is that it was the last pattern he made for Mr. Brownlee in 1909. When cross-examined as to how he is able to fix this date, he states that he made three body patterns altogether, and that this was the last one made. This testimony is very unsatisfactory, as it is just as reasonable to suppose that he worked upon Exhibits B, C, and the patterns for the Brownlee irons disclosed in Exhibits F and G, patents Nos. 969,033 and 992,334. The only other testimony as to Exhibit E is that of Smith, of the firm of Smith & Hansell, who states that his foundry made castings which looked very much like that for Mr. Brownlee, and that he made castings of this type for Mr. Brownlee in May, 1910. He produces his books and under the date of May 3, 1910, shows a charge for castings made for Brownlee of 25 cents, which bill was receipted for the firm by Wright. Smith does not satisfactorily identify Exhibit E, and as the proprietor of the foundry it seems very unlikely that he would have examined castings with sufficient particularity to have been able to have distinguished Exhibit E from any of the others in the case. None others were shown him, and we are therefore unable to determine whether he was capable of distinguishing one from the other upon casual inspection. The witness Guenther, a clerk in Smith & Hansell's foundry, when shown Exhibit E, also states in about the same way as Smith that he saw castings like this sample in the Smith & Hansell foundry in May, 1910. This testimony also seems to be too vague and uncertain to establish the date of Exhibit E, and we do not find that Brownlee has properly proven any date for the matter in issue prior to the date of Wright's application for the patent involved in this interference. Wright, himself, admits, in the stipulation on page 152 of his record, that he had knowledge of Brownlee's completed gas irons before he filed his application.

"If we are correct in our findings as to the failure of Brownlee to satisfactorily prove the dates of any of his exhibits, it is unnecessary for us to consider Wright's record, etc. * * *

"As the burden of proof in this case is upon Brownlee to prove priority beyond a reasonable doubt, we are compelled to hold that he has failed to sustain this burden and has not satisfactorily shown that the invention was disclosed by him to Wright. It is true that Wright was for a considerable period in such relation to Brownlee as to be familiar with all that he was doing, but he was not employed to invent or assist Brownlee in inventing

anything relating to the irons. He was merely the foreman of a foundry to which Brownlee brought his patterns in order to have castings made therefrom, and while there is always a presumption, where it is impossible to determine what each party has done, that the invention was made by the employer and that any addition made to the invention by the employé inures to the benefit of the employer, yet in such cases it must be shown that the employer had at least the main plan of the invention. In the present case it has not been shown that Brownlee disclosed to Wright anything more than the construction upon which he has already obtained patents, and some of the features involved in the issue are also old in references cited in the case, which were patented long before any work was done by Wright. It would be too harsh a rule to hold that, because the foreman of a foundry saw the castings made for an inventor, he should not interest himself in the general subject to which these inventions relate and do any independent work in that line without raising a presumption that he had derived the invention from his customer.

"For the reasons stated, we reverse the decision of the examiner of interferences and award priority of invention to George H. Wright, the senior party."

As already stated, this account seems to us more probable than the view adopted by the District Court; but, even if we stated the question in the form most favorable to Brownlee, the best that can be said is that two equally probable accounts find support in the evidence.

The decree is reversed, with instructions to the District Court to enter a decree in favor of complainant.

TONOPAH MINING CO. et al. v. VINCENT.

(Circuit Court of Appeals, Third Circuit. February 25, 1914.)

No. 1800.

1. PATENTS (§ 167*)—WORDS AND PHRASES—"LEACHING."

Where a specification of a patent for an ore-reducing process described the third step as "leaching" the ore by the use of cyanide solution whereby the finer values were dissolved, the word "leaching" was used in its ordinary sense, namely, to cause a fluid to percolate through the pulverized ore.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

2. PATENTS (§ 328*)—PROCESS FOR TREATING ORES—INFRINGEMENT.

Brown's patent, No. 781,711, for a process for treating ores, the essential feature of which consists in subjecting the crushed ore to the cyanide process for the recovery of fine values before concentration, *held* not infringed by a process which, though using the cyanide solution in the earlier stages of the process preparatory to concentration, employed effective finished and final concentration as the initial and intermediate step in which the fruits of concentration are withdrawn from the process, after which the by-product was treated by a protracted process of cyaniding.

Appeal from the District Court of the United States for the District of Delaware; Edward G. Bradford, Judge.

Suit in equity by Joseph A. Vincent against the Tonopah Mining Company and another. From a decree for complainant (207 Fed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

579), defendants appeal. Reversed and remanded, with directions to dismiss.

Jos. C. Fraley, of Philadelphia, Pa., and J. Harvey Whiteman, of Wilmington, Del., for appellants.

Horace Pettit, of Philadelphia, Pa., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. By this bill the plaintiff, Joseph A. Vincent, owner of patent No. 781,711, granted to Alden H. Brown, February 7, 1905, for a process of treating precious metal bearing ores, charged the Tonopah Mining Company and others with infringing the two claims thereof. The court below, in an opinion reported at 207 Fed. 579, found the patent valid and said claims infringed. From a decree so holding, defendants appealed.

Brown's patent, as recited in the specification, "relates to a process for the treatment of precious metal bearing ores, and embraces the treatment of the ore by a solution of cyanide of potassium or of other alkaline cyanide and the subsequent treatment of the ore by concentration." The specification states that:

"It has been the practice for many years in plants where the concentration and cyanide processes are used in combination, to treat the ore, first, by concentration, and, secondly, by cyanide. The process which I have invented and which I now have in successful operation is a reversal of this proceeding with the addition of certain special features in connection with the cyanide step."

The second or broad claim is for these two steps in succession, to wit:

"2. A process of treating sulfide ore consisting first in subjecting the raw or unroasted ore to the action of a cyanide solution whereby the finer metallic values are dissolved, and, second, subjecting the ore or tailings to concentration whereby the coarser values are recovered."

The first claim also includes the two foregoing steps, but "certain special features in connection with the cyanide step" are detailed in the claim, which is:

"1. The herein described process for the treatment of ore consisting in first pulverizing the ore in the presence of cyanide solution; second, subjecting the ore to hydraulic classification by the introduction of cyanide solution at the bottom of an overflow tank to produce an ascending current; third, leaching the ore by the use of cyanide solution whereby the finer values of the ore are dissolved; fourth, removing the dissolved metallic values from the ore in any suitable manner; and finally subjecting the residue of ore to concentration."

The cyanide process, which process is described in *Moore v. Tonopah*, 201 Fed. 532, 119 C. C. A. 626, a case in this court, consists in subjecting metal-bearing ores to cyanide of potassium dissolved in water. The result is that the metal is disengaged or dissolved and is carried in solution. Such solution is then removed from the residue of the ore by percolation, filtering, or decantation, and is ultimately subjected to electro-chemical action whereby the precious metal is precipitated.

On the other hand, concentration is a mechanical process of removal. It is usually done on concentration tables. Such tables are slightly inclined and have grooves, across which the finely divided ore is slowly carried by a shallow current of water; the table being given a jerky, reciprocating motion. The result is that the heavy constituents work along and run over the edge of the table at different places from the lighter ones. It will thus be seen that the two processes of cyaniding and concentrating are distinct, well known, and operatively different; one is chemical, the other mechanical. As noted by the patentee, it was usual to concentrate first and cyanide last, and the patentee advised a reversal of this process. His object in so doing, he states, was because where concentration was used in advance of cyaniding there was a large loss in values by reason of the fact that the necessary water treatment in connection with the reduction of the ores to a fine state of division resulted in a taking up by the water of a large percentage of ore values. As a result:

It was "difficult, if not impossible, to settle these values for further treatment within the limits of a plant of ordinary construction, for the reason that in the case of many ores these slime values remain in suspension for many hours. It will therefore be understood that in the case of ores of this sort, if amalgamation, concentration, or other process involving the use of water for crushing or treatment is used preliminary to the cyanide process, it will be necessary to have a very extensive system of settling tanks in order to recover these suspended values and hold them in the mill, so that they may be subjected to further treatment. It is a well-known fact that the cyanide process recovers only the fine values, and in the treatment that I have devised these fine values are recovered by the cyanide process in the beginning, leaving only the coarser values, which are readily recoverable by concentration; the latter being specially adapted for saving this class of values."

It will be noted that no new principle of operation, either in cyaniding or concentrating themselves, was disclosed in this patent. It was at most simply a more effective, workable treatment, and it will thus be seen that transposition of concentration from initial to final stage, and of cyaniding from final to initial stage is the substantial disclosure of this device. Assuming, for present purposes, that this change was original with Brown, and that it involved invention, it must be conceded the field of invention was narrow, and Brown's claims should not by construction be enlarged to include within infringing fences processes which were not within the field of his inventive disclosure. Now without entering into details, it suffices to say that the second claim embodies the two elements of: First, cyaniding, viz., "subjecting the raw or unroasted ore to the action of a cyanide solution whereby the finer metallic values are dissolved"; and, second, concentrating, viz., "subjecting the ore or tailings to concentration, whereby the coarser values are recovered." This claim is perfectly clear. A reading of the patent shows precisely what the patentee disclosed, and the claim as precisely claims that disclosure. There is no ambiguity in either disclosure or claim. They are self-sufficient and self-explanatory. The first element is the use of the well-known cyaniding process as the initial and finished first step of the process. The specification thus unmistakably refers to both the initial use and also the completion of cyaniding in this first stage of Brown's process. Thus:

"My invention relates to a process for the treatment * * * by a solution of cyanide of potassium * * * and the subsequent treatment of the ore by concentration. * * * It has been the practice * * * to treat the ore first by concentration, and, secondly, by cyanide. The process which I have invented * * * is a reversal of this proceeding. * * * If * * * concentration * * * is used preliminary to the cyanide process, it will be necessary to have a very extensive system of settling tanks in order to recover these suspended values and hold them in the mill, so that they may be subjected to further treatment. * * * In the treatment that I have devised these fine values are recovered by the cyanide process in the beginning, leaving only the coarser values, which are readily recoverable by concentration."

The drawings illustrate a wet crushing plant.

"I will say, however, that so far as the broad idea of employing the cyanide step *previous* to concentration is concerned, the advantage in this respect would be equally great if dry crushing instead of wet crushing were employed. * * * From the tanks *II* the gold-bearing solutions pass to the zinc boxes *JJ*, where *the values are precipitated*. * * * After the cyanide treatment has been *completed*, the sand tailings from the leaching tank *G* are transferred * * * to the tailings bin *P*. * * * The mixer *K* distributes the tailings to the concentrating table *L*."

These extracts show that all steps prior to the said tailing reaching the concentrating table concerned cyaniding, and cyaniding alone. Indeed, the cyaniding of Brown's process had, at this stage, done all that cyaniding was intended to do. In other words, it had resulted, as cyaniding ordinarily did, in "the gold-bearing solutions pass(ing) to the zinc boxes *JJ* where the values are precipitated."

Following this completed process of cyaniding came the second step of the claim, namely, "subjecting ore or tailings to concentration where the coarser values are recovered." Concerning this step there is no ambiguity. It simply takes the sand tailings, which the finished cyanide process had left in the mixer *K*, and concentrates them. Cyaniding has finished its assigned work and recovered its share of the metal product. The sand tailings were the by-product of cyaniding. It was with this by-product that concentration took up its part of the process. Concentration was so well understood that the patent simply says:

"In regard to the matter of concentration, I will say that any desired system may be used, either the standard practice, * * * or any of the more recent oil-concentrating processes, in which the affinity of certain oils for metallic sulfids or other valuable minerals is made use of in order to effect the proper separation."

The first claim is based generally on these two elements, viz., cyaniding and concentration, but embodies in the cyaniding step those "special features in connection with the cyanide step," which the patentee disclosed and thus claimed. As we read that claim, the first four elements, viz., "pulverizing the ore in the presence of the cyanide solution; * * * subjecting the ore to hydraulic classification by the introduction of cyanide solution at the bottom of an overflow tank to produce an ascending current; * * * leaching the ore by use of cyanide solution whereby the finer values of the ore are dissolved; * * * and removing the dissolved metallic values from the ore in any suitable manner"—all these are specific substeps of cyaniding; those "certain special features in connection with the cyanide step,"

as the patentee aptly says. They culminate and effect cyaniding. Unitedly they are the same as the first and broader stated first element of the second claim, viz., "subjecting the raw or unroasted ore to the action of the cyanide solution whereby the finer metallic values are dissolved." It follows, therefore, that all the four first elements of the first claim are to be treated as agencies culminating in cyaniding, and so regarding them it follows that, however much some other process may utilize one or more of these elements, if they are not made use of in a process that culminates in and completes cyaniding as its first and pre-concentrating step, such element or elements are not employed to infringe the cyaniding initial step of these two claims.

[1] We here note that the discussion of this case seemed to center on what was meant by the third step, "leaching the ore by the use of cyanide solution whereby the finer values of the ore are dissolved," and, the fourth, "removing the dissolved metallic values from the ore in any suitable manner." To us this is plain. "Leach" is a word of recognized import, namely, to cause a fluid to percolate through. Brown's teaching was by the cyanide process, namely, "leaching the ore by the use of cyanide solution," and the other words, "whereby the finer values of the ore are dissolved," merely state the result of such percolating or leaching. What was meant by leaching was well understood in the art. It was thus described in *Moore v. Tonopah*, supra:

"The cyanide ore process came into use about 1887, and is the real foundation of the tremendous increase of gold production in the last two decades. It is now the prevalent method of treatment. In it the ore is first crushed and then placed in tanks containing a solution of cyanide of potassium. This solution percolates through the crushed pulverized mass, and, being a solvent of gold, carries off such gold as is subjected to its action. This is called 'leaching,' and any crushed ore through which percolation took place was termed 'leachable.'"

As the term was thus well understood in the art, we are justified in giving it that meaning in this claim. So doing, it follows that the fourth step, which "removes the dissolved metallic values from the ores," merely removes the metallic values which the leaching has dissolved.

[2] This two-staged process—first cyaniding, next concentrating—being the only disclosure of Brown and the claims embodying those two separate, individual, completed stages or steps, it follows that any process which makes concentration an intermediate and completed step, one that precedes final and effective cyaniding, is a process different from the one Brown disclosed and claimed. Measuring the defendant's process by these standards, it follows that infringement is not shown, for, without entering into a detailed description of its plant, it suffices to say that a study of its workings has brought us to this conclusion. The defendants, in common with Brown, it may be conceded, are using the cyanide solution in the earlier stages of their process, and to that extent we may say initially utilize the general chemical treatment incident to cyaniding, preparatory to concentrating. But beyond this the resemblance ceases, for by defendant's process concentration—effective, finished, and final—is the initial and intermediate step in their process. At such intermediate step the fruits of concentration

are withdrawn from the process, and this first completed step of the process, the one "whereby the coarser values are removed," is, as we have seen, the second step of Brown's process.

After the defendant's concentration is finished, the by-product goes forward to be subsequently treated by a protracted process of cyaniding. This is at variance with Brown's process in three respects: First, cyaniding follows concentrating; second, it is a system condemned by Brown and one he sought to avoid, in that where "concentration * * * is used preliminary to the cyanide process it will be necessary to have a very extensive system of settling tanks in order to recover these suspended values and hold them in the mill so that they may be subjected to further treatment"; third, the defendant's process which physically withdraws from the operation of the process the products of concentration in advance of withdrawing those of cyaniding, makes the process one avoided by Brown, viz.:

"It is a well-known fact that the cyanide process recovers only the fine values, and in the treatment that I have devised these fine values are recovered by the cyanide process in the beginning, leaving only the coarser values, which are readily recoverable by concentration, the latter being specially adapted for saving this class of values."

It is apparent, therefore, that the defendant's device, which the proofs show has been of great practical worth, owes its worth to the fact that it is built and operated in express disregard of the instructions of Brown's patent. Without passing on the question of the validity of that patent, it suffices to hold defendants do not infringe.

The decree below is therefore reversed, and the case remanded, with instructions to dismiss the bill for noninfringement.

VALVONA-MARCHIONY CO. v. PERELLA et al.

(Circuit Court of Appeals, Third Circuit. February 25, 1914.)

No. 1786.

1. PATENTS (§ 167*)—INVENTION—SPECIFICATIONS—DISCLOSURE.

A patentee is bound to disclose his invention in his specifications and may not successfully claim infringement with reference to a matter not so disclosed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

2. PATENTS (§ 328*)—VALIDITY—ICE CREAM CONES.

The Valvona patent, No. 701,776, for a mould for making biscuit-cups, held void for want of patentable invention.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by the Valvona-Marchiony Company against Fred Perella and another. From a decree of dismissal (207 Fed. 377), complainant appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

F. W. Winter and F. W. H. Clay, both of Pittsburgh, Pa., and H. H. Huffaker, of Louisville, Ky., for appellant.

Paul Synnestvedt and James C. Bradley, both of Pittsburgh, Pa., for appellees.

Before GRAY and BUFFINGTON, Circuit Judges, and YOUNG, District Judge.

BUFFINGTON, Circuit Judge. In the court below the plaintiff, the Valvona-Marchiony Company, owner of patent No. 701,776, granted June 2, 1902, to Antonio Valvona, for an apparatus for baking biscuit-cups for ice cream, filed a bill against Fred Perella and others, charging infringement thereof. On final hearing that court entered a decree dismissing the bill for noninfringement. Thereupon this appeal was taken.

This patent has been the subject-matter of several cases. The published opinions are as follows: The court below, 207 Fed. 377; Eastern District of Pennsylvania, 135 Fed. 544; District of New Jersey, 207 Fed. 380; District of Massachusetts, 207 Fed. 374; District of Kentucky, 207 Fed. 374. The patent has now for the first time reached a Circuit Court of Appeals. After argument, we have reached the conclusion the decree of the court should be affirmed; but, as we base that conclusion on the invalidity of the patent, we deem it proper to set forth the reasons that lead us to this conclusion. The patent concerns, or rather has been made to concern, the edible baked dough cones or horns in which ice cream is sold on the street or at public places. These cones have proved very popular, as by the use of them ice cream can be carried in the hand and eaten without a spoon, and the cone itself is both edible and attractive. Such cones are made in large quantities and are sold by the manufacturers thereof to dealers in ice cream. The business has grown to a large industry and a monopoly thereof under this patent would be valuable.

[1] It seems to be assumed on all sides that this cone industry is the outgrowth of this patent. An examination of the patent, however, shows that, if Valvona had the cone in view, he did not disclose it in his specification. By the statute he was bound to disclose his invention in order that the public might practice it when his patent expired. An examination of his specification shows that, if the disclosure therein made was all the information the public had, the use of cones would not be known. This is plain when the patent is studied. The patent avers it is for baking biscuit-cups; the only vessel illustrated is an ordinary shaped cup with a flat bottom; the word "cup" is used as synonymous with dish. Moreover, no mould for making anything but this flat bottomed cup or dish is shown. And not only is the interior of the matrix flat bottomed, but the die as well, and this interior flat bottom has a corresponding exterior flat bottom, which is made flat for functional reasons. Thus the mould, as stated in the specifications, is designed so as "to occupy a stable position on the top of the gas range," and in the claim, "the outer faces being so formed as to be adapted to rest on the top surface of a stove either side up." Now while it is true the specification says, "The cups or dishes thus

produced may be either of the shape shown in Figs. 7 and 8, or of other preferred pattern," yet the fact still remains that neither text nor drawing disclosed the idea of a cone-shaped vessel or an apparatus for making one. As there is no proof that any machines were ever constructed to make these biscuit-cups for ice cream, it is evident that the subsequent development of the popular ice cream cones may as well be attributed to any one else as to Valvona. Certain it is they were not disclosed by his patent. Confining ourselves, therefore, to the actual disclosure of Valvona's patent, did it involve invention?

[2] It will be observed that this is an apparatus patent and the question is: Did the devising of this machine to press and bake biscuit cups involve invention? The use of dies for forming and baking indented pastry is as old in the culinary art as waffles. Indeed, a waffle is defined as an indented cake. In fact, there was no other way to make the apparatus than simply to make corresponding cup dies of the desired size and utilize them on a jointed and reversible waffle iron. And this is all Valvona did. Putting aside the verbiage of his description and looking at what his biscuit-cup apparatus really was, we find it simply a reduced pair of jointed waffle irons with cup dies substituted for waffle dies. In its passage through the patent office his patent was four times rejected; the waffle iron patent to Griswold, *inter alia*, No. 270,659, of January 16, 1883, being effectively cited against his application. Conceding, for present purposes, that there may have been some inventive originality in the use of an edible dough cup, yet the suggestion of such a use antedated Valvona. Indeed, he says he owned one of the cone-shaped moulds of Aegeter's Swiss patent No. 1443 of September 24, 1889, before he designed his apparatus. Having also the waffle irons of the old art, with their indented dies, with the evenness and completeness of baking that came from reversal, it seems clear to us that the problem of constructing a mould for shaping and baking a flat bottomed dough cup was a mechanical rather than an inventive task.

After a patient study of the patent and of all that has been said in support thereof in the various cases referred to, we are of opinion that the several rejections of the Patent Office were the just estimate of the noninventive character of Valvona's mould.

The decree below will therefore be affirmed on the ground that this patent was invalid.

REPUBLIC RUBBER CO. v. G. & J. TIRE CO.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1914.)

No. 2044.

1. PATENTS (§ 328*)—INVENTION—VEHICLE TIRE.

Mell patent, No. 898,907, for a rubber tire for vehicle wheels, having projecting elongated studs on the tread surface to prevent skidding, was a mere modification of the prior art disclosed by the Healy British patent granted in 1895, and was void for lack of patentable invention.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PATENTS (§ 35*)—SCOPE OF PRIOR ART—USEFULNESS.

Proof that a patented article has developed a higher degree of usefulness and has become a great commercial success is available only to resolve a doubt in favor of the patentee on the question of patentability, when the court, after full consideration, is left in doubt as to the nature and scope of the patent, and comparison thereof with the teachings and structures of the prior art; proof of utility and commercial success being unavailable however to create such a doubt.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 39; Dec. Dig. § 35.*]

Appeal from the District Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

Suit in equity by the Republic Rubber Company against the G. & J. Tire Company. From a decree dismissing the bill, complainant appeals. Affirmed.

Appellant's bill, charging appellee with having infringed claim 1 of patent No. 898,907, September 15, 1908, to appellant as assignee of Mell, was dismissed for want of equity.

Mell's application was for improvements in tires, and his particular objects were to improve the road-gripping and anti-skidding qualities.

Drawings of the surfaces and of the contours of the Mell tire and also of the earlier Healy tire are as follows:

Claim 1, on which infringement was predicated, reads as follows:

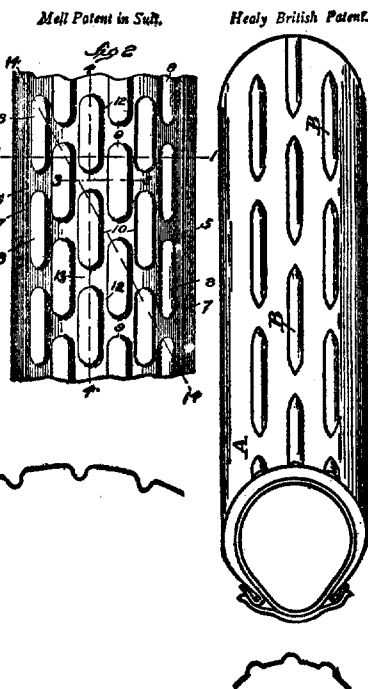
"(1) A tire for vehicle wheels provided with outwardly projecting, circumferentially arranged, elongated studs, each having inwardly diverging walls, a flat outer surface, and a relatively large base, substantially as described."

Bayard H. Christy, of Pittsburgh, Pa., for appellant.

Charles Martindale, of Indianapolis, Ind. (Livingston Gifford, Ernest Hopkinson, and Edward W. Vaill, all of New York City, of counsel), for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. [1] This Mell patent was quite fully considered by the Circuit Court of Appeals for the Second Circuit in the case of Republic Rubber Co. v. Morgan & Wright, 197 Fed. 549, 117 C. C. A. 45. In view of the prior art and the nature of the alleged improvements it was held that the patent was void for lack of invention. Counsel for appellant insist in this court: First, that they are entitled to the independent judgment of this court, despite the adverse decision in the second circuit; and, second, that the record in this



*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

court differs from the record in the second circuit in such material particulars that a different result should be reached, even if this court upon the facts that were before the court of the Second Circuit should concur in the conclusion there reached.

In both records appear the Healy patent and other structures of the prior art, and also the testimony in relation to what Mell actually did in producing his tire. The Healy tire was for bicycles, and the Mell tire was designed especially for use on automobiles. Therefore the Mell tire had to be constructed in a way to bear much heavier weights and meet much greater strains than was the case with the Healy tire. But Healy, for the use of bicyclists, sought to accomplish the same objects which Mell later sought for automobilists, namely, the improvement of road-gripping and anti-skidding qualities. And to accomplish those purposes Healy devised a tire provided with outwardly projecting, circumferentially arranged, elongated studs, in parallel lines, and arranged so as to break joints; and each stud considered separately had a base which was relatively larger than its bearing surface, and necessarily had walls which diverged toward the base. The only difference between the Healy and Mell tires (apart from the difference of dimensions between a bicycle tire and an automobile tire, and the size and number of studs) is that the outer surface of the Healy stud is rounding while the outer surface of the Mell stud is flat, and the base of the Healy stud meets the tread at an obtuse angle while the base of the Mell stud meets or merges into the tread with a curve. These changes in detail, when for automobile uses it seemed desirable to make the studs broader and firmer, would seem to be obvious. And the recital of the testimony given in 197 Fed. at page 551, 117 C. C. A. 45, shows that Mell, in trying out the Healy tire for automobile use, at once observed what details should be changed and instantly suggested how to change them. We agree with the Circuit Court of Appeals for the Second Circuit that in so doing Mell employed nothing higher than the ordinary knowledge and skill of a mechanic versed in the art of rubber manufacture, as that art stood prior to the filing of his application.

[2] In the record before us the new thing is said to be the testimony which bears upon the high degree of usefulness of the Mell tire and also the great commercial success that has been achieved in its manufacture and sale. Matters of this kind can only be used to resolve a doubt in favor of the patentee, when the court has been left in doubt after a full consideration of the nature and scope of the patent and a comparison thereof with the teachings and structures of the prior art. Utility of a device and commercial success in exploiting it cannot be used to resolve the doubt as well as to create it, else every useful and successful thing would be patentable.

The decree is affirmed.

JOHNS-PRATT CO. v. SNOW.

(District Court, W. D. New York. November 5, 1913.)

1. PATENTS (§ 328*)—VALIDITY—INFRINGEMENT—SAFETY-FUSE.

Sachs' patent, No. 660,341, for an electric safety-fuse, consisting of a combination of elements the most important of which is a thin flat strip of metal disposed through an appreciable area and held between terminals within a tubular casing or cartridge containing a nonconducting substance in a powdered or granular form, claims 1, 2, 3, 5, and 6, held to involve a patentable invention, not anticipated, and infringed.

2. PATENTS (§ 64*)—ANTICIPATION.

In order that a prior patent may anticipate a later one, it must do so without assistance from the patent alleged to be anticipated.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 79; Dec. Dig. § 64.*]

3. PATENTS (§ 328*)—VALIDITY—DESCRIPTION.

Sachs' patent, No. 660,341, for a combination in a safety-fuse with a tubular case and a nonconducting filling material, of end terminals within the case of relatively ample conductivity, and a fuse-strip of thin flat metal of extended area connected to and between the terminals, was not void for concealment and indefiniteness, in that it did not describe or specify the particular nonconducting filling material; the invention not involving a new filling material, and the character of such material not being an essential element of the patent.

In Equity. Suit by the Johns-Pratt Company against Ernest W. Snow, doing business as E. W. Snow & Co. Decree for complainant.

Edmund Wetmore and Oscar W. Jeffery, both of New York City, for complainant.

Church & Rich, of Rochester, N. Y. (Frederick F. Church, of Rochester, N. Y., of counsel), for defendant.

HAZEL, District Judge. This action was brought by the Johns-Pratt Company, to enjoin the defendant, E. W. Snow & Co., from the infringement of letters patent No. 660,341, for an electric safety-fuse, issued October 23, 1900, to Joseph Sachs, who subsequently assigned the patent to complainant. The defenses are want of invention, and invalidity for failure to clearly disclose "what is absolutely necessary to accomplish the desired result." Claims 1 to 6, excluding the fourth, are involved; but it will suffice merely to reproduce the second claim, which reads as follows:

"2. The combination in a safety-fuse with a tubular case and a nonconducting filling material, of end terminals within the case of relatively ample conductivity, and a fuse-strip of thin flat metal of extended area connected to and between the said terminals, substantially as and for the purposes set forth."

The Sachs patent in controversy has been considered by the Circuit Court and by the Circuit Court of Appeals for the Second and Third Circuits; the first time being in the case of Johns-Pratt Co. v. Sachs Co. (C. C.) 168 Fed. 311, wherein it was held that the patentable novelty of the device resided in the use "of a thin, flat strip of ap-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

preciable area," but the bill was dismissed because the device of the defendant was not an infringement of complainant's; and, afterwards, the Circuit Court of Appeals, 175 Fed. 70, 99 C. C. A. 92, reversed this decision, holding that the fuse-strip used by the defendant in that case was described in complainant's patent, and that the doctrine of estoppel applied, as the patent had been assigned by the patentee Sachs to the complainant, making inquiry into the prior state of the art to prove invention unnecessary.

The said patent was next litigated in the District Court of New Jersey, *Johns-Pratt Co. v. E. H. Freeman Elec. Co.*, 201 Fed. 356, affirmed (C. C. A.) 204 Fed. 288, and the late Judge Cross found a decree of infringement in complainant's favor, deciding in a clear and comprehensive opinion that the various elements of the combination in suit, though separately old, had never been combined to coact, and that by such combination a new and useful result was produced.

It is practically admitted by the defendant that the defenses in the Freeman Case were similar to those in the case at bar, but criticism is made as to the manner in which that case was presented, the contention being that important features relating to the defenses were overlooked or ignored. It goes without saying that the decision in the Freeman Case is entitled to the utmost respect, and, though not conclusively bound thereby, it is nevertheless the duty of this court to follow it unless persuaded by the present record that such decision was wrong, and, even though the questions presented were not entirely free from doubt, it would still be incumbent upon this court, in order to secure uniformity of decisions in the various circuits in patent causes, to agree with such decision as to matters therein decided unless clearly satisfied that it was erroneous. *Calculagraph Co. v. Automatic Time Stamp Co.*, 187 Fed. 276, 109 C. C. A. 618; *Gormley & Jeffery Tire Co. v. United States Agency*, 177 Fed. 691, 101 C. C. A. 479. From my examination of the record I regard the Freeman Case as having been properly decided.

[1] The invention in question relates to an inclosed electric fuse which has a thin, flat strip of metal disposed through an appreciable area and held between terminals within a tubular casing or cartridge containing a nonconducting substance in a powdered or granular form. When the device is in operation—that is, when electric currents of excessive intensity pass through it—such often being the case, the strip, which is the fusing element, melts the fuse because of the heat engendered by the resistance of the current in its path, and the molten portions are divided into minute particles which commingle with the filling material in the tube. The evidence shows that where safety devices were not used there were injurious consequences from the use of electric currents generated from a dynamo because of the frequent overloading and short circuiting, and that to eliminate such injurious effects the safety-fuse came into existence. It was designed to concentrate the high resistance supplied by the excess current in a tubular casing so that the consequent heating or arcing of the wire or fuse should occur within the casing, wherein was contained a fusible section of higher resistance than the conductor, causing the molten:

material to disperse in a suitable filling so as to break the circuit. The specification of the patent in suit, after stating that the prior art disclosed a safety-fuse consisting of wire, or lead, or lead-tin alloy, says:

"I have discovered that the nonarcing qualities or action of a fuse depends upon the disposition, character, and amount of the metal, and that for this purpose a fuse-strip having a relatively small quantity of metal will give the best results. I have also discovered that the best results are obtained from the use of a metal which when melted or fused rapidly oxidizes even if the melting point of the metal is not comparatively low."

It was therefore not new at the date of the invention in suit to inclose a safety-fuse in a round casing, and it was not an uncommon expedient to use a filling of a nonconducting material, preferably a powdered or granular substance; indeed, without such nonconducting filling material for dispersing the melted wire, the fuse would have proven inoperative. The lead or tin alloy wires consisted of comparatively large sections of metal, and on account thereof, according to the evidence, were objectionable, owing to the difficulty in dispersing the fused parts in the filling which manifestly hindered the flow of the current. The patentee overcame this difficulty by substituting a thin, flat piece of metal of rapidly oxidizing qualities in place of the large sections of wire mentioned, disposing the same through a considerable area of the casing to impart to it an enlarged superficial contact with the filling material. He arranged the flat strip in the casing so as to cover the same with the filling material without exposing it to air spaces—an important modification of the prior state of the art to which much of the success of the achievement is due.

The fact that the skilled in the art were aware of the inadequacy and ineffectiveness of prior safety devices because of their tendency to arc or hang, and the further fact that prior inventors who endeavored to eliminate the objections and make more efficient fuses failed to achieve success, are cogent proof that the patentee, after many trials and failures, made by his invention a meritorious advance in the art. The commercial success which his improvement at once attained, as shown by the large number of sales, is strong proof of the assertion that by the introduction of the flat, metal strip in the inclosed fuses, and by his arrangement of it in the casing, the patentee overcame the objections to which the prior devices were subject, producing a safety fuse of greater efficiency in the protection of property. From such an inventor, even though not a pioneer but merely one improving a known art, due praise should not be withheld by the courts in an action brought for the protection of his patented improvement.

As to anticipation by prior patents: The court has reached the conclusion that the feature of the thin, flat metal fuse-strip of extended area in contact with nonconducting filling material is patentably novel. It will be necessary to follow the argument of counsel for defendant in a few only of the prior patents to which he attaches importance.

The Hadaway patent describes a fuse wire strip of magnesium. The specification says that by oxidizing the wire strip below the point

of fusion it becomes a nonconductor, and thereupon the flow of the electricity is interrupted and broken off. There is no fusing of the metal strip as in complainant's patent, but rather a prevention thereof, and, though defendant contends that this difference from complainant's patent is inconsequential, I am nevertheless of the opinion that the operation of the Hadaway device is on an entirely different principle. The experimental tests to dissipate the filling as made by the witness Shearer have not been overlooked, but I am not satisfied from the evidence that the said tests were operated in the precise manner specified in the Hadaway patent, which, by the way, was fully discussed by Judge Cross, who thought the fuse similar to one disclosed in an earlier patent to the present patentee.

[2] The Mordey patents, the one British and the other United States, the former dated 1890 and the latter 1899, which are concededly defendant's best references, were thoroughly gone into in the Freeman Case. In the British patent is mentioned the dispersing action of the molten metal as well as its contact with the filling. The strip consists of one or more wires, or a thin foil, or sheet metal. In the Mordey United States patent is included the feature of an air space in the middle of the fuse for the purpose of centering therein, as the patentee says, the rupturing point of the fuse; but, though such patents are suggestive of some of the elements of the patent in suit, yet there are important omissions. They do not indicate a fuse strip of the character described in complainant's patent—one having an appreciable area within a tubular casing and surrounded by a nonconducting filling. These were features which were considered by the patentee in suit as essential and necessary to achieve the desired result. Mordey's metal strip or wire was of copper, which oxidizes slowly, while complainant's metal strip oxidizes rapidly. Moreover, there are in his structures no terminals within the tube possessing greater conductivity than the metal strip. As heretofore intimated, there are similar features in the Mordey and complainant's patents, but unfortunately the former were unable to successfully overcome the objections to which reference has herein been made. The rule is well established that a prior patent to anticipate one of later date must do so "without assistance from the patent" alleged to be anticipated. *Cohn v. United States Corset Co.*, 93 U. S. 366, 23 L. Ed. 907. None of the prior patents come within this rule. The experiments of the witness Shearer relating to the Mordey patents are not of such a thorough character as to persuade me to disregard their inability to achieve the desired result.

The McCulloch patent, in relation to which no expert testimony was tendered, describes a fuse-strip or ribbon which is reinforced by an enlargement at each end imparting an increased capacity for carrying the current at these points. The patent, however, lacks the essential thing to which complainant's patent is indebted for its success, i. e., the thin, flat strip of extended area connected to and between terminals. In the McCulloch structure a calibrated wire with ends turned back is wound around or twisted so as to leave a part of the single wire "or other conductor in the center." The terminals are

not extended into a tubular casing "of relatively large area and ample conductivity" as in complainant's, and, besides, the filling material has wholly different characteristics, for it consists of asbestos which covers the wire or ribbon inclosed in a box and not in a tubular casing. The McColloch patent is not anticipatory of complainant's patent.

The Downes patent, No. 640,371, and invention are next claimed to be a complete anticipation, and importance is attached to patentee's concession in the Patent Office regarding the prior state of the art. It is shown that originally claims 1 and 2 of the patent in suit referred to a series of thin strips, and other claims to a thin, flat strip, each of which was designed to functionally operate in such a way as to reduce the strips to a molten state from excess current and to then dissipate the same in the filling material. Claims 1 and 2 of the original application were rejected upon the Mordey and Hadaway patents, and were then amended, but without limitation as to a strip of thin, flat metal of extended area, etc.; but there was yet another rejection, the examiner citing the Downes patent, and then the patentee eliminated the feature relating to a series of strips and substituted the claims under consideration. Defendant now contends that, as applied to electrical and mechanical action, there is no essential difference between the series of wires connecting the terminals, and the thin, flat strip; but it strikes me that it was not a mere substitution of a thin, flat strip for a series of wire conductors with similar functions, and, furthermore, the Downes reference discloses that the fuse links therein described are preferably of lead or lead alloy passed through the ends of a drum and "penetrating into air spaces C." Such method of construction is thought materially and functionally different from complainant's, which, as already stated, emphasizes the feature of a flat strip of appreciable area in a tubular section in combination with the material by which it was covered. This determination makes it unnecessary to pass upon the disputed point of priority to decide whether or not Downes was the original inventor. Defendant's counsel at the argument stated that the patentee (Sachs) in an address before the American Institute of Electrical Engineers frequently admitted the equivalency of a series of wires to a thin, flat strip, but upon reading the same I am unable to draw that inference.

Defendant has introduced in evidence link fuses of aluminum and zinc which were in use anterior to the patent in suit; but, as such fuses can only be used in the open air, they are thought to belong to a different class and to be without material relevancy to the safety fuses in question.

[3] In reference to the claim of concealment and indefiniteness, it was principally contended that the patent in controversy was fatally defective for its omission to describe or specify the particular nonconducting filling material; but I do not agree with this contention. The patentee does not claim to have invented a new filling material, nor is this feature an essential element of his patent. He designed to improve the prior art, and in his specification admitted that safety devices of the type described in the specification were ordinarily 'inclosed

in a tubular case and surrounded with a filling of nonconducting material." He refers to a filling material of nonconducting characteristics such as will "more readily disperse through the interstices of the filling than if the strip were of compact sectional area," and with such filling materials the art was familiar. For these reasons the defense of invalidity on the ground of concealment and insufficiency of description is not sustained.

The exhibit in evidence marked, "Complainant's Exhibit No. 4. Defendants Infringing Fuses and Parts," contains in combination all the elements of the claims of the patent in suit, and, as they operate in precisely the same way and achieve the same result, the complainant is entitled to a decree determining that the claims in controversy, namely, claims 1, 2, 3, 5, and 6, are valid and infringed. So ordered.

BORLAND v. NORTHERN TRUST SAFE DEPOSIT CO.

(District Court, N. D. Illinois, E. D. March 24, 1914.)

No. 29,771.

1. PATENTS (§ 26*)—PATENTABLE COMBINATION.

In order that an invention constituting a combination of old elements may be patentable, the constituents must so enter into the combination that each qualifies the other.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.*]

2. PATENTS (§ 328*)—VALIDITY—INFRINGEMENT—SAFE DEPOSIT BOX LOCKS.

Borland patent, No. 940,300, for a safety deposit box lock, *held* valid, but not infringed by a double-nosed lock made under Roche patent, No. 860,940.

In Equity. Suit by Bruce Borland against the Northern Trust Safe Deposit Company. Decree for defendant.

Josiah McRoberts, of Chicago, Ill., for complainant.

George D. Seymour, of New Haven, Conn., and Robert H. Parkinson and Wallace R. Lane, both of Chicago, Ill., for defendant.

SANBORN, District Judge. Suit for infringement of patent No. 940,300, applied for June 14, 1905, issued November 16, 1909, to the plaintiff, on a safety deposit box lock. Defendant's locks were made under the Roche patent of July 23, 1907, No. 860,940. While the Roche patent was issued more than two years before Borland's, it was applied for June 1, 1906, nearly a year later.

The devices in question are changeable key locks, used chiefly upon safety deposit boxes, and are "double-nosed" locks; that is, the two or three keys go in separate keyholes. They are designed to be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

opened by the use of two keys, one held by a person in charge of the safety deposit vault, known as the guard, and the other by the person who rents the box. Neither can open the door of the box-compartment without the co-operation of the other, or without the possession of both keys. When the box owner rents a box he is supposed to receive two duplicate keys, one or both of which he carries with him. When he wants access to his box, he goes to the vault, and either asks the guard to help him open the lock, or to lend him his key. The guard's key is a master key, which will unlock a dog so placed as to prevent the movement of the main bolt. When this dog is unlocked, the box owner may insert his key and slide back the bolt, while the guard's key remains in the lock.

So long as the same person retains a box, the simple double-nosed lock affords due protection to whatever securities or other valuable papers or property he may have placed in his box. But he may lose one or both his duplicate keys, or give up the box, or mistrust that the guard has in some way obtained a copy of his key, so it becomes desirable to change the lock-combination, to enable the box to be either rented to a new customer or retained by the former one, with a new key in place of the one lost. In tumbler locks, such as those in question here, in which the tumblers are normally held firmly together, the change is made by disengaging them, and then inserting a new renter's key to line them up so that the bittings or irregular edges of the key, if a flat one, will not only place the tumblers in a new position to be locked together, but will operate them in such new position. This disengaging operation is done by pivoting one set or part of the tumblers on an eccentric. Turning the eccentric one way pulls them apart, so their relative position may be changed by the new key, and turning it back joins or locks them in their new relation.

This resetting or changeable key mechanism, however desirable or necessary it may be, subjects the lock to the danger of surreptitious resetting by a dishonest guard. To avoid this a third or supplemental lock, governed by a third key, is provided, by which the resetting mechanism is locked and unlocked. This key is placed in the custody of the manager of the vault, thus making a criminal conspiracy between manager and guard necessary in order to change the renter's key and get the new one into his hands in place of the old one without his knowledge. This supplemental lock feature is Borland's sole claim to invention in this case, apart from the specific form of his device. The supplemental lock is old in the art, and was known as "St. Peter's lock," because, as explained by the witness Warren H. Taylor:

"St. Peter was supposed to carry the keys guarding the gates of Heaven; the name St. Peter was adopted as the name for this lock, as this guarded the securities or the opportunities of manipulating the tumblers in the combination of this lock, which was supposed at the time it was brought out to be one of the best and most secure locks that had ever been produced."

[1] The Borland device is a double-nose, three key lock, very highly organized for the purpose of making it unpickable, and to prevent irregular resetting. The feature of safety was made the chief consid-

eration in its construction. Tubular keys are employed, to avoid picking and easy duplication, and the lock contains 15 tumblers. The most important feature of this lock, however, which distinguishes it from others, including defendant's, is the co-operation of all its parts, each with the other; the resetting mechanism being part of the unlocking and lock mechanism in daily use. This lock, as a combination of old elements, comes more nearly within Justice Matthews' definition of a patentable combination than is usually found in combinations which are sustained. In *Pickering v. McCullough*, 104 U. S. 310, 26 L. Ed. 749, Judge Matthews said:

"In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other."

The different elements in this lock are operatively tied together. To open the safety box door part of the supplemental lock mechanism must be used, while in other locks it is not. In defendant's lock no use of the supplemental lock feature is made in ordinary opening and closing, except to idle a disc in a nonfunctional way. The supplemental lock may be taken off entirely without affecting the everyday use of the locking and unlocking, while in *Borland* the whole lock would be destroyed.

It is urged by defendant that *Borland* did not bring forward the supplemental lock feature in his patent application, nor until some two years later, so that the *Roche* application of 1906 antedates him. But the fact is that *Borland* fully described his supplemental lock in his first specification. In fact, he could not explain his invention without doing so, by reason of the complete co-operation of parts, and the co-operative law which governs the whole device. His original figure 4 shows the resetting mechanism on the back of the lock, and figure 14 the manager's key. On June 8, 1905, *Borland* fully describes his resetting mechanism shown in figure 4, and other cuts, including the third or manager's key, shown in figure 14. He closes this description as follows:

"Then both the new key" (meaning the fourth key, or new depositor's key) "and the manager's key may be withdrawn, the withdrawal of the former returning the locking tumblers and associated gears to their locking positions, while upon the withdrawal of the manager's key the dog 84 is thrown back into engagement with the disk to hold the post 30 against movement."

The supplemental lock is thus fully described by *Borland* at the outset.

Original claim 21, filed June 14, 1905, also covers the supplemental lock in a blind way. It is true that *Borland* did not elaborate the notion of a supplemental lock until long after *Roche* had filed his application for a patent on what is now defendant's lock. But such is the nature of *Borland*'s invention that he could not describe the resetting operation without also ipsissimis verbis describing the supplemental lock.

[2] There could be no invention in merely adding a supplemental lock to the permutation or resettable lock of the earlier art. This is

so far beyond controversy as to justify only a bare mention of a few of the prior devices. Speaking generally, all that Borland added to the Roche 1901 lock was a supplemental lock for the resetting mechanism, and to put that lock on the inside of the lock-case, so as to effectually guard against fraudulent resetting. The use of a supplemental lock was old, but the manner in which it was tied up to the old tumblers governed by the customer's key, and the guard's key driving gears, was not only entirely new with this inventor, but is not used by defendant, nor anything like it.

Numerous exhibits having a supplemental lock were shown at the hearing, such as several Yale locks dating back to 1872 and earlier. They are by no means so highly organized as the Borland, but they show beyond question that there could not possibly be invention in the mere adding of a supplemental locking device to any sort of a mutable key lock.

It is equally true that there could not be invention in merely putting the supplemental device inside the lock casing, both because this might involve only a change of position, and because it would not be novel, as shown by defendant's exhibits 18, 19, and 29, all dial locks with supplemental devices inside the lock casings; also by the Newell reissue, No. 208, of 1851. They are not to be compared in safety with Borland's lock, but the idea is there nevertheless. As plaintiff's expert says:

"There are in the prior art some so-called dial locks, not intended for use upon safe deposit boxes, and not adapted for such use, wherein access to the tumblers for resetting them to a new combination can be had only by the use of a key which must be inserted at the back of the lock, but in none of these dial locks having this supplemental key does this resetting require either a knowledge or a use of the combination required for opening the lock."

This is the same as saying that Borland has improved on the prior art by so associating the main and supplemental portions of his device as to protect it to an exceedingly high point. In fact, his invention is so highly organized that its practical usefulness is doubtful.

Between the Roche 1907 device, used by defendant, and the complicated but ingenious lock of the plaintiff, there are many differences, some functional and others not. Among those involving different means, operation, or result are the following: (1) The Roche supplemental lock is entirely separable from the other parts, while in Borland there can be no unlocking or locking without using it. It is only in the resetting operation that there is co-operation between the two-part tumblers and the supplemental lock. (2) The customer's key in each lock has an entirely different function, so far as insertion into the case is concerned. (3) In plaintiff's device the guard's key must be withdrawn before the manager's key can be used, thus making one functional operation necessary to reset plaintiff's lock, and rendering it safer. (4) The two manager's keys have different functions, one being used to undog the eccentric, and the other to turn it after being undogged by the renter's key.

Other differences appear when the operation of the two devices is carefully compared, as I will now attempt to do.

Unlocking Borland device.

1. *Unlocking cam to operate latch-tooth.* Insert guard key and rotate back and forth to line up gatings of guard's tumblers to unlock cam 50 for engagement with latch.

2. *Coupling renter's drive gears to register gatings of supplemental lock.* Insert renter's key and rotate it to turn drive gears to register gatings of supplemental lock pinions in front of latch-tooth.

3. *Undogging main bolt.* Turn guard's key to actuate cam to lower the tail of the latch, and raising tooth into gatings, out of locking connection with bolt.

4. *Withdrawing main bolt.* Turn renter's key to left, swinging lower pinion of supplemental lock, to operate rack bar on bolt, and slide back the bolt.

The box door may now be opened.

Resetting Borland device.

(The door now being open, and the bolt retracted, the back of the lock is exposed, ready for resetting).

5. *Placing main bolt in locked position.* Turn renter's key opposite to direction in No. 4.

6. *Disengaging latch tooth.* Turn guard's key.

7. *Withdrawing guard's key.* As it is now necessary to use the manager's key in the guard's keyhole, the guard's key must be pulled out.

8. *Undogging eccentric.* Insert manager's key in guard keyhole, push in and rotate back and forth until it registers with the bottom tumbler, then turn to left to undog the eccentric, so that its post may be turned.

9. *Separating pinions from drive gears.* Manually turn thumb-nut on back of lock, thus turning eccentric, and unmeshing pinions from gears.

10. *Resetting to new combination.* Insert new renter's key, rearranging the drive gears according to the sinuous slot of the new key.

11. *Restoring eccentric to mesh.* Turn thumb-nut back to original position.

12. *Relocking eccentric.* This is done by withdrawing the manager's key, alternately rotating and pulling out; (seven motions in all).

Unlocking defendant's device.

1. *Undogging main bolt.* Insert guard key, and turn to left.

2. *Retracting bolt.* Insert renter's key and turn to right. The box door may now be opened.

Resetting defendant's device.

3. Turn renter's key to left.

4. Turn guard's key to right.

5. *Placing supplemental lock in un-locking position.* Insert old renter's key and turn to right as far as possible.

6. *Unmeshing the counterpart tumblers.* This is done by inserting the manager's key, and turning it a half-turn, thus swinging the eccentric to separate the two-part tumblers.

7. *Resetting to new combination.* This is done by inserting the new renter's key, and turning it. The different bittings line up the separated tumblers to fit the new key.

8. *Remeshing the counterpart tumblers.* The manager's key is now turned back to reconnect the meshes.

9. *Locking eccentric.* Take out the manager's key, and the lock is restored to its condition at the beginning of resetting.

It would be difficult to find two locks more different in practical construction than those here in question. One is excessively complicated, slow, and difficult to operate; the other simple, rapid, and easy in operation. One has gear tumblers and gear wheel keys; the other the old two-part tumblers and flat-bitted keys. In one it is necessary to make four to seven separate movements of the key to fully insert it in the lock; in the other the key is simply pushed straight in by a single movement. In one the supplemental lock is an integral part of the main lock mechanism; in the other this lock is entirely separable, and may be removed without affecting the main lock. One has two keyholes; the other three. In one the bolt can be undogged only by the co-operation of guard and renter's keys, neither one of which can be dispensed with, while in the other the bolt is undogged by a simple turn of the guard key, and the guard lock may be taken out and still leave the lock operative, both for opening and closing and resetting. Some of these differences, no doubt, may be referred to equivalent functions; but there are too many radical contrasts to make it necessary to discuss the range of equivalents to which Borland is entitled. There are great differences in means and operation, even though result may be deemed substantially the same.

Many other questions were raised on the argument, and are fully covered by the briefs. One of them is that Borland obtained practically all his ideas and suggestions from defendant's officers and agents. While it is true that Borland got his first knowledge of the tumbler lock art from defendant, yet, as he fully described his complete supplemental and main lock mechanism early in June, 1905, I have not been able to find sufficient evidence to overcome his patent, as of the date of his application.

An attack is made on the Borland patent on account of representations made in the Patent Office to overcome the citation of the Taylor patent as a reference. I have not thought it necessary to decide this question, because I think noninfringement exceedingly clear. For the same reason, I have not fully considered the effect of the assistant commissioner's decision holding certain claims unpatentable in view of Taylor's supplemental lock.

Much is made of the fact that defendant's locks had been in its vault for nearly three years before Borland filed any claims directed to the supplemental lock feature, and that in May, 1909, long after the Roche 1906 application was made, covering the alleged infringing lock, he canceled all his original claims and all those of July, 1906, and inserted 36 new claims, which, it is alleged by defendant's counsel, was done to cover the Roche 1906 lock adopted by defendant. But I find all this immaterial, because Borland fully described his present lock, with its supplemental lock as an integral and absolutely essential part, early in June, 1905.

Because I regard the question of infringement so clear for defendant, also, I have not thought it necessary to carefully consider the asserted disclosure to Mossman of the Lips lock as made in Holland, or to determine whether such a disclosure was made as would amount

to prior knowledge without actual use of the Borland invention in this country.

Defendant's lock reads squarely on many of plaintiff's claims, but these claims by no means represent his actual invention, of which defendant makes no use. *Westinghouse v. Boyden Power-Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136.

A decree should be entered sustaining plaintiff's patent, and that it is not infringed.

KUPPER et al. v. WESTINGHOUSE ELECTRIC & MFG. CO.

(District Court, W. D. Pennsylvania. March 31, 1914.)

No. 11.

1. PATENTS (§ 116*)—VALIDITY—DESCRIPTION.

The Bormann patent No. 736,812, for solder, described the same as consisting "of an intimate mixture of finely powdered soft-solder (tin, alloy, or the like) triturated to a paste, a deoxidizing agent (e. g., zinc chloride, ammonium chloride, or both together) and a thickening body (such, for example, as cellulose) which burns easily and leaves no trace behind it." *Held*, that the use of the word "to" in the phrase "triturated to a paste," instead of "for," did not render the description insufficient.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 168½; Dec. Dig. § 116.*]

2. PATENTS (§ 328*)—VALIDITY—INFRINGEMENT.

The Bormann patent No. 736,812, claim 1, for a liquid soft-soldering mass, *held* to involve a patentable invention, not anticipated, valid, and infringed.

In Equity. Suit by Rudolph Kupper and others against the Westinghouse Electric & Manufacturing Company for patent infringement. Decree for complainants.

H. A. Seymour, of Washington, D. C., and W. G. Doolittle, of Pittsburgh, Pa., for complainants.

Wesley G. Carr, of Pittsburgh, Pa., for defendant.

ORR, District Judge. The plaintiffs possess all the rights under United States patent No. 736,812, issued to Rudolph Bormann, of Berlin, Germany, under date of August 18, 1903, for solder. They have complained that the defendant has infringed their rights, and seek the customary relief. The defendant denies the validity of said patent for want of novelty and invention. It also denies the sufficiency of the disclosure of the patent, but does not aver in its answer that the failure of Bormann to make sufficient disclosures was due to an intention to deceive the public.

[1] Before describing the compound, Bormann in his specifications makes reference to the method hitherto used for uniting metals by soft-solder, and shows the disadvantages of such method. He then describes his compound, shows the method of using it; and states the advantages of such method over the method formerly in use. The former method included:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"First cleansing the portions to be united (for example, two metal bodies) by means of a known deoxidizing agent (e. g., zinc chloride or the like) and then heating the same with a soldering-iron, applying the solder to the seam, and melting the same."

The disadvantages of that method were waste of solder by reason of difficulties in evenly distributing the same, and inability to use the soldering-iron in the manipulation of small objects. His description of the compound in the specifications is as follows:

"The soldering agent forming the subject of the present invention consists of an intimate mixture of finely-powdered soft-solder (tin, alloy, or the like) trituated to a paste, a deoxidizing agent (e. g., zinc chloride, ammonium chloride, or both together) and a thickening body (such, for example, as cellulose) which burns easily and leaves no trace behind it."

Discarding for the present the examples given in the above, it is to be observed that the "deoxidizing agent" must be in liquid form. It is that which "cleansed" the metals before heating under the old method. It is that which gives the liquid or pasty characteristic to the mixture because solder could not do so; neither is it to be understood that the "thickening body" should do so. Again it is well known that the chlorides given as examples are extremely soluble in water, and can be procured commercially in such form. As to the "thickening body," it is observed that the only quality demanded is that it shall burn easily and leave no trace behind. The phrase "trituated to a paste," when considered as descriptive of the "finely-powdered soft-solder," has given the experts some trouble. When we consider that powder has been defined to be "any substance made fine and dry as rough as sand or as fine as flour" (Stormouth's Dictionary), and that "trituration" is the rubbing or grinding to a fine powder, we must find the degree of fineness to be indicated by the word "paste." Had the phrase read "trituated *for* a paste," there could be no question as to clearness of expression. That the word "to" and not the word "for" is used should not be held to obscure the intention of the inventor, who appears by the patent to have been a German in whose language "zu" stands for either of the foregoing words. His description is sufficient for men skilled in the art of using soft-solder, such as tinsmiths. They know how finely powdered a substance should be to form a paste, they know the nature of paste, and how to thicken it. Exactness in measurements is not necessary. Following his description the patentee says:

"This complies with the necessary requirements, since a soldering material is thus obtained which can be spread on in a form hitherto unknown as a pasty fluid, and has this striking advantage that it can be applied to the object to be soldered by means of a brush, so that there is a guaranty that the soldering material will be applied in the necessary quantity and will be very evenly distributed over the parts to be soldered. By this means these parts may be securely and intimately connected by simply heating them over a spirit or similar lamp. A further striking advantage of employing such a pasty fluid soft-solder material is that in a space of time incomparably shorter than what was hitherto possible quite a number of objects—particularly small objects—can be simultaneously soldered. One proceeds by first applying the soldering material with a brush to the articles to be soldered and then heating them one after another over a spirit-flame, or the like. Also if on one article there are several places to be soldered these places can first be provided with a coating of the material, and consequently heated

without the solder falling from the seam on the turning and manipulation of the article in flame of the lamp. This is prevented by exactly the necessary quantity of the soldering material being applied."

[2] Claim 1 of the patent, which is alleged to be infringed, is as follows:

"1. A liquid soft-soldering mass consisting of a mixture of a finely pulverized soft-solder metal, triturated to a paste and a deoxidizing agent, together with a thickening substance, which burns without leaving any trace behind it, substantially as specified."

In view of what has heretofore been stated, it is not necessary to analyze the claim further than to note the three elements to be intimately mixed, the powdered alloy, the flux, and the vehicle. The court is satisfied that the patent discloses a "new and useful composition of matter," and that the manner of making it is sufficiently disclosed in the specifications. So far as appears from the evidence the invention was not anticipated. British patent 2410 of 1862 to Johnson is for "Improvements in coating or covering metallic surfaces with copper." It relates to the coating of iron "by means of magneto-electric or electro-galvanic processes," and consists in the employment of certain compositions of which none is a solder, although erroneously called such in the patent. United States patent No. 86,414 to Kent is for a flux only, while United States patent No. 87,391 to Blinn, in the light of the patent in suit, seems to be suggestive of the Bormann product, yet a careful reading of it compels the court to hold that it is not a disclosure of the subject of the Bormann patent. In the first solder not finely powdered, but coarsely granulated, is first given an oily covering to prevent oxidation, then mixed with a described tinning flux, and then further mixed with pulverized or granulated solder and then thoroughly dried. United States patent No. 351,546, issued to Charles W. Walther, does not relate to soft-solder at all. It describes a mixture for brazing which can only be used at a high temperature. United States patent No. 496,116, issued to William Lloyd Gale, for a compound for welding cast iron, has no reference to soft-solder. United States patent No. 592,914, issued to Knox is for a flux paste which does not contain any solder. This is true also with respect to United States patent 608,978, issued to Burnley, and United States patent No. 728,079 to Brocius and Eshelman.

The Bormann patent in suit is the first patent to disclose a pasty soft-solder comprising powdered alloy, a vehicle and a flux. It is valid.

Infringement must also be found. The plaintiffs for some years prior to 1912 had been selling its product to the public under the name of "Tinol." Early in that year defendant bought from plaintiff some pounds of "Tinol," and later defendant advertised and sold its product to the public under the name of "Weldwell," and has continued to do so notwithstanding early notice of infringement and subsequent complaint in court. "Tinol" and "Weldwell" appear to be like each other. It is strongly insisted by defendant that they are not alike. Three analyses of defendant's product used at different times are in evidence. In each, however, there is the intimate mixture of soft-

solder, the flux, and the vehicle. In one the flux is ammonium chloride, the vehicle is vaseline and glycerin. In another the flux is zinc chloride and ammonium chloride, the vehicle vaseline, transformed oil and fusel oil. In the third, the flux is zinc chloride, dissolved in denatured alcohol and also ammonium chloride, the vehicle vaseline. Such variations do not give defendant any right to sell their products, if the substitutions are equivalents for any of the parts of the plaintiff's mixture. If the flux is used in the form of a salt instead of a solution, it necessarily follows that there should be some change in the vehicle. Whether two substances are added to the mixture to make the vehicle is immaterial. The mixtures of the defendant are composed of the same parts as specified in the patent or their equivalents.

It is further urged that plaintiffs' mixture is made in accordance with United States patent to Leisel, No. 804,664, which was issued some two years after the patent in suit. It is unnecessary to determine the scope of the Leisel patent, as it can have no bearing upon the present issue. The product of the plaintiffs is that which is described in the patent in suit. The product of the defendant is also that of the patent. The latter entered the field with full knowledge of the rights of the plaintiffs. Therefore they should be enjoined.

Let a decree be drawn.

BRANDT v. LOUIS K. LIGGETT CO.

(District Court, D. Massachusetts. March 21, 1914.)

No. 394.

PATENTS (§ 328*)—INFRINGEMENT—FOUNTAIN PENS.

Eberstein and Brandt patent No. 764,227, for an improvement in fountain-pens, claims 1, 2, providing for a holder with screw threads and an outwardly flared pen end, etc., intended to prevent leaking and sweating, *held* not infringed by a pen constructed under Sanford patent No. 969,198, having a beveled or tapered cap end, the taper of which was so abrupt as to be in marked contrast with that shown in the drawings of complainant's patent.

In Equity. Suit by Charles Brandt against the Louis K. Liggett Company for patent infringement. Bill dismissed.

Oliver Mitchell, of Boston, Mass., for plaintiff.

Emery, Booth, Janney & Varney, of Boston, Mass., and D. Walter Brown, of New York City, for defendant.

DODGE, Circuit Judge. The plaintiff is now sole owner of United States patent No. 764,227, issued July 5, 1904, to Eberstein and Brandt. The patent is for an improvement in fountain-pens. He charges the defendant company with having infringed it by the sale of two fountain pens, Exhibits A and B.

The alleged infringing pens were made by the Sanford & Bennett Company of New York, which is defending this suit. Their sale by the defendant is not disputed. They are marked as made under

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

United States patent No. 969,198, issued September 6, 1910, to William W. Sanford.

The advantage sought by the patent is declared therein to be to prevent the pen from leaking when turned bottom side up, and also to prevent its "sweating." Both the pen of the patent and the defendant's pen have what are referred to in the patent as "the usual holder, pen-point and a main cap having a closed end." The patent provides what it calls a "supplemental cap," adapted to be placed within the main cap, not attached to it, but fitting within it closely enough to be held there by friction. The supplemental cap is to have a pen-receiving pocket, and is to be so shaped at its end as to fit within the tapering pen end of the barrel or penholder, which pen end is to be flared outwardly and receive within it the end of the supplemental cap. When the main cap is screwed upon the holder, the supplemental cap so held within it is to enter the interior of the flared end of the holder, make a tight joint therewith, when the main cap is screwed down, and thereby prevent any ink escaping from the pen from getting into the main cap by confining it wholly within the supplemental cap.

Two of the three claims of the patent are said to be infringed. They are:

"1. In a fountain-pen, a holder provided with screw-threads and having an outwardly-flared pen end, a main cap to cover said end, said cap having screw-threads to co-operate with the screw-threads on the holder, and a supplemental cap separate and independent from the main cap and located entirely within the same within the main cap, said supplemental cap having a pocket or chamber to receive the pen-point and being tapered at its end whereby when the main cap is applied to the holder said tapered end enters and centers itself against the interior of the flared portion of the holder.

"2. In a fountain-pen having the usual holder, pen-point and a main cap having a closed end, said holder being provided with a flaring end, a removable supplemental cap independent from the main cap and located entirely within the same, said supplemental cap having a chamber to receive the pen-point, and having a non-yielding inwardly-tapered end to enter and engage the flaring end of the holder and make a tight joint therewith."

In the manner of engagement between the end of the supplemental cap and the pen end of the holder when the main cap is screwed home, may be said to lie the only differences between the pen of the patent and the defendant's pen which need be considered for the purposes of this case.

The pen end of the defendant's holder is "outwardly flared," or is "provided with a flaring end" only in the sense that its edge is not quite flat in section, but very slightly inclined toward the axis of the holder. If the defendant's supplemental cap is "tapered at its end" or has "a non-yielding inwardly-tapered end," the bevel or taper begins so close to the end and is so abrupt as to be in marked contrast with the taper shown in the drawings of the patent. The contact between the two ends, when complete, is within the outer circumference, but outside the inner circumference of the edge of the pen end of the holder. That the tapered end of the defendant's cap "enters and centers itself against the interior of the flared portion of the

holder," or "enters and engages the flaring end of the holder so as to make a tight joint therewith," does not seem to me true in the same sense in which those statements are true of the patentee's device as shown by his drawings. Instead of the tapered end "entering" the end of the holder or centering itself against the "interior" thereof, the contact in the defendant's pen seems to me practically an end to end contact, and the resulting joint, therefore, a joint differing substantially in character from that produced by the patentee. All this is much more easily apparent by inspection of the defendant's pens themselves than by description. Fig. 2 of the Sanford patent, under which the defendant's pens are said to be made, illustrates some of the differences referred to above by comparison with the drawings of the patent, but the pen end there represented in section seems to me rather better qualified to be called "flaring" or "flared" and to fit the surface of the "taper" on the cap better than do the corresponding parts of the alleged infringing pens produced.

Further indications are found in the language of the patentee's specification that the joint formed by contact between the ends of the supplemental cap and the holder is to be of a kind unlike that which is formed in the defendant's pen. The specification states that the supplemental cap is to "enter and fit within" the flared portion of the holder, also that the screwing home of the main cap is to bring the "tapered portion" of the supplemental cap "hard against the interior of the flanged portion of the holder," also that there is special advantage in having the line of contact between the supplemental cap and holder "on the interior of the holder rather than on its end or exterior, because where the line of contact is just on the interior the ink cannot by any possibility get over the edge 16 of the holder end." The line of contact in the defendant's pen cannot, as it seems to me, be fairly called within what corresponds to the edge 16 of the holder end, nor do I think the other statements quoted can be applied, in any proper sense, to the defendant's pen. The complainant says that the difference of the defendant's pen over the plaintiff's patent as regards the slant of the flaring end is the difference between a saucer and a bowl, and is one only of degree. It seems to me that the difference is sufficient to prevent that kind of contact between the tapered portion of the cap and the interior, whether of "saucer" or "bowl," which the patent describes.

No broad construction can be resorted to for the purpose of assisting the plaintiff upon this point. Supplemental caps within the main cap, to fit against the end or edge of the holder and confine any ink escaping from it, are of too frequent occurrence in the pens of the prior art, and the contact joints which they form with the ends of the holder are too nearly similar in character to that of the patent. In view of other features of the patent, I am unable to hold that no patentable novelty is disclosed by it, but I consider it limited to the particular construction described.

It may be added that the only pen proved to have been made by the patentees, or under license from them (Defendant's Exhibit C), more nearly resembles the alleged infringing pen than the pen of the

patent in the form given the ends of the supplemental cap and of the holder, and in the kind of joint resulting from contact between them.

I am obliged to hold that infringement by the defendant of the claims in question is not shown, and there may be a decree accordingly.

E. W. BLISS CO. v. ATLANTIC HANDLE CO.

In re VAUGHAN.

(District Court, D. Massachusetts. March 19, 1913.)

No. 348.

PATENTS (§ 326*)—INFRINGEMENT—INJUNCTION—CONTEMPT.

Where, when suit was instituted against a corporation for infringement of complainant's patent, V. was defendant's general manager, but not an officer of the company, nor party to the suit, and prior to leaving the defendant's employ he knew none of the details of the suit and had no control over it, and it did not appear that his subsequent use of the alleged infringing machines was either by authority derived from the defendant company as its general servant or confederate, or a part of a fraudulent or collusive attempt by the defendant to evade the injunction, V. was not subject to attachment for contempt in using the infringing machine in violation of the injunction.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 613-619; Dec. Dig. § 326.*]

In Equity. Suit by the E. W. Bliss Company against the Atlantic Handle Company. Petition for attachment for contempt against George E. Vaughan. Dismissed.

Browne & Woodworth, of Boston, Mass., for plaintiff.

A. Chesley York, of Boston, Mass., for defendant.

MORTON, District Judge. This is a petition for attachment for contempt against George E. Vaughan. On December 6, 1912, a final decree for the complainant was entered in the principal case, and on December 7th a permanent injunction issued forbidding the "Atlantic Handle Company, its servants and agents," from making, using, or selling the device described in the patent in suit. The petition alleges that Vaughan is in contempt for violating this injunction.

The material facts are as follows: Vaughan was not a party to the suit, which was against the Atlantic Handle Company, a Massachusetts corporation, as sole defendant. So far as appears, he was never a corporate officer of that company; he was employed by it as general manager. On July 24, 1912, it closed its doors and ceased to do business. Vaughan thereupon left its employ and went away from Massachusetts. He came back here early in the fall of 1912. The machines formerly used by the Atlantic Handle Company, upon which the infringement suit had been based, had passed into the control of the Morrisville Machine Company. Vaughan arranged with the Morrisville Machine Company for the use of these machines and started in business on his own account. No evidence whatever was offered tend-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing to show that any other person who had been connected with the Atlantic Handle Company was in any way interested in Vaughan's business, which appears to have been an independent new venture. Vaughan knew at this time, in a general way, that a suit had been brought against the Atlantic Handle Company for infringement of this patent; but he did not know about the details of the suit, and had had no control over it. The injunction was served upon Vaughan "as general manager of the Atlantic Handle Company" on December 7, 1912. At that time he was not "general manager" of the company, and had had no connection with it for nearly six months.

Vaughan, under advice of counsel, continued to use the machines after service of the injunction upon him, believing, in good faith, that he was not bound by it. He contends that upon a proper defense the complainant's patent would be shown to be invalid, that he desires to make such defense, and that he is entitled to do so. The complainant contends that Vaughan is bound by the result of the suit against the Atlantic Handle Company.

It has not been shown that Vaughan's use of the machines either was by authority derived from the defendant company as its agent, servant, or confederate, or was part of a fraudulent and collusive attempt by the losing parties in the infringement suit to evade the injunction and to escape the result of that litigation. He is not, therefore, in contempt for disregarding the injunction. In the Lennon Case, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110, the defendant in the contempt proceedings, in doing the acts complained of, was acting as an agent of the enjoined defendant. In *Bernard v. Frank*, 179 Fed. 516, 101 C. C. A. 459, the new corporation, of which the defendant in the contempt proceedings was the moving spirit, "was organized for the purpose of escaping the consequences of the infringement of the patent." In *Campbell v. Magnet Light Co.* (C. C.) 175 Fed. 117, the defendants in the contempt proceedings had been officers and directors of the defendant company against which the injunction had been issued. Afterwards they formed a new company to carry on the same business in violation of the complainant's patent. It is plain that the new corporation was, in the language of Judge Coxe, "organized for the purpose of escaping the consequences of the infringement of the patent." This is all that was necessary for the decision of the case and it is with reference to those facts that the somewhat broad statements in the opinion were used. Almost the precise question here raised was considered in *Omelia v. American Cap Front Mfg. Co.* (D. C.) 195 Fed. 539, and it was decided that the defendant was not in contempt. See, also, *Donaldson v. Roksament Co.* (C. C.) 178 Fed. 103.

The petition for attachment is dismissed, with costs.

LOVELL-McCONNELL MFG. CO. v. AUTOMOBILE SUPPLY MFG. CO.
et al.

(District Court, E. D. New York. January 6, 1914.)

1. PATENTS (§ 101*)—VALIDITY—INCLUDING METHOD CLAIMS IN MECHANICAL PATENT.

If a mechanical device produces a result by a method which is patentable, a method claim may be included with claims for the mechanical device in a patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 141; Dec. Dig. § 101.*]

2. PATENTS (§ 64*)—ANTICIPATION—PRIOR PATENT.

Mere possibility of a suggestion in a patent for further discovery or invention, not covered by any claim, is not anticipation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 79; Dec. Dig. § 64.*]

3. PATENTS (§ 101*)—VALIDITY—CLAIMS FOR EQUIVALENT PARTS OF SAME STRUCTURE.

Claims of a patent, which cover different, but equivalent or exchangeable, parts of one patentable device, if each of such parts is patentable of itself, are not necessarily void, nor does their inclusion in the same patent render it invalid.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 141; Dec. Dig. § 101.*]

4. PATENTS (§ 54*)—PRIOR PUBLIC USE—ABANDONED EXPERIMENT.

Mere experimentation in public, or in a public place, followed by no improvement upon the prior art, and ultimately abandoned, is not sufficient to defeat a subsequent invention, upon which a patent has issued, and which has proved to be of commercial value, even though the experiments might have progressed to the point of disclosing the patented invention, but in fact did not.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 73; Dec. Dig. § 54.*]

5. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—AUTOMOBILE HORN.

The Hutchison patents, Nos. 923,048, 923,049, and 923,122, all relating to signaling or alarm horns for use on automobiles, launches, fire engines, etc., were not anticipated, and disclose patentable invention; also held infringed.

In Equity. Suit by the Lovell-McConnell Manufacturing Company (formerly the Lovell-McConnell Manufacturing Company, the Hutchison Electric Horn Company, and Miller Reese Hutchison) against the Automobile Supply Manufacturing Company and Louis Rubes, its president. On final hearing. Decree for complainant.

See, also, 193 Fed. 658.

George C. Dean, of New York City (Drury W. Cooper, of New York City, of counsel), for complainant.

Ralph L. Scott, of New York City (Frederick P. Fish, of Boston, Mass., and C. A. L. Massie, of New York City, of counsel), for defendants.

CHATFIELD, District Judge. The complainant in the present action alleges infringement by the defendants of three patents issued to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Miller Reese Hutchison, numbered 923,048, 923,049, and 923,122, all under date of May 25, 1909.

The answer presents the issue of noninfringement, invalidity of generic claims, both as to the devices of the patentee (when viewed as a complete structure, and also as to many separate features embodied in respectively separate claims), nonpatentability by reason of alleged anticipations, and nonpatentability from alleged lack of originality over the prior art, or of invention in the applications and devices set forth in the specifications and drawings and described in the claims. The defendants insist that the broad claims must be limited to what they assume might be patentable invention as improvements or definite combinations, but that they cannot be interpreted by the comprehensive meaning of the language alone, and, if the claims are so limited, the defendants' devices are alleged not to infringe.

The early difficulties of the case and various issues presented upon the application for a preliminary injunction (which was denied, without considering the merits of the patent in any way, in 193 Fed. 658) have been eliminated, either by intermediate orders of the court, by agreement of the parties, or by the testimony presented upon final hearing, which has rendered these matters of minor importance.

The complainant company held the patents by assignment. The complainant Hutchison, as patentee, appeared to be nevertheless entitled to join in the equity action; but the division of damages, if recovered, or of benefits under an injunction, if obtained, would have been reserved for decree and accounting. This is now immaterial.

The individual defendant appears by the record to have been properly joined as participant in the acts alleged to be infringements, and his objection to being included as an individual defendant, for the purpose of meeting the expenses of the action and satisfying an award of damages, will not be determined as a part of the questions of validity and infringement, but will also be left for final decree. His connection with the acts charged is such that there would seem to be no reason for separating him from the defendant company, in considering the merits of the charge of infringement.

A question of unfair competition, through the similarity of the devices put upon the market by the complainant and defendants, in their general appearance, size, contour of case and horn, general adaptability to be applied in the same way for exactly the same purpose, and the striking similarities of labeling and external appearance, indicate merely that the two articles are put forward by two different manufacturers, to supply exactly the same demand, to be substantially interchangeable in purpose or use, and render competition possible only by advertising any differences in price. The tone emitted by the complainant's device and that of the defendants cannot be told one from the other, unless the horns be sounded in a way to furnish almost simultaneous comparison, or when tested by an experienced ear.

The complainant's device was first upon the market, and the defendants' device is plainly, in the general ways described, a copy. Certain patterns of the defendants' device appear to have been sold before

certain modifications of the complainant's, and as to these the defendants insist that the complainant has copied their commercial article. But these questions do not control in the present case.

If the complainant is entitled to the patents as alleged, then the placing upon the market of an article resembling the patented article in appearance merely simplifies the question of infringement, and throws some light upon the allegations of practicability, commercial advantage, and use. But the very evidence showing that the defendants have sold their device at a cheaper rate, to do the work of the complainant's device and in competition with it, makes the question of unfair competition merely an element of evidence in the patent action. If the defendants have not the right to use the various elements comprised in their device, in the form and relation in which the device is put upon the market, then its general resemblance to the complainant's device would involve the question of unfair competition inextricably with the question of infringement. If, on the other hand, the defendants do not infringe, or if the complainant has not the right to control the manufacture of the device in question, the methods of advertising and the rivalry shown by the testimony, together with the old or obvious right to use similar materials, such as brass casings or horns and enameled labels, are of so little importance that at final hearing the issues have been confined strictly to the questions involved in the actions upon the patents.

Numerous other difficulties as to the order and taking of proof, conduct of the parties before and during the trial, and objection as to matters of advertising, which were brought to the court's attention and disposed of, or which came up from time to time and have disposed of themselves by later developments, need not now be restated. The strong feeling manifested, however, between the parties to the action, must be taken into account in weighing the testimony, and brings us to the collateral matters of public use in advance of discussion of the patents themselves.

The complainant, as shown by the record, has, by great effort and evident business ability, taken advantage of the sudden increase in the use of the automobile and the great market furnished for automobile parts within the last few years. It is true, as urged by the defendants, that no large market could have existed if automobiles had not been largely used; but, assuming that the complainant was fortunate in having a device to put on the market at the right time, nevertheless, the extended use of the complainant's and defendants' horns, and the large proportion of use in comparison with other kinds of signal alarms or horns for automobiles, make it certain that the device which Hutchison tried to patent, as worked out in commercial form, has a large sale, and its value has been speedily and apparently generally recognized by the public.

No serious contention is made that the complainant has put upon the market a different device than that patented by Hutchison. On the other hand, the defendants have argued in the opposite direction, viz., that Hutchison's patents set forth a device, and his claims generally cover a signal alarm, which has been capable of the commer-

cial success given it by the complainant, but which was much broader in many ways than any invention or claim to which the defendants admit Hutchison was entitled, if he had anything patentable in his mind at the time of filing his application.

It appears, further, that after filing his first application Hutchison continued to develop at least the expression of whatever patentable novelty he had. His counsel progressed in their dealings with the Patent Office, both in the way of volume and discrimination or differentiation of the separate matters which ultimately were embodied in separate claims. When placed upon the market, a number of the ideas and claims of the Hutchison applications were never carried beyond the paper patent stage, and by methods of elimination from the extensive statement of equivalents or of possible uses defined in the Hutchison applications, the complainant, for the commercial device, gradually worked out one form or type, which is the only form now treated as having such large commercial value, and which is also shown in the device of the defendants.

It further appears that the complainant, by ordinary business methods, contracted for and now uses, as a part of its signal, a one-way electric motor, of a type available to any one, but having the necessary capacity and qualifications for the use which the complainant wished. In practice, this motor can be run upon six dry cells and with a current of about six volts, for the ordinary use of the complainant's larger signal; the defendants' signal and a later and smaller horn of complainant are generally so constituted and adjusted as to run normally with the use of four volts. These devices are planned for attachment to an automobile, so that the current can be supplied from the secondary starting battery of the automobile, and the smaller current requirements of the smaller devices are like matters of cost; they introduce the element of saving both in cost and maintenance, as a matter of commercial competition.

In the course of business, the defendants procured from a manufacturer who sold to the market generally a number of electric motors, which had been manufactured to meet the supposed future wants of the complainant, and while the defendants thereby did not infringe any specific claim of the patent, nevertheless they have by the use of those motors, and similar motors of the same sort, increased the physical resemblance and the structural similarity of their signals to those of the complainant, and thus simplified the question of infringement.

The testimony shows, what would accord with the experience of the ordinary observer, that a signal alarm has two primary purposes: (1) The presence of the signaling moving object is to be brought to the attention of some person or persons; and (2) the effect desired is to prevent accident or cause the avoidance of danger. Where the signal is intended for use by boats, vehicles, individuals, or other moving and movable objects, the relation of the two parties to the signal is apparent. In street traffic, as in water traffic, notice is to be attracted, and, when attracted, information as to the next movement of the signaling party and as to what should be done by the party signaled must be conveyed. In operating automobiles upon the streets,

the presence and movement of the automobile has to be signaled to the unobserving or unconscious pedestrian, automobilist, or driver, whose own movements will be affected by the nearness of the signaling object. Sometimes the approach or the presence of the signaling object at a distance should be indicated, and the mere difference in loudness, caused by the difference in distance, direction of sound, or interference by other noises or the wind, strongly affects the successful use of a signal that might give proper warning under perfect conditions.

The testimony refers to the use of rubber bulb horns, sirens, bells, and signals that may be used to attract attention, but as to which it is unnecessary to discuss apparent limitations. Automobiles, which it is recognized now furnish the greatest demand for an efficient and successful signal, in many cases carry the smaller signal and also one of the complainant's or defendants' so-called horns. The signal alarm emitted by the complainant's and defendants' horns must be referred to, and although it is impossible to set forth in words any definition which will convey the same impression as the sound itself, this sound is so well known that identification is all that is necessary.

Both the complainant's and defendants' devices, almost simultaneously with the closing of the electric circuit, attain a sound of the same tone, power, and attraction-compelling capacity as that maintained by the device while the circuit is kept closed. This sound can be heard at a great distance. Both parties advertise that the sound can be heard half a mile, a mile, or such distance as may be illustrative of the use under description. When further away, the tone of the alarm is more musical, but of sufficient volume and penetration to attract the notice, in spite of other noises and general air vibrations. As the signaling object approaches, or as the sound comes from a lesser distance, its harsher, less melodious, more unpleasant, and more compulsory qualities increase, until, when close at hand, the unpleasant and disturbing elements of the sound overwhelm any musical or tone-producing sensation to the hearer. The sound has the further quality of indicating the direction of its source. This seems to be not only assisted by the general use of a horn, but even without the presence of a horn, the air vibrations set in motion localize themselves easily upon the senses of human beings generally, and, as shown by the testimony and judged from practical experience, the device of both the complainant and the defendants causes little confusion as to the exact direction from which the sound is coming. Such confusion as frequently results in accident is rather doubt as to the direction in which the person warned shall proceed to avoid danger than doubt as to the place from which the danger is coming. These signals further, by the immediate completeness with which they furnish the signal sound, as soon as the connecting part is pressed, have a tendency to control physical movement on the part of the person signaled, so quickly and so abruptly as to give greater protection than would be furnished by a more musical, pleasant, or gradual obtrusion upon the sensory faculties of the person to be warned.

The testimony indicates some discussion as to whether the element

of sudden fright increases or diminishes the danger from an approaching automobile; but this has nothing to do with the sufficiency of the signal of the complainant's and defendants' horns, in comparison with other signals, and does not enter into the present case.

Certain forms of the devices are made for operation by hand, that is, by turning of a crank instead of by the use of an electric motor; and, as will be seen when the specifications and claims are discussed, the automobile signal alarm makes no use of a number of actuating means stated in the patent. Both the complainant and the defendants use a rotary cam. This one means would seem to be, at the present time, the only commercially valuable means for putting an automobile or similar horn upon the market, and the use of these means in an automobile horn is plainly the most valuable use to both the complainant and the defendants, and covers, so far as the issues in this case are concerned, any question that might arise from modified devices for other purposes.

The various matters concerning the understanding of the patentee at the time of filing his application, and as to the possibility of claiming invention by describing a process or method, as distinguished from the functions or description of operation of a given machine, must be borne in mind in considering the patents themselves; but further discussion can be reserved until the objections to the claims of the patents are being considered.

The general defense of noninfringement is interwoven with the claims of the defendants that they are using embodiments of certain patents of the prior art, or that the differences between the complainant's patents and the patents of the prior art are as to details and as to matters which also distinguish the complainant's devices from those of the defendants.

These defenses will be disposed of by the determination of the questions as to validity and scope of the patents. The only two matters involved in the defense of noninfringement, which need be taken up separately, are those connected with the form of cam employed and with the presence of a bar rigidly attached at one extremity to the rim inclosing the diaphragm of the defendants' horn, and at the other end directly and rigidly in contact with the so-called wear piece or block or anvil upon which the blow of the cams is delivered.

Experiment, as stated in the testimony, has shown that this bar can be substantially or totally cut away without changing the action of the defendants' device, and that it serves no purpose except to stiffen the diaphragm and to offer resistance to some part of the force applied by the cam. Whether or not the independent vibration of this bar (and any resultant tone therefrom) may have something to do with the slightly greater musical sound of the defendants' horn is of no effect upon the case. This bar has no bearing, unless it corresponds in function and purpose to the springing bar of what will later be called the Gieseler and Pierman patents, and is not a sufficient change to provide any basis for the defense of noninfringement, unless it compels classification of the defendants' device as a Gieseler or

Pierman embodiment, and these matters will be discussed in connection with those patents.

The defendants use a cam having the projecting or cam surfaces upon the face thereof, that is, the cam revolves in a plane substantially parallel to the initial position plane of the diaphragm; while in the earlier form of the complainant's device the cam surfaces were upon the edge or periphery of the cam, which stood in a plane at right angles to that of the diaphragm. The defendants also use an undulating or symmetrical series of projections in its commercial device, thus making the cam generally capable of revolution in either direction. But the use, also, of the one-way rotary motor takes away any difference that might be claimed because of this feature of the cam. The complainant's cams can also be run in the reverse direction; but the arrangement of the cam surface and the use of the one-way rotary motor make it unnecessary to use more than one direction of rotation, and advantage is taken thereof in shaping the cam surface. The patents, also, as will be shown later, actually provide for various forms of cam contacts, capable of rotation in both directions, because of being entirely symmetrical, and also with greater or less pitch and variation of slope. But the preferable form, as stated in the patent, and the one which the complainant actually uses, presents a slope of such shape that the cam will deliver a blow substantially in the line of direction in which the diaphragm is to be moved; that is, without lateral thrust and immediately allowing for uninterfered-with movement or elastic return of the diaphragm, until the next cam comes in contact upon its rising slope; that is, the receding or back slope of the particular cam projection must be of sufficient pitch to serve the purpose intended of allowing the diaphragm to vibrate in the way desired. This the defendants' cam surfaces also accomplish, and, if valid, the claims of the patent are broad enough to cover all forms shown in the defendants' devices.

In other respects, the commercial articles are alike in all matters at issue in this case, and we therefore can pass to the consideration of the patents themselves, and view them from the standpoint of the prior art.

The first patent, No. 923,048, was issued upon an application filed March 14, 1906, and states that the invention relates to signaling or alarm horns, particularly such as are used on automobiles, fire engines, launches, etc.:

"My object is to produce a device of this type capable of utilizing as much power and of producing as loud a sound as may be desired. Another object is to obviate the necessity for refinements of construction and adjustment usually found in devices of this class and also to insure reliable positive operation of the device, under all the exigencies of practical everyday use."

Nine drawings are shown. Of these, Figs. 1, 3, 4, 5, and 6 represent a diaphragm firmly connected with the end of a pitman or link, which at the other end is mounted upon a rotary drive member or eccentric. The power for this rotary drive member may be either frictional or positively supplied by separate motor.

In Fig. 3, the pitman, although firmly connected with the diaphragm,

is divided into two parts, and a slot, instead of a round hole, is furnished for the pin connecting the two parts, thus allowing freedom of motion at right angles to the plane of the diaphragm and in the direction of the longitudinal dimension of the pitman.

Fig. 9 shows a rotary cam with two cam projections, with an anvil or wear piece firmly affixed to the center of the diaphragm, and of such form or shape that the resultant motion produced by the push of the cam is at a right angle to the surface of the diaphragm. In practical commercial use, the principles applied in the loose link coupling of the pitman, in this right angle thrust against the wear piece of the diaphragm by the cam projection, and in then giving space for elastic return of the diaphragm, are the elements taken from this patent, and with which we have to do in this suit.

The inventor says that he prefers to employ a horn, or resonant amplifier, and also a case around the pitman or rotary driving part; but he also says that neither the resonant amplifier nor the case is necessary. He says that the diaphragm may be actuated by any mechanical connection, although he prefers the loose link form of pitman. As a source of power he prefers a rotary motor; but this is to be used in connection with a pitman or reciprocating mechanism, and is not specifically mentioned as carrying the cam disk upon the armature shaft.

It may be assumed, however, that it would be no invention to employ a rotary motor to actuate a cam, after the disclosure of Hutchison's specifications, or in view of other patents such as Byng, No. 14,642, of 1896 (British). In fact, Hutchison inserted in this original application claims subsequently carried into the third patent, and covering the use of a rotary motor, inclosed in a case and driving a cam disk, with projections like those of Fig. 9 of this first patent, but only in combination with other parts.

The application was divided in the Patent Office and a part refiled on October 14, 1908. Upon this letters patent No. 923,122 were issued, upon the 25th day of May, 1909, and are generally referred to as the third patent in this suit. The specifications in general follow those of patent 1, saying that a case may or may not be necessary. Preferably a resonator or horn may be provided, and an electric motor, in connection with the resonator diaphragm and case, is arranged so that the periphery of the rotary driving member has "a plurality of cam surfaces contacting with the wear piece or thrust member on the diaphragm." The cam is based upon the disclosure of Fig. 9 of the first patent. This cam is mounted directly upon the armature shaft of the small rotary motor. The case is made water and dust tight. The cam face is designed to furnish the resultant force in a direction perpendicular to the diaphragm surface, and the patentee states that the cam is preferably of low pitch on the advancing side. (It will be noticed that no limitation is stated in this connection as to the form of the cam beyond the crest.) The thrust member or wear piece on the diaphragm is preferably relatively low, and this diaphragm is preferably placed close to the closure or cap around the rear end of the horn and at the front of the case.

The specifications state that the operating voltage for the motor may be low, although powerful sounds may be produced, and that little current will be consumed, so that storage batteries or a small generator driven by the engine may be used to furnish power.

This patent describes the form of diaphragm preferred by the inventor, substantially equal in size and diameter to the front of the case, and held by suitable washers clamped between the end of the case and the closing cap around the horn. A diaphragm of relatively great diameter, stiffness, and amplitude of vibration, preferably mounted for vibration on both sides of normal, and, for example, when 6 inches in diameter, having an amplitude of vibration from $\frac{1}{32}$ to $\frac{3}{32}$ of an inch, is indicated as a properly working embodiment of the invention. The material of the diaphragm in this patent is said to be selected for the purpose of securing elastic and acoustic properties, without reference to electro-magnetic properties, and may be made of soft iron, spring steel, wood, etc. The projections upon the periphery of the cam disk are cut away beyond the high point or crest, so as to allow as much *space* for the elastic return of the diaphragm as is needed and to use the same amount of time as was allowed for the advancing thrust. In other words, the depression behind each cam, and the advancing slope of each cam, occupy substantially equal parts of each revolution or circumference, and the cam is in this respect symmetrical, allowing the diaphragm at least as much time for return as is allowed for the blows from the cam. The cam projections are of equal height, and by the use of an electric motor a wide range of speed can be secured. The testimony shows that speeds as high as 30,000 cam contacts a minute have been measured and compared in the commercial device of the complainant, and the tone available for the purposes of alarm begins at 8,000 or less; the only difference caused by increased speed of revolution being a jump from one tone to a higher harmonic (or to a higher harmonized frequency) when the speed increase is sufficient to force vibration at the rate required to produce the higher note.

The rotary motor is said to be particularly adapted for the purpose indicated, because the shunt winding of the field compels revolution in the desired direction without regard to the direction of the current supplied to the motor. The shape and relative arrangement of the cam surfaces, as between the driving surface on the cam wheel and the driven surface upon the diaphragm, can be varied considerably, if the result be a positive thrust in a direction vertical to the diaphragm.

This patent also states that:

"When in full operation, the spring of the diaphragm is partly forced and partly free, and the note produced is of a frequency equal to the revolutions per second multiplied by the number of cam projections."

The patentee states that the number of cam projections and their distance apart will be best determined (that is, are to be preferably arranged) so that when driven at the desired speed (that is, the speed planned for use) the cam surfaces will permit the elastic return of the diaphragm through a desired distance, before the next cam projection causes an outward movement. It is evident that this desired distance

is a distance which will bring the diaphragm back of its normal plane and produce actual displacement of the air in front of the diaphragm, which is necessary for the production of sound. The patentee says that the rates and frequencies of movements forced on the diaphragm may be independent of the frequency of free vibration of the diaphragm; that is, that the forcible displacement of the diaphragm need not be at the same rate at which the diaphragm would vibrate as a whole or in sections, if struck with a single blow. But the patentee says that great resonant effect, with small expenditure of power, will be attained when the forced displacement of the diaphragm and its natural vibrations to and fro under the impact of these blows adjust themselves so as to correspond. He suggests that this be done by multiplying the number of cams and correspondingly increasing the periphery of the disk, so as to maintain the relative spacing of the cam projections. And he states that the rate of positive outward displacement of the diaphragm is necessarily limited by the time required for the elasticity of the diaphragm to bring it back within the range of the cam projection. If the cam contacts occur more frequently than the natural period of elastic vibration, the cam contact will interfere with the full swing of the vibration and shorten its amplitude. Hence the patentee says that the outward forced movements of the cams are to be preferably harmonious with the times and velocities of the elastic return movements, although sufficient space or pitch of the surface back of the cam projection may allow the elastic return to be more rapid than the outward movement, if the forcing side of the cam be of less pitch. The patentee further says that, with the partly forced and partly free movements above described, the use of a horn resonator, having a pronounced natural frequency, will cause the natural vibratory movements of the diaphragm to harmonize with the natural frequencies of the horn. With an electric motor drive by which the speed varies in proportion to the work done, the "*device*" will tend to act in synchronism or harmony with one of "*its own natural frequencies*"; that is, the note produced will tend to remain as caused by the vibration at a rate of natural frequency for the *entire* instrument, until the power increases to such an extent as to overcome the load or work, and to cause a vibration at the rate of the next natural frequency.

To return for a moment to the first patent in suit, we find that the patentee has stated many more possible forms and arrangements of parts available for the pitman or eccentric connections, and even describes the blow delivered to the diaphragm as "a tapping impact," or a "positive forced vibration," or a "partly forced and partly free elastic vibration." With the tight connection, he states that the crank throw and the amplitude of the vibration are equal; with the link or loose pitman connection, some lost motion is possible, thus allowing of some vibration of the diaphragm inside of the limits furnished by the extremities of the link as the shaft of the pitman is pushed either forward or back. The patentee also says that, with the tight rod connection, some angular flexure of the diaphragm will be caused, and this will have to be considered in connection with some of the prior art patents, and will be referred to later.

In other respects, the disclosures of the drawings and specifications of the first patent are either similar to those in the third patent or vary from them only in the differences caused by the use of the rotary electric motor described in the third patent.

We need therefore repeat the language of this first patent no further, except to specify the claims sued on and to refer to these and the other claims of the patent when viewing the prior art. These claims of patent No. 923,048 are as follows: Nos. 16, 17, 19, 24, 27, 29, 36, 37. It seems unnecessary to repeat them in this opinion, as reference to the letters patent is necessary in any event.

The second patent in suit, No. 923,049, dated May 25, 1909, was issued upon an application filed May 16, 1907. This patent has to do with the vibrations of the diaphragm and the application of the cam surfaces thereto, as indicated in the first patent, and as applied in the third patent. The patentee states that great carrying power and loud sound are obtained by great amplitude of vibration with high frequency (greater velocity of vibration). Increased amplitude, with a decrease of velocity (such as increased amplitude through the use of a heavier diaphragm, thus diminishing the velocity, unless the power and speed be increased), will produce a low, ineffectual note for the purpose of alarm. The patentee therefore indicates that the desired note for alarm purposes lies within certain definite limits of frequency of vibration, resulting from the size and proportion and shape of parts and the power used. He comments upon what has been referred to in describing the first patent, and states that, in order to get greater vibrations and higher velocity without destroying the diaphragm, he seeks to have the vibratory spring as much as possible or wholly in the direction normal to the surface of the diaphragm, and to avoid segmentary or high frequency vibrations of parts of the diaphragm, except as these are necessary incidents to any bodily displacement. He again in this patent describes the arrangement of the cam surfaces and the contact piece upon the diaphragm, and specifies that this contact piece should have a large enough base, and its surface should be so shaped that the resultant thrust of the force applied by the cam surface falls, when projected, within the base of the contact piece. He states that by making this base small, and bringing the resultant thrust as much as possible in the direction of a perpendicular to the diaphragm, he is able to avoid the necessity of using too large a diaphragm, or of being compelled to clamp the diaphragm so far from the center as to necessitate localized bends, which tend to break the diaphragm and to increase its weight to a point where satisfactory velocity is interfered with. He states that proper arrangement will enable the device to cause a positive displacement out of normal by each cam projection, thus causing an acoustic wave or impulse of great amplitude, and that these acoustic waves may be made sufficient in number to give a note available for use as an alarm signal. But he recognizes that the rate of displacement may not be the same as the elastic return. He thus applies force to move the diaphragm as a whole, while "the production of high frequency vibration and noise" is merely incidental. He states that in

prior wheel-operated alarms the power is applied to strike the higher frequencies.

"Neither the directions nor times of its application bear any definite relation to bodily movement, and, if there is any bodily movement, it is wholly incidental and insignificant."

He describes in this patent and shows in the drawings a cam having more than two projecting cam surfaces, and having these cam surfaces of substantially symmetrical slope on each side of the high point. He shows in Figs. 2 and 15 the contact or wear piece of the diaphragm when in normal position, substantially at the bottom or low point of one of the recesses between the cam projections. He has indicated a general arrangement of parts capable of allowing attachment of the signal to either side of the automobile, and he has again illustrated a method of actuating the device by contact with a rapidly revolving member of the automobile, or by means of an electric motor. He specifies the arrangement of the anvil or contact piece upon the diaphragm, so as to make the vibratory stress take effect in the direction of the greatest strength of the fibre of the diaphragm. He provides for adjustment of the axis of the rotary cam so as to save unnecessary expenditure of power, and to secure a sufficient normal displacement of the diaphragm without causing a destructive strain by the repeated blows of the cams. He provides for the use of lubricating parts and drainage holes in the case. He specifies diminution of weight or load, by reduction in the size of the contact piece, or by bending up part of the diaphragm for this purpose. He then states in his specifications two paragraphs which will need consideration in connection with the prior art. These are not made use of in the commercial form of horn, but do throw light upon the patentee's ideas of the phenomena produced and the means used to produce the same (letters patent No. 923,049, page 5, lines 124 to 131, and page 6, lines 1 to 8):

"The diaphragm may be of skin, parchment, wood, fiber, glass, board, or other desired material, because the method of operation of the device does not require the material to be magnetic, and almost any desired amount of power may be applied through the rotary cam."

"An irregular note may be produced by having the projections of the cam irregularly spaced, or by having them arranged eccentrically of the axis. Various concordant effects may be produced by regular spacing of regular groups of cams about the periphery of the rotary member."

In letters patent No. 923,122, where the rotary cam alone is to be used, the patentee shows his idea of equivalents by specifying that he—

"may make the diaphragm of * * * any desired quality of elastic material, as, for instance, soft iron, spring steel, wood," etc.

Whether the driving instrument is a friction wheel or an electric motor, he recognizes and states the necessity of immediately throwing the parts into substantially full normal operation, and of stopping the revolutions of the cams without a gradual dying away of the sound. The patentee then sets forth a method of selection and arrangement of parts by which results may be obtained, illustrating what he has attempted to describe, and teaching any person endeavoring to embody the patent in a device how to manufacture the same. In so doing, he

enters into a disquisition or discussion of the phenomena produced or to be observed (page 7 of letters patent No. 923,049), and these statements are contained in this second patent in suit only.

The defendants contend that the patentee has thereby attempted to describe the functions or action of a device made up in accordance with one of the forms shown by the drawings and specifications, and that the claims of this second patent (as well as those of patents 1 and 3) are no more than a statement in concise form of the functions thus explained.

If this contention be correct, it is evident that the patentee could not obtain a valid patent for the mere statement in language of the physical phenomena observable by the operation and use of the different parts of the device (*Marchand v. Emken*, 132 U. S. 195, 10 Sup. Ct. 65, 33 L. Ed. 332), nor for the production of well-known results by the use of larger or different equivalents by means of which the phenomena may be more easily observed or satisfactorily analyzed (*Planing Machine Co. v. Keith*, 101 U. S. 479, 25 L. Ed. 939, *American Road Machine Co. v. Pennock & Sharp Co.*, 164 U. S. 26, 17 Sup. Ct. 1, 41 L. Ed. 337, and *Marchand v. Emken*, *supra*).

Nor could a patentee obtain a valid patent under the guise of a "method" claim by describing such machine functions and stating that he claimed a patent for the result; i. e., the illustration of the phenomena described. *Corning v. Burden*, 56 U. S. (15 How.) 252, 14 L. Ed. 683. The mere use of the word "method" does not prove discovery of a new process or a useful and novel way of producing the desired results or functions through an original application of well-known principles, with well-known materials and well-known parts of different prior art devices and methods. *Union Match Co. v. Diamond Match Co.*, 162 Fed. 148, 89 C. C. A. 172; *Westinghouse v. Boyden Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136.

[1] The patentee has claimed in the present case devices to create a sound, and also the way or method of arranging and using the parts of the device to make it produce a sound of the sort desired. In so far as this result is a noise or signal, it is impossible to patent the noise itself; but, if that noise be produced by a patentable method, there would seem to be no reason why a valid method claim should not be included with the claims for the combinations of parts shown in the device. *Risdon Locomotive Works v. Medart*, 158 U. S. 68, 15 Sup. Ct. 745, 39 L. Ed. 899, and cases cited; *Leeds & Catlin v. Victor Talking Machine Co.*, 213 U. S. 318, 29 Sup. Ct. 495, 53 L. Ed. 805.

The defendants contend, rightly, that the production of a similar noise by another method or unequivocal devices would not be infringement; but the complainant may use the result produced as evidence of the occurrence of similar physical phenomena. If the instruments producing those phenomena are the same, it is a necessary conclusion that the methods of production are similar, and a valid method claim might be infringed, even when the product itself is unpatentable.

It is impossible to quote at length the statements of the patents which are involved in the contentions of both parties upon this question. They must, however, be considered in reaching the conclusion,

and must also be kept in mind in the subsequent discussion of the earlier patents.

The claims relating to the lubricating devices, the drainage arrangements, and a number of other claims stating mere refinements or alternative arrangement of parts that have nothing to do with the complainant's or defendants' device, might be quoted as illustrations of the patentee's thoroughness in description and industry in obtaining the issuance of a patent, in which a claim for every possible arrangement of specific parts might be distinguished from claims covering other arrangements. In other words, the patentee has included many specific claims, rather than a few general claims, and has introduced many of the mechanical equivalents in the form of definite description.

These claims have to be considered as a part of the patent in the study of its teachings and in interpreting its language. They have to be considered in connection with the prior art, but only those upon which infringement is charged in this action need be embodied in this opinion. They are claims 1, 2, 8, 12, 13, 22, and 30, for the wording of which reference must be had to the patent.

The third patent has been substantially described in connection with patent No. 1, and in the specifications (as has been indicated) many of the statements and propositions of the first and second patents are repeated. The invention of patent No. 3 is confined entirely to a device using the rotary motor described, or the rotary cam and diaphragm used in connection with such a motor. As in patent No. 2, there are a number of claims covering refinements or particular forms of device not shown in the commercial devices of either the complainant or defendants, and of use only in studying and testing the patentee's ideas and statements in connection with the prior art.

The claims relied on in this suit are 1, 2, 3, 4, 5, 6, 7, 8, 9, 13, 14, 15, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 35, 36, 37, 38, 45, 47, 48, 52, and 53, and will be quoted herein only by reference to the patent.

The development of the patentee's idea, with the selection and working out of the particular device which has proved successful on the market, indicates the difference between the patentee's idea of utility and salability of the invention and the successful commercial application thereof. That such an idea may be patentable, even though commercially unsuccessful, until further development has occurred, or even until further invention has been devoted thereto, is shown by such cases as the Telephone Cases, 126 U. S. 1, 8 Sup. Ct. 778, 31 L. Ed. 863; and, on the other hand, knowledge of the principles of physics, such as are justly attributed to Von Helmholtz, would not prevent the patenting of a new device making use of or embodying those principles. In the present case the file wrapper shows that many of the ideas were developed and worked out, and the statements modified by cancellations and inclusions in the specifications and in the claims, during the time that the applications were pending in the Patent Office. The greatest industry and ingenuity were shown by the solicitors as well as the patentee, and many of the statements in the specifications, as

well as much of the language of the claims, is open to the criticism that the results of experimentation and the production of phenomena are described at the same time as the device or method used is being explained, and it is difficult to separate what is patentable, or even to carry in mind what is claimed as the invention itself.

The record in this case contains many hundred pages of testimony, in which the statements of the patent, all physical phenomena described or referred to by the patentee, and even by the witnesses, the disclosures of the prior art, and the accuracy of observation of both the patentee and the witnesses are discussed. Both parties in their briefs make assertions that certain contradictory propositions are true, and that it is unnecessary to consider further differences which, during the progress of the trial, compelled the taking of testimony in great volume upon these particular points. Each counsel then proves his point by referring to the voluminous testimony of the experts upon these questions. In a number of instances, the premises from which the experts drew their different conclusions have been questioned and their conclusions contradicted. Hence it has been necessary to read and consider all of the testimony to test the understanding, reliability, and reasoning powers of the experts, and to learn what were observations of fact by them and what were matters of opinion.

The defense introduced an expert as a witness who entirely avoided reading or considering the language or substance of the claims in suit. His testimony deals entirely with the physical construction, capabilities, and activities of the exhibits in the case, the principles of physics involved and illustrated thereby, and discussion of prior art patents or devices produced to illustrate them.

Another witness for the defendants testified only from the claims of the patents in suit. He attempted an interpretation and classification of the patents and of the devices of the prior art from the standpoint of these claims.

The complainant used one witness, in rebuttal as well as in the *prima facie* case, who covered both the phenomena and principles under discussion, the patents of the prior art and in suit, and the exhibits in the case, as classified or tested or read under the claims of the patent in suit.

It is not necessary to state in detail the points of difference caused by this division of labor on the part of the defendants' witnesses, nor to discuss the matters in which the experts differed as to the explanation of certain results, or disagreed in their observations and conclusions from certain experiments and from the physical exhibits in the case, as well as in stating the disclosures and embodiments of the paper patents introduced as constituting the prior art. These matters have to be borne in mind and weighed in connection with reaching conclusions from the testimony and in forming opinions as to the facts proven by the testimony. But it is impossible in an opinion to set forth in detail all of the separate matters forming the basis of the general result.

[2] As has been indicated above, the patents in suit describe certain devices and methods of producing a characteristic sound. They con-

tain much argument or statement as to the way in which the alleged invention is demonstrated or illustrated by certain specific parts and forms of the device, and as to how the parts act. In spite of the inclusion of these other matters, certain apparently novel arrangements of parts, capable of producing the desired result and physically illustrating the principles involved in the production of such results, have been set forth and plainly involve invention, unless previously shown by earlier patents or by actual public use, when performing similar functions and teaching substantially the same application or use in the prior art. Mere possibility of a suggestion for further discovery or invention, like the unappreciated clue or idea shown by a sketch and not covered by any claim, is not anticipation. *A. R. Mosler & Co. v. John Lurie*, 209 Fed. 364, 126 C. C. A. 290.

It is evident that any sound might be used and in a sense be available as a signal. Certain sounds, principally because of their musical qualities, are of little use as *warning* signals, if the warning is to be conveyed by the sound, and not by a process of reasoning after the sound has drawn attention and observation. The warning signal, too, must be loud, and possess the other qualities discussed earlier in the opinion.

The construction of the patents in suit and the allowance of the various claims have been attacked upon the ground that the claims included in each of the three patents describe inconsistent and different constructions; in other words, that the patentee has included, in each of the patents, claims for a diaphragm actuated by a solid pitman or rod, with an eccentric and means to operate the eccentric at a high speed, and a diaphragm with a rotary driving member operated by an electric motor, and many descriptions of cases, oilers, drainage holes, and arrangement of friction drive or cam surfaces, in such a way as to make it evident that no one signaling device could make use of all the ideas claimed as invention in one structure.

It is evident that something like this suggestion led to the division in the Patent Office of the application for patent No. 1, but neither the patentee nor the Patent Office went so far as to completely separate the claims relating to the particular style of horn or signal, from the standpoint of the means of actuation, nor were the patents divided from the standpoint of means and methods.

Patent No. 1 contains claims 27, 29, and 37, describing the method of producing a signal, and also claims for a great number of devices, some of which actuate the diaphragm through a fixed connection with the pitman, while others actuate it by means of the cam surfaces. But if both are equivalent or exchangeable parts of one patentable device, and if each divided or separated part is patentable of itself, the claims would not seem to be necessarily void, nor the patent invalid. *Leeds & Catlin v. Victor Talking Machine Co.*, supra; *Hohman Co. v. Tagliabue Co.* (C. C.) 175 Fed. 87.

The second patent describes *devices* alone, but has claims covering both the pitman and motor as actuating methods; while patent No. 3 describes only *devices* and only in connection with the use of an electric motor. No one of these claims is inconsistent with any other

claim, in the sense that it could not be used conjointly or in connection with all other claims of the same type of machine. Each set of claims as to an equivalent for some part is consistent with the other claims affecting the complete machine of the series or type to which the particular claim relates. In so far as every claim of any particular patent must of itself describe a patentable invention, regulations or statute might go so far as to require that every patentable claim of invention be presented separately, and thus compel the issuance of as many patents as the patentee can or must draw claims. But such a rule would be plainly impracticable, if not trivial, and the dividing line between this extreme and the other extreme, of combining inconsistent, separable inventions (or claims foreign to the device or machine which is described as embodying other claims of the same patent), cannot be discovered by any definite standard of interpretation until the other extreme is reached.

It is apparent that, with proper regulations and constructions, the Patent Office should not issue a patent for two entirely distinct inventions upon the same application and with the same grant of letters patent; but if a patentable invention—that is, a device or method—contains certain differing applications, patentable by themselves (yet actually forming a part of the general scheme or construction which is described as the comprehensive or main invention), then, not only the claims which are consistent with each other in one form of the device, but also all claims which are consistent with each other in the variation caused by a difference in type or difference in choice of some primary element (of itself the equivalent of some other primary element in the original device or complete patentable combination), may be included legally in one patent for the complete invention. If so issued with joinder of claims by the Patent Office, no invalidity is necessarily shown.

This may be carried back as far as the patent of the combination or as the patentable device comprises one general patentable embodiment of idea, and is not a mere aggregation of the parts or of separate inventions, in which no one general claim, applying to all forms of the device and covering every claim urged thereunder, can be found.

[3] The defendants recognize this proposition, but attempt to show the patents in suit to be invalid by contending that the only mechanical combination really shown by the claims is the mechanical vibration of a diaphragm with certain means or attendant devices used in earlier patents in the same way. They also contend that the mechanical vibration of a diaphragm, for the purpose of creating sound waves by the movement described, was old in the art when Hutchison filed his application.

It will be seen that this argument raises the principal question of the case. The patents as a whole are consistent, and can be supported, if the idea of the device generally, with the different equivalents or parts necessary for its actuation, was capable of being patented as a whole as a new invention by Hutchison. On the other hand, if Hutchison merely described certain ideas or devices old in the art, and, without suggesting or describing any new patentable use, arrangement, or

application of the devices, merely proceeded to string together, on the unpatentable structure, new combinations of various sorts to produce the same result, then, in so far as these new combinations did not of themselves show patentability, the claims would be invalid. Even though some of the combinations should show patentability, the general claims for the entire device and all method claims would be invalid, and the defendants' structures would have to be tested from the standpoint of infringement of the particular claim.

In this very way the defendants seek to show that, when narrowed to particular combinations or arrangements of parts, the Hutchison patents could not be read so as to include the defendants' devices, and these devices are said by the defendants to be rather those of the prior art, such as Pierman and Gieseler, which will be considered in that connection.

Passing by, therefore, the immediate determination of the various claims, from the standpoint of improvements or new combinations, we will take up the patents, instruments, and writings of the prior art, including those pleaded as anticipations.

The experts for both sides have enumerated seven different physical parts in the complainant's and defendants' commercial signaling devices. They have used this arrangement in construing the Hutchison patents, in comparing the complainant's horn with the claims of the patent or with the defendants' horn, and in comparing the defendants' horn with the patents of the prior art. These seven elements as stated by the complainant are:

- (1) A small rotary motor requiring low voltage current.
- (2) A cam wheel.
- (3) A diaphragm.
- (4) A contact or wear piece.
- (5) A horn or resonator.
- (6) A casing.
- (7) Means for adjusting the position of the different parts.

The defendants' expert includes, in making up a similar list, the corresponding parts of the devices of the first and second Hutchison patents, and stating them in the same order he names:

- (1) The actuating means (an electric motor or something else).
- (2) Transmitting means (a rotary disk with cams or something else).
- (3) An air-vibrating member (diaphragm or something else).
- (4) Transmitting means (wear piece or some other member between the cam and the diaphragm).
- (5) A horn or resonator.
- (6) The casing.
- (7) The adjusting means.

Both experts add as an eighth part, or as a general essential, the wires, switch, and battery for applying current. These the defendants' expert names as controlling means, in the sense that without the application of current, the driver of the machine could not operate the signal. But this use of the word "control" must be carefully distin-

guished from the so-called harmonizing or reciprocal adjustment of speeds and vibrations because of the amount of current load, the natural rate of vibration of the parts themselves and the interference caused by the relation of the parts with respect to one another.

The defendants allege that Hutchison specified the choice of "any suitable material" for his diaphragm, the use or omission of a horn, the possibility of using a horn of any shape, the use of a cam with surfaces of any shape (providing a direct thrust and allowing of an undisturbed or elastic return), the use of a casing or not, the possibility of adjustment so as to increase or decrease the load (from the point where the motor would not operate the cams to a point where the contact was so slight as to give insufficient vibration of the diaphragm), the choice of any size or thickness of the diaphragm, which would allow forcible displacement and elastic return, the use of a tight connection or a loose link, a friction drive or motor, a pitman operated by an eccentric, or by some other positive means. They argue, therefore, that he has in effect claimed but two essential elements, viz., some sort of a diaphragm, and something to cause the diaphragm to be displaced and vibrated or bent, and then caused to return in readiness for another blow. They go so far as to claim that Hutchison has attempted to patent a mere noise, and that he has not described or specified what noise, so long as it is a loud or disagreeable and startling noise. They claim that his commercial horn produces a loud, disagreeable, startling, or alarming noise, which is merely the effect upon the human ear of a repeated vibration of a metallic diaphragm at a substantially predetermined speed, and hence that any similar rapid disturbance of a comparatively similarly sized metallic diaphragm must produce a similar noise. They argue from this that the Hutchison patent is invalid, as they assert that the vibration of a diaphragm, at a speed which could be substantially predetermined and caused by transmitted force through a rod or cam, was old in the art and has been shown by prior patents. They also assert that the use of the horn or resonator was well known or understood, and deny the novelty of control of the motor by the resonator and diaphragm.

In this way they allege that both the complainant and defendants are using old ideas, and that Hutchison has not described any patentable combination or new arrangement of parts. They say that Hutchison, or those developing the idea of his patent, at a time prior to the final allowance of that patent, had merely succeeded in adapting one old form of mechanism for vibrating a diaphragm by hand or friction or by an electric motor; that his wear piece is but one form of various transmitting means shown in earlier patents; and that he and his solicitors, in attempting to describe the arrangement of the parts which he had assembled, and their physical movements and behavior when in operation, have done nothing more than to elaborately state the functions of the particular choice of parts which he saw fit to use, with the insertion of all the equivalents of which he could think, although all were old in the art, and that he then claimed as invention the conclusions of his study of this particular machine.

One further matter presented by the defendants must also be stated in anticipation of the consideration of the prior art. The complainant

has calculated and argued that arithmetic determination of the speed of vibration and of cam contacts proves its contention that various parts have a harmonizing or standardizing effect upon the rotation caused by the electric current, and the speed of vibration of the diaphragm under the influence of that current. They have shown that, beginning with 4 (or less) ordinary dry cells, the rate of vibration of the diaphragm and the note produced by the signaling device remain substantially constant until, by the addition of cells up to 10 or 12 in number, and the corresponding increase of current, a speed of 30,000 cam contacts per minute is produced. The increased amplitude of vibration, or the increased loudness of tone, or the increased work from more rapid and more frequent cam thrusts (whichever may be the actual result), does finally cause a jump in the note to the next harmonized or next substantially constant speed of vibration (which is at some note higher in the scale than the one just left), and that there again the note will remain substantially constant, even though a large increase of power be applied. They have shown, by braking a cam with some exterior object, that the load upon the motor can be increased until the cam contacts are so infrequent, at a slow rotation of the cams, as to give, for short intervals, substantially silent rotation. This is apparently caused by the free elastic vibration of the diaphragm, at such a rate as to synchronize with the interference of the cam contacts, so as to cause a skipping of the successive engagements, while the diaphragm is vibrating freely, but not rapidly enough, nor with sufficient amplitude, to make audible sound.

It would appear from this illustration that the load upon the motor must not be increased to a point where it will prevent the necessary rapidity of vibration of the diaphragm, and hence that adjustment, in the sense of measuring the propinquity and thrust of the contact surfaces, is necessary, and also that, if the amplitude of vibration remains substantially the same, increased speed, under additional power, will cause an additional number of cam contacts, without thereby changing the resultant vibration of the diaphragm and the production of tone, until the increase in the number of cam contacts causes a distinct increase in the resultant natural frequency of the diaphragm vibrations to the very next temporarily steady rate, and with sharp or sudden jumps from one rate of vibration to the other. This makes it possible to produce, by the quick application of reasonably constant power, a rate of rotation of motor, and a speedily formed, loud, and disagreeable sound, in connection with which there are sudden raisings and lowerings of pitch, with harsh overtones and breaks from silent speed to full resonance. Each change from one general rate of vibration to the next (higher or lower) is attended with similar discordant or harsh conflict of notes, all of which possess the qualities discussed earlier in this opinion, by giving a useful alarm signal where warning is intended.

The evidence shows a number of experiments and tests intended to demonstrate the truth or falsity of these claims. The defendants' expert has attached a mirror on either side of the center of the diaphragm of a so-called Pierman device, and by reflection of the beams of light upon a screen attempted to determine whether or not the parallel

beams from the two mirrors were deflected apart, when the diaphragm was pushed out by the cam contact. He argued that if, under the influence of the cam, the diaphragm were convexed at the center, the beams or rays of light would be thrown apart, whereas, if the diaphragm were merely bent or buckled by a sidewise thrust or scraping of the cam contact, bodily displacement, with free elastic return, would not be shown, but, on the contrary, either mere sounding board vibrations, or the tapping displacement or buckling, such as will be referred to under the Gould patent, would be indicated.

The complainant's expert had by the use of one mirror tried to prove with the Hutchison diaphragm the absence of tilting or buckling. But the defendants' testimony merely showed that the so-called Pierman device as offered in evidence did not buckle or tilt. The beams of light remained substantially parallel, or were deflected apart, and this would seem to indicate that the experiment was not carried out in such a way as to measure any flexing deflection, or that the flexing of the point or button did not produce much central flexing of the diaphragm, and probably little bodily displacement or free vibration.

We are left to the ordinary conclusion that, if the diaphragm be bodily displaced, it must have a bodily elastic return, whereas, if there is any tendency to twist or to buckle any diaphragm, there will be a tendency to reverse on the return, and in so far as this buckling or twisting of the diaphragm might produce sound it would increase the harsh or discordant effect of the signal, but has no bearing upon the question of invention or patentability of Hutchison's disclosure. If Hutchison's idea of causing bodily displacement of the diaphragm, with free elastic return, in a direction at right angles to the general plane of the diaphragm, and in the way described in the patent, was original with him, it is patentable over Pierman, which in that respect follows Gould, as will be shown later.

It should be borne in mind that a sounding board resonator, causing vibration of the atmosphere through ripples or waves transmitted from the surface of the sounding board, is entirely distinct from a plunger which moves (backward and forward) the air in front of its surface, and is also entirely distinct from what is known in the art as a diaphragm. This last is understood as meaning a surface which causes bodily displacement or movement of the body of air in front of the surface, while the perimeter or outer edge of the diaphragm remains in the same general position. A partial bending or displacement of the diaphragm may cause vibration of its surface, imparting to the atmosphere sound waves in the sounding board sense, while a plunger may impart forcible displacement, causing, in connection with the resonator, sound waves similar to those produced by the diaphragm.

But the three devices are not equivalents of one another in all ways in which they can be used. In the same way a horn, like a speaking trumpet, may have such arrangement of its sides and such curvature at the bell as to respond to any rate of vibration, and thus to intensify all tones of the voice. A megaphone with regular sides, upon an even slope, and without bell or longitudinal curvature, may intensify and direct the sound waves. An organ pipe may cause sound waves through vibrations set up by the movement of air within its length,

and will be a closed or open pipe, according to the point and manner of construction where the sound waves are set in motion. The nodes and loops of a closed or open pipe, and the acoustic length thereof, are matters settled by long study and experiment, and none of these ideas are of themselves patentable.

Hutchison specifies that a resonator may or may not be used, and experiments in the case show that different resonators have substantially no effect in changing the character of the tone (except as the load upon the motor assists in harmonizing), and that the difference between a speaking trumpet and megaphone or a straight tube as a resonator merely affects the carrying power, general penetrating qualities, increase of loudness to a certain extent, and the range of tones to which the resonator responds.

The use by Hutchison of a comparatively large diaphragm and of a resonator with a large mouthpiece opening removes from the structure the general magnifying character of the speaking trumpet or megaphone, that is, of the intensifying reflector, and gives to the resonator only the improving qualities of sharpness, direction, and somewhat better carrying ability, with a harmonizing effect in connection with the action of the diaphragm case and cams.

The presence of the resonator adds to the resultant restraining influences of the other parts of the device, increases the load upon the motor to such an extent that the resonator does have considerable effect in this harmonizing or standardizing of the diaphragm vibrations between the speed limits, and thus assists in establishing what have been called the different harmonics of the lowest audible tone of the instrument under full operation, or of increasing speed of the motor with increased power.

Among the other patents of the prior art, the Gould campaign rattle, No. 785,874, March 25, 1905, together with the watchman's rattle and the old device known as the Savart wheel, should be considered together.

The Savart wheel has been known for a very long period and described in many text-books under the subject of acoustics. A rotary toothed disk is made to strike or vibrate the edge of a card or metal plate held rigidly at the opposite end. When the rotation is slow, a series of audible and distinct taps is produced by the contact of the card with the approaching side of one tooth after the other. If the rotation be increased, so as to cause vibrations of the atmosphere at a sufficient rate to make a musical tone, a rising succession of notes is produced as the speed increases, and conversely, after the establishment of a standard, the speed of revolution can be estimated by the resultant tone. In the same way, the rising note or sound of a siren can be produced by the action of a jet of air upon the holes of a rapidly rotating disk, and a card so positioned that its corner will touch the perforated row of holes will produce a similar note to that caused by the jet of air.

The old watchman's rattle is based upon the idea of the Savart wheel, and produces a noise consisting of a succession of harsh taps or concussive sounds, by the striking of a springing finger or strip (firmly fixed at one end) upon the successive ridges or serrated surface of a

ratchet wheel, about which the member carrying the springing finger is revolved at such a distance as to let the end of the spring slip off from one ridge before the next one has reached the plane in which the springing finger normally rests.

The Gould campaign rattle provides for a flexible axis, upon which is mounted a metallic disk having a serrated edge. A tin diaphragm is so placed as to bring a ridge or projection turned up in its center against the serrated edge of the revolving member, and each tooth or point of this serrated edge, in slipping by the obstruction upon the face of the diaphragm, causes a displacement of the flexible axis, with the result of producing a sharp and harsh sound of contact when the next (or a succeeding) tooth comes in contact with the obstruction.

The action of the diaphragm would seem to be to some extent a displacement or a bending, and to some extent segmental vibration, under the effect of the tapping blow, as in the case of vibration imparted to a sounding board. The sound produced is intensified by the tin case surrounding the diaphragm and the revolving member and by a small horn with a flaring mouthpiece. But the instrument is not arranged for nor capable of rapid vibration, and no sound can be produced except the harsh tapping sound of the old watchman's rattle, intensified by the sounding board effect of the diaphragm, by the case and resonator.

In so far as the horns of the complainant and defendants locate their diaphragm near the front of the case, and in so far as the resonator and case, as well as the diaphragm, intensify the sound produced, the Gould campaign rattle is like the patent in suit. In so far, also, as the toothed member delivers the successive blows by rotation and by the contact of each tooth with the raised portion of the diaphragm, the Gould patent is like the Hutchison idea.

But there is no forcible positive displacement of the diaphragm, with a flexible and free return at a rate which will set in motion air waves, producing either harmonies or discordant musical notes, and the action of the different parts is in no way dependent, so far as the production or control of the sound is concerned, upon the relative effect of the construction and position of the different parts in controlling or harmonizing the vibrations, so as to cause a fairly definite and uniform sound immediately upon the actuation of the device, as in the case of Hutchison's patent with the rotary electric motor.

A careful effort to rotate the Gould campaign rattle as rapidly as possible will, for a very short space of time, produce a substantially steady, harsh sound, and of course this could be used as a signal for anything for which the particular sound was suitable and sufficient. But the Gould campaign rattle is nothing more than a combination of parts teaching a limited use of old devices in an instrument, commercially of some value, but evidently requiring more than the services of a mechanic before it can be changed to the Hutchison signal. If Hutchison were patenting a sound or noise, the Gould patent would perhaps serve somewhat of the purpose; but as a device it does not anticipate.

The Bapst & Falize patent, No. 384,412, of June 12, 1888, also patented in England on September 7, 1886, and in other countries.

applied the idea of the Savart wheel or the watchman's rattle in much the same way, so far as result is concerned, as that shown by the Gould patent, to an alarm clock in which a portion of the clock case is made to serve as a sounding board for a series of blows imparted by a toothed wheel set in motion by the clock mechanism and driven by a clock spring. The portion of the case used for this purpose is set in vibration by the springing distortion of a so-called point attached to a diaphragm, which is fastened around its perimeter in the case of the clock, and has a projecting horn or bell-shaped mouth-piece projecting therefrom. This point is sprung back and forth by a ratchet driven by the clock spring, and produces a series of transverse bendings or bucklings in the diaphragm, which are necessarily few in number. The point also strikes the succeeding teeth of the ratchet and gives the sounding board or tuning fork effect produced from the use of metallic parts, in a way similar to the Gould rattle, but with more musical tone. The spring or tapping is caused by bending of the diaphragm or the point, instead of by the yielding of the axis as in Gould, and this adds to the sounding board and tuning fork qualities of the instrument.

It is but a slight transition from Gould and Bapst & Falize to Pierman's British patent. This patent was issued under No. 13,495, upon the 26th of August, 1899, and is intended to provide a simple, easily attached, and loud-sounding alarm for general use, but especially for vehicles such as bicycles. It consists of the combination of a point (also called by Pierman a button) attached to a resonant diaphragm, in such position that this point or button is in contact with the transversely raised portions or corrugations upon a wheel, which can be brought by a spring lever or other attachment in contact with the bicycle tire or rotary member of the vehicle. The same corrugations with which the point of the diaphragm comes in contact cause sufficient friction to rotate the small wheel at a much higher rate of speed than the larger bicycle wheel, and thus a rapid vibration of the point and of the diaphragm is produced.

In the Pierman United States letters patent, No. 620,958, of March 14, 1899, as in the English patent, the diaphragm is shown inclosed in a case securely clamping the diaphragm around its perimeter and furnishing room for the vibration of the diaphragm between the sides of the case. A megaphone or horn is attached to the opening of the case, on the side of the diaphragm opposite to that carrying the point or button. The result is a more rapid vibration of the diaphragm, when the bicycle or other vehicle is moving at a fair rate of speed, than in the Bapst & Falize or the Gould campaign rattle. If the bicycle wheel could be made suddenly to revolve from slow movement to rapid movement, the Pierman device would cause a rising note, and, as illustrated by the exhibits in the case, produce a shrill, squeaky tone of no great volume. The difference between the rotation at low speed of the bicycle and at high speed is manifestly very great, the wear upon the rough surfaces and upon the tire of the bicycle is also manifestly great, and there is no evidence that the Pierman device has ever been commercially practicable, or that it served to more than teach that a rotary member, acting upon a point attached to a metallic

diaphragm, inclosed in a metallic case, operating at increasing rates of speed, will produce a note of rising pitch, like the note of the Savart wheel. This is caused, as in the Bapst & Falize, or in Gould, by segmental vibration of the diaphragm, and with incidental partial displacement of portions of the diaphragm, which undoubtedly increase its sounding board vibrations, while the tapping or snapping of the point adds vibration and sounds of its own.

Upon the final hearing of the case some testimony was produced by the inventor, Pierman, as to experiments with a fog signal or horn, in which, according to one of the witnesses, Pierman vibrated the diaphragm by means of a spring point fastened to the diaphragm and actuated by a ratchet or toothed wheel in contact with the outer end of the point. Pierman, however, testified that he used a phonograph diaphragm, and deflected it by a weight lifted by a trigger running over a ratchet wheel.

The testimony is that one device made by Pierman caused a vibration which, by some harmony of wave movement, put out a lamp whenever it was tested in Mr. Pierman's garret; and also that a diaphragm of large size, actuated in some manner, was tried as a fog device out of doors, but in particular was open to the objection that it did not indicate definitely the direction from which the sound came. These experiments did not, therefore, result in anything. The experiment was evidently abandoned, and would not be an anticipation of the Hutchison patent, even if some of Hutchison's ideas were temporarily working in Pierman's mind.

A most interesting prior art device is that of Wiegler, who did not attempt to take out a patent, but who lectured and exhibited models in Germany, and whose device has been reconstructed by the witness Carll, from an ordinary drumhead, with the skin of the drumhead reciprocated by a pitman rod driven by an eccentric, which in turn is rotated by any convenient application of power.

The Wiegler instrument is said, with a drumhead 40 centimeters in diameter, to produce a tone of quite extraordinary intensity, increasing in strength with the lengthening of the amplitude of vibration, and rising in tone with increased rapidity of vibration. Wiegler is said to have claimed that this so-called motorophon would far surpass every known mechanism for signaling or for a fog horn, as it could be "heard above the greatest storm, the loudest thunder, and the mightiest roar of the sea, and that, even in its present hand-actuated embodiment, the hearing is dangerously affected when it is not cautiously approached."

No such alarming consequences appear from the exhibit manufactured by Mr. Carll, and the Wiegler device as produced in court is substantially the application of power to a drumhead and pitman, to accomplish the same result as that shown by another illustration by the defendants on the argument. This latter illustration brings in the antiquity of the idea of vibrating a diaphragm to produce noise, in the form of a tin can actuated by a small boy applying some surface treated with rosin to a string, projecting through a hole in the bottom of the can and terminating in a knot upon the inner side of this hole.

That such vibration of the diaphragm will produce noise does not need argument, as every one has been familiar therewith, and Wiegle seems to have dignified this instrument of torture into an example of scientific and practical sound making, by producing the vibration of a tightly stretched diaphragm or membrane, with the rapid back and forth movement of the pitman, instead of the frictional pulling and slipping of the rosined string.

It is rather difficult to see how Hutchison can base any broad patentable idea upon his fixed pitman rod diaphragm vibration, except in the narrow sense that he provides for a positive forward and back displacement of the diaphragm surface, and thus moves the volume of air immediately in front of the diaphragm, in the same manner as would be caused by the operation of a plunger. But this is much like Wiegle's production of greater sound by causing greater amplitude of stroke.

When, however, we come to the loose link operation of the pitman or the cam drive, a different question is presented, and the Wiegle motorphon teaches only a practical application of the tin can "howler," as it has been called by defendants' counsel. Hutchison has included no claim for the fixed pitman or rod device, and the Patent Office evidently rejected such claims on the prior art.

The Gieseler German patent, No. 119,306, issued April 4, 1901, shows an application of the use of a closed resonator, or tuning fork vibrator, or siren device, available when means are desired to determine the rate, or to indicate the rate, at which revolution of some member is occurring. It is a speed indicator. The way in which Gieseler sought to secure this result was to describe a device from which sound audible to the normal ear would be produced only when the speed approached or reached the rate from which the indication was to be taken. He illustrates this use by referring to an ordinary cream separator, in which the skimmed milk will be thrown off by centrifugal effect, at the desired rate, or at the desired speed, when sound is produced by the impact of the small jets of milk.

In this German patent he has also a device with tuning fork attachment, by which a rotary cam, with evenly spaced sloping cam surfaces upon the outer edge or periphery of the rotary member, actuates a triangular shaped projection at one end of a spring firmly attached at its other extremity. The spring bears upon a small diaphragm across the end of the cylindrical resonator by means of an ovoid-shaped object like a small spherical pad under compression.

In his English patent, No. 21,084, of 1900, he describes a similar device, in which the pulsations are caused by a spring hammer tapping the diaphragm, or by a spring attached to a tuning fork. This hammer (or the spring) is actuated by a disk having a corrugated edge, located upon a rotating shaft, and the patent specifies that care be "taken that the spring is so arranged as not to produce a tone by its own vibrations."

The drawings of the English patent show the member, which in the German patent is in the form of a compressed sphere, as if it were a continuation through the spring of the triangular projection or ham-

mer head which contacts with the cam surface of the rotary member. But the testimony in the case indicates that such a hammer or tapping member would fracture the diaphragm, if the rotary member be revolved at high speed when close contact is maintained at all times, and, if not so arranged, the spring member becomes merely a tuning fork, while the diaphragm becomes the sounding board or drumhead, representing an entirely different device than the diaphragm of the Hutchison patent.

The Gieseler patent has been illustrated by several devices introduced in the case, and in one of them, called "Complainant's Exhibit Hammer—Gieseler Device No. 2," a soft rubber pad has been interposed between the spring and the diaphragm, and the spring is actuated by a rotary member with low-pitched cam surfaces, capable of adjustment so that they can cause vibration of the diaphragm at a rate corresponding to the pipe note of the cylindrical resonator. If this vibration is caused by a positive displacement of the diaphragm, with some elastic return, then certain conditions recognized by Hutchison, and also shown by Gould, are taught by the Gieseler patent. But there is nothing shown by which Gieseler stated, or from which a mechanic should have known, that a uniform and constant *signal*, at all speeds of rotation within the ordinary power of the motor, can be furnished by positive or bodily displacement of the diaphragm with free elastic return, when no resonator is furnished to pick up and sound the particular note corresponding to one speed of that vibration. The only suggestion is that some tuning fork note or extraneous tone might be caused, which is to be avoided.

In other illustrative exhibits offered as "Gieseler," the interposition of a hard body to act as a hammer, or the arrangement of parts to allow such movement of the metallic spring as to relieve the strain on the diaphragm caused by operation with close contact, result plainly in what Gieseler gives warning against, viz., the causing of audible sound by the spring itself, and we then have the tuning fork or Savart wheel type of Gieseler, which would not anticipate the Hutchison signal.

The complainant company has obtained the rights to the Pierman patents by assignment, and their license notices in evidence state that the instrument to which the license is attached is made under various patents, including those to Pierman. The right of the complainant to use the ideas of the Pierman patent in connection with the Hutchison patents does not diminish his right to sue an infringer. Nevertheless, if the anticipation of the Pierman patent had the effect of narrowing the Hutchison patents, or of making them merely improvement or combination patents based upon Pierman, the ascription to the Pierman patent would be taken into account with respect to the question of patentability of the broad claims of Hutchison, and as to the charge of infringement by the defendants of the Hutchison patents alone. As the Pierman patent does not anticipate, its ownership is immaterial.

An alleged prior use resulting in an application for patent, which was abandoned (serial No. 251,901, filed March 24, 1905, by A. L.

McMurtry) and never really went beyond the point of certain experiments, was shown by one McMurtry, who in the years between 1905 and 1907 was connected with an automobile supply or sales house and made experiments upon a signal alarm for automobiles. He is shown to have had one signal of the siren type and another signal generally illustrated by certain drawings introduced in evidence. This signal consisted of a horn or resonator, set into a case in which a diaphragm was fixed, with a spring arm resting against a rotary cam, which was driven by an electric motor. Midway of the length of the spring arm, which was firmly fastened at or toward the opposite end, was a bolt or rod fastened to the spring, and also to the middle of the diaphragm, in such a way as to impart the vibration of the spring to the diaphragm.

McMurtry testifies that he never succeeded in getting a device which could be relied upon to work in the same manner and to stay in workable condition for any length of time. He would seem under certain circumstances to have caused a vibration which made a noise in some ways like the complainant's device, or in some way to have transmitted the tuning fork, Savart wheel, or Gould vibrations to a sounding board diaphragm, with a forced movement each way. The experiments broke the diaphragm, and generally the device was unworkable, unless the cam be started by hand, if the spring were fastened firmly enough to actuate the diaphragm at all.

[4] Another witness identified one of McMurtry's devices as having a point attached to the diaphragm like the Bapst & Falize alarm clock; but no one seems to have learned from these experiments anything practical, nor anything in which invention was perceived, or possible invention carried to the point of public use. Mere experimentation in public, or in a public place, followed by no improvement upon the prior art, and ultimately abandoned, is not sufficient to defeat a subsequent invention upon which patent has been issued, and which has finally proven to be of commercial value, so that those who abandoned their unsuccessful experiments realized what they might have accomplished if they had themselves reached the point where the invention could have been patented by them.

In the same way, a defendant cannot defeat an otherwise valid patent by showing abandoned experiments, even though these might have (but as a matter of fact did not) progressed to the point of disclosing the patentable invention. The various discrepancies or conflicts in connection with the McMurtry device, as to dates, as to the amount of noise produced, and as to its location upon the automobile or its manner of actuation—that is, whether from a frictional contact or by an electric motor—need not be considered, as the entire matter is insufficient to serve as a defense.

A number of patents from the phonograph art and considerable testimony relating to the phonograph disk or cylinder have been put in the case and commented upon by the experts with respect to the contention of the defense that the irregular surface produced by the stylus of the recording instrument (and followed by the instrument delivering vibrations to the transmitter in the reproducing instrument) is in

reality and in effect a rotary member with surface cam projections. Each of these projections is said to be of itself a cam vibrating a diaphragm by an outward thrust to produce sound. In the first place, it is evident that the vibration of the diaphragm in the case of a phonograph is like the resonator of the speaking trumpet, in that any sound transmissible by vibrations must be exactly reproduced through vibrations of the diaphragm itself, whether these sounds involve bodily displacement of the diaphragm or merely transmission of varying vibrations from the sounding board or telephone transmitter. The result is not that which is described in the Hutchison patents, nor which can be defined as producing sound through the vibration of the air in front of the diaphragm by a to and fro positive displacement and free elastic return of that diaphragm under described conditions. The necessity in the phonograph or telephone of having the vibrations transmitted exactly to the diaphragm, without the possibility of any elastic or free secondary vibration, is of the greatest importance, and patents have been taken out to prevent any vibration due to elastic return or to elastic vibratory displacement, beyond the exact motion of the so-called cam surface. Overtones, or accompanying vibratory tones, and all other sounds which interfere with the exact reproduction of the sound which has been recorded, must be prevented in the phonograph. In the Hutchison device, vibrations which (if at a proper rate) would give a musical or commonplace note would not serve the purpose of a signal, and no device accomplishing merely the musical or exact reproduction result would anticipate the Hutchison patent. Nor could anticipation be claimed from the phonograph devices solely because they show some actuation of the diaphragm by a surface which can be called a cam.

In the same way the patents (such as Zizang, No. 415,990, of November 25, 1889, or Chalas, No. 874,792, of December 24, 1907) relating to magnetic vibrations of a diaphragm, or magnetic vibrations of an instrument actuating a diaphragm, and based only upon the old idea that, as in the phonograph, the diaphragm may be made to reproduce a noise, or may by opening and closing the circuit do the work of the Wiegler crank and eccentric, are not anticipations of the Hutchison patent.

Reference has been made to the reproduction of a sound by a piston or sliding valve, setting in motion a column of air in a pipe or resonator, and the principle of an organ pipe has been also used in illustration. The vibration of the column of air in an organ pipe is of itself a collateral matter, as to which discussion need not be had in this case, except in so far as the vibration of the air in front of the Hutchison diaphragm with a resonator is claimed to resemble the vibration caused by the movement of a piston, or by the letting in of air in an organ pipe, and the Hope-Jones patents, which have applied these ideas to the purpose of making loud notes in an organ, and also in making fog signals, etc.

Hope-Jones is shown by the record to have been an engineer and inventor, as well as a musician. He has taken out two British pat-

ents, No. 14,473 of 1896, and No. 2,677 of 1901. In the earlier patent he describes what he calls a "diaphone," consisting—

"of a valve moved in a periodic manner by a diaphragm or its equivalent and governed by the application of a resonator or other form of spring or regulator."

By the use of his valve, he discharges a stream of fluid, or a current of air, or a jet of steam, into his resonator or organ pipe. The valve is made to open and close with the changes in pressure of the fluid or vapor in the resonator, by the flexing or bending of a thin wall or diaphragm in the casing of the resonator, at a point where the resultant compression and expansion is greatest. The fluid or air or steam injected will, with a proper adjustment (size and length) of the resonator or organ pipe, produce a sound.

In describing a device which he calls Fig. 5, he shows a barrel valve, opened and closed by pressure in the resonator chamber, for repetition of the admission of steam, and says:

"This, of course, results in the admission of a series of puffs of steam, governed as to frequency by the sympathetic period of the resonator *G*, thus producing a musical note."

With respect to other devices he states that the repeated introductions of steam or other fluid—

"result in the production of a musical note practically governed in pitch by the length of the tube *G*."

It is apparent that the patent intends to provide for a certain number of operations of the valve, corresponding to the wave length produced in the column of air, whose vibration causes a tone "governed in pitch by the length of the tube." In the form of device using a diaphragm, no vibration of the diaphragm is planned, except that which the wave lengths of the column of air produce, and which are transmitted to the valve.

This patent would be no anticipation of Hutchison, even though the diaphragm or thin portion of the resonator wall might have some slight effect upon the vibrations of the column of air in the resonator.

In the later Hope-Jones patent, he refers to the use of an electric motor with an eccentric and a pitman arm, to operate for the production of musical tone a diaphragm or piston in an organ pipe. In one drawing, Fig. 7, he shows a sounding board clamped around its outer edge, and set in vibration by a rod reciprocated by a motor or engine. Hope-Jones says that this sounding board will transmit vibrations to the atmosphere in the "usual well-known manner," and is apparently describing a device like Wiegler, with a wooden sounding board, instead of the skin drumhead or diaphragm.

In so far as this device, or any other of this Hope-Jones patent, shows a method of transmitting vibrations to produce sound, it is not an anticipation of Hutchison.

He claims under this patent, however, a third function, which he describes as "so arranging matters (if desired) that the periodicity of the musical tone shall to a certain extent control and regulate the periodicity of the reciprocating engine"; and, referring to Fig. 5, he

illustrates one method of this government and control. He says that the column of air in the resonator will exert considerable influence upon the motion of the piston, and "must tend to make the said piston move at a periodicity that shall correspond, or almost correspond, with the natural periodicity of the resonator." He states that the action upon the piston is communicated to the engine, and in this way the periodicity of the engine is to a considerable extent "governed and controlled."

"From this it will be seen that, if the length of the column of air in the resonator n be slightly increased, the action of the reciprocating engine will be slightly retarded, while, on the other hand, if the length of the resonator n be reduced, the action of the reciprocating engine will be accelerated."

This seems to be a statement that the use of resonators of different lengths, producing different musical notes, and having different wave lengths, would have some effect upon the speed; in other words, that increased rate of vibration with a short resonator will require faster rotation of the engine, and presumably increase the load or cause more work.

But Hope-Jones shows no result or object produced by his "governing" or changing of speed, and it is not until we come to Hutchison's use of rotary electric motors, and to vibration of a diaphragm with small motive power and large results, that harmony of the vibrations by controlling speed will give some benefit and show a patentable idea. Hutchison's application of "harmonizing" for the maintenance of a rate of vibration, until the jump to a higher rate, is also not taught by Hope-Jones, and is not anticipated by him. In fact, Hope-Jones described a function of operation with a longer or shorter resonator in connection with an organ pipe, where a given note was to be produced, and claimed it in his patent as a part of the device for getting the right note.

There would seem to be patentable idea in Hutchison over anything taught by Hope-Jones, or by Hope-Jones as applied to the Wiegler form of operation. It follows, therefore, that none of the patents presented in the prior art have anticipated the ideas which Hutchison seems to have claimed in his patent, and those ideas as shown in the devices or methods described in the patent were patentable.

The complainant and defendants have presented a number of models which have been labeled as Gould, Pierman, Wiegler, Gieseler, and McMurtry illustrative exhibits, and much testimony has been devoted to the explanation and criticism of these various devices. It is sufficient to say, without analysis of this testimony, that the various devices have presented, either exactly or in an enlarged manner, certain ideas of the Pierman, Gieseler, and Gould patents, which, taken in connection with the patents themselves, have proved valuable and available as illustrations, even though in each device it is possible to point out where departure from the Pierman, Gieseler, or Gould patents, or the McMurtry and Wiegler disclosures, has occurred, and where, in making the reconstruction, the teachings of Hutchison or comparison with the Hutchison device has caused experimentation and

original application with the patentee's improvements, rather than simple enlargement of the structures of the earlier patents.

The shape and proportion of the diaphragm, the wear piece, and the corrugated surface in the so-called Pierman devices, the method of applying power in distinction from the variable attachment of the Pierman device itself to a bicycle wheel or other vehicle, with the variations and changes from Gould and Gieseler, all go to substantiate the contention of the complainant that the various exhibits, while instructive and illustrative, do not show that Pierman or Gieseler described in their patents any device illustrating and showing appreciation of the patentable ideas of Hutchison in the patents in suit.

Even if this illustration and embodiment of the Wiegler device and the description of the Wiegler motorophan, in connection with the other patents, be held sufficient to throw doubt upon any patentable invention by Hutchison, describing a device consisting of a diaphragm of metal or some other substance, with or without a resonator, and vibrated by a crank attached to an eccentric, to which power is supplied by a steam engine, by hand, or by motor, nevertheless, none of the issues in this case and none of the claims of the Hutchison patents of any proven practical value have to do with that single idea.

Claims 1, 9, 18, and 20 of letters patent No. 923,048 are not relied upon in this case, but are closely connected with the claims rejected by the Patent Office on the prior art, and greatly resemble the disclosures of Hope-Jones and the Wiegler disclosure in connection with a magnified throw of the actuating rod.

The Wiegler illustrative devices seem to indicate that Wiegler's ideas would not produce a positive displacement, but rather sectional vibrations, and most of the claims above mentioned might be distinguished on that ground.

The expert for the defendants has produced a model, which he calls the "Second Wiegler Device" or a "Hope-Jones Device," and in which the usual Klaxon diaphragm, horn, and case are attached to a pitman rotated by an eccentric and driven by the usual complainant's rotary motor. He compares this with a Hutchison device having but one cam projection upon the rotary disk. He finds similarity of sound produced, and therefore argues that his so-called application of Wiegler or the Hope-Jones method of vibrating a diaphragm or small sounding board, by a motor used in connection with Hope-Jones' other idea of affecting speed of actuation by lengthening or shortening the resonator, completely anticipates the Hutchison patents, and says that he sees no reason why such a device as he has called the "Small Wiegler or Hope-Jones Illustration" would not give a practical commercial automobile signal.

For the reasons previously stated in this opinion, it would seem that Wiegler did not disclose any such idea, nor one which could be merely applied by a mechanic in making a successful practical alarm signal. Nor does Hope-Jones disclose anything beyond at least the discarded claims of the Hutchison application, and Hope-Jones' idea of governing the vibration is apparently distinguishable from that of Hutchison.

It would follow, therefore, that a combination of Hope-Jones' applications to a Hutchison diaphragm, resonator, and motor does not prove that Hope-Jones either invented or disclosed any such use. The Hutchison claims would seem to be patentable over any such disclosure.

A question was reserved earlier in the opinion as to whether the use of the stiffening bar in the defendants' form of diaphragm made this a Gieseler or Pierman device, rather than an infringement of the Hutchison claims. As Gieseler and Pierman have been held not to anticipate, this question becomes material, and the conclusion from the whole matter would seem to be that, if the bar has any effect at all, it may render the tone somewhat more musical, and in that sense is like certain parts of the Gieseler and Pierman devices; but its presence does not affect the other elements covered by the Hutchison claims, and the use of this bar would not, therefore, allow the defendants to escape infringement by claiming to follow Gieseler and Pierman.

Claim 24 of letters patent No. 923,048 calls for "means actuated * * * adapted to cause bodily movement of said diaphragm," etc., in combination with other parts. This form of claim has been upheld in the Paper Bag Patent Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122, and in *Hillard v. Fisher Book Typewriter Co.*, 159 Fed. 439, 86 C. C. A. 469. It describes a device or parts of the instruments, so shaped and arranged as to produce the result stated. It is not the statement of a function, as contended by the defendants.

As has been previously said, the claims in suit are not inconsistent, even though their number, detailed description, and perhaps unnecessary statement of small variations has made it more difficult to consider, classify, and compare them with the other patents, and to read them in connection with the testimony in the case.

If the disclosures of the specifications were carried into the various claims of more than one patent, the technical objection of "double patenting" might be well founded. But the claims of each patent are separate and distinct from the other patents, and the resemblances in drawings and text are the natural result of describing improvements, or of dividing an application and presenting claims for a specific part or device as a separate invention. *Underwood v. Gerber*, 149 U. S. 224, 13 Sup. Ct. 854, 37 L. Ed. 710; *Miller v. Eagle*, 151 U. S. 187, 14 Sup. Ct. 310, 38 L. Ed. 121.

It would seem unnecessary to go through the various claims of these patents, merely to classify them or to attempt to pick out particular ones, about which some further argument might be stated. None of them are in such broad language that they could not apply to or be read upon the commercial device of the so-called complainant's Klaxon or Klaxonet horns and the defendants' Newtone horns, or with the commercially useful and valuable forms of this kind of signaling apparatus.

The manner in which the case has been tried, and the presentation of the issues, together with the possibility of causing further litigation by an attempt to separate and comment upon the individual claims

that have been called in question, or to specify what structures might escape infringement, make it seem unnecessary to decide other than in a general way that the complainant has the right to employ the Hutchison patents in manufacturing the devices about which issue is raised in this case, and to control or prevent infringement of their claims.

[5] Upon the issues raised, the Hutchison patents and the claims relating thereto, both as to devices and as to a method of operation, seem to be valid. The defendants' devices are infringements, and the complainant may have a decree.

LEWIS v. JULIUS et al.

(District Court, S. D. New York. December, 1913.)

1. COURTS (§ 99*)—LAW OF CASE.

Where a discharge is denied to bankrupts on the ground that they have made a conveyance of their property with intent to defraud creditors, such determination will be regarded as the law of the case in an equity suit by their trustee to set aside such conveyance.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 340; Dec. Dig. § 99.*]

2. BANKRUPTCY (§ 279*)—FRAUDULENT CONVEYANCES—VACATION—DISCHARGE.

Since Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), only pronounces conveyances by bankrupts in fraud of creditors null and void when not made to purchasers in good faith and for a present consideration, it is possible that bankrupts may be denied a discharge under section 14, because of their having conveyed property in fraud of creditors, and yet that the property so conveyed cannot be recovered by the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 419-424; Dec. Dig. § 279.*]

3. BANKRUPTCY (§ 180*)—FRAUDULENT CONVEYANCES—ACTION BY TRUSTEE—GOOD FAITH.

In a suit by a bankrupt's trustee to recover property alleged to have been conveyed by the bankrupt in fraud of creditors, the good faith of the transaction is to be measured by the same standard of care that is applied to a creditor in accepting payments or transfers as payments from an insolvent debtor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 252, 253; Dec. Dig. § 180.*]

4. BANKRUPTCY (§ 182*)—FRAUDULENT CONVEYANCE—GOOD FAITH—EVIDENCE.

Transactions known by a purchaser from a bankrupt to be out of the usual and ordinary course of business tend to negative good faith in determining whether they are void as in fraud of creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 255-258; Dec. Dig. § 182.*]

5. BANKRUPTCY (§ 182*)—CONVEYANCES—FRAUD—RECOVERY BY TRUSTEE.

Where the members of a partnership, with knowledge of their insolvent condition, transferred all their assets to a corporation organized for the purpose, to which certain of their personal friends and relatives contributed money to make a settlement with the bankrupts' creditors, the transfer, not being made for a present fair consideration, was in fraud

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 212 F.—15

of creditors and voidable by the trustee in bankruptcy of the firm who was entitled to recover the property as against the trustee in bankruptcy of the corporation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 255-258; Dec. Dig. § 182.*]

6. BANKRUPTCY (§ 279*)—TRUSTEE—ASSETS—PROCEEDS OF INSURANCE.

Where members of a bankrupt firm transferred their assets to a corporation organized to take over the same, in fraud of creditors, and the corporation immediately insured the property, it had title and an insurable interest therein, and hence neither the insurance nor the proceeds thereof after loss were recoverable by the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 419-424; Dec. Dig. § 279.*]

Action by Augustus Lewis, as trustee in bankruptcy of the firm of Julius Bros., against George Julius and others, to set aside a fraudulent transfer, and to recover the proceeds of a fire policy on goods alleged to belong to the bankrupts. Judgment for plaintiff, for a part of the relief demanded.

In May, 1910, George and Simon Julius, trading as Julius Bros., were insolvent and knew it. They communicated their misfortune to some of their creditors and were advised to lay their trouble before a member of the bar, who was the attorney for the recommending creditor. This was done, and a creditors' meeting called. At the meeting a committee was appointed, and subsequently the Julius partners made an offer of 25 per cent. with a possible additional sum if certain insurance turned out of any value. All the creditors accepted this proposition except the firm of Frank & Sons and one Pressman.

The manager of the Frank firm was and is one Herzog, the brother of the attorney for the plaintiff in this case. Mr. Herzog always refused to compromise the claim of his firm against the Juliuses. He was advised so to do by his brother; no reasons for such action appear; but he was entirely within his rights in this decision.

Pressman had credit insurance, and was afraid of vitiating his insurance if he took any positive steps regarding Julius. He seems to have done nothing but leave the matter to his insurers, who took a judgment in his name and apparently refused to compromise.

The Juliuses did not have enough money to pay the 25 per cent. settlement. They or their attorney were necessarily aware that, with debts of about \$6,000 and two creditors with claims (aggregating about \$1,000) refusing to settle, bankruptcy was imminent. I find that, in consequence of this recognized condition, the following plan was devised and carried through: Certain friends of the Juliuses contributed about \$1,500, depositing that sum with the bankrupt's attorney, Mr. Sundheimer. This was done on or about May 24, 1910. On June 7th the corporation of Julius Bros. Company had been formed and all the property of Julius Bros. was conveyed to the new corporation. The expenses of formation were paid out of the fund in Mr. Sundheimer's hands, and he also paid directly 25 per cent. to the assenting creditors. The aggregate of these payments, plus a fee of \$200 to Mr. Sundheimer, substantially exhausted the fund. Julius Bros. Company thereupon continued the business of Julius Bros., collecting the accounts, using the goods, and utilizing as the foundation of its business certain machinery, furniture, and fixtures particularly set forth in the bill of sale from firm to corporation. After the corporation was formed and in business, one or both of the Juliuses had interviews with Herzog and Pressman (the nonassenting creditors). There was also talk between Mr. Herzog, the attorney, and Mr. Sundheimer. The one contested point in this case is what was said at these interviews.

I find that the Juliuses were willing to pay 25 per cent. after the formation of the corporation, but that they always coupled any expression of such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

willingness with a threat that, if the creditors did not take 25 per cent., he would never get anything.

Frank & Sons and Pressman obtained judgment and issued execution in vain, and then, in or about September, 1910, filed a petition in bankruptcy against Julius Bros. The third petitioning creditor was Mr. Herzog, the attorney, for the costs included in the judgment of his brother's firm. In this bankruptcy proceeding George and Simon Julius individually and as a copartnership were duly adjudicated, and the plaintiff herein duly elected trustee.

The schedules reveal no other creditors but the petitioners. This was the result of Mr. Sundheimer's advice; he holding that the acceptance of 25 per cent. by all the creditors had extinguished their debts before bankruptcy. This view of the law has not been acceptable to all creditors, and some other claims have been filed, but it is not clear whether any steps have been taken to expunge them. The pendency of this bankruptcy proceeding against Julius Bros. did not prevent Julius Bros. Company from going on in business. They bought, manufactured, and sold, but with no capital except the proceeds of the accounts and goods obtained from Julius Bros.

All of the money contributed by friends and relatives had been used to pay 25 per cent. of old debts; none of it had in form gone into the coffers of the corporation; it had been received and disbursed by the attorney; but those who contributed the money received stock in Julius Bros. for it.

There is no evidence to show that George and Simon Julius, or either of them, ever agreed to repay the money so contributed or to secure otherwise than by the issuance of the stock of Julius Bros. Company.

In July, 1911, there was a fire on the premises of Julius Bros. Company. A considerable amount of goods was destroyed, and the machinery, furniture, and fixtures above referred to were somewhat injured. This machinery had been kept in repair by Julius Bros. Company, a small portion of it had been sold and replaced, but upon the whole it continued to be the same equipment which had been the undoubted property of the firm of Julius Bros. While the insurance questions arising out of this fire were still unsettled, this action was begun.

The original theory of suit was (and still is) that everything that Julius Bros. Company had was either directly or by a species of descent the property of Julius Bros.; that is, that Julius Bros. Company had nothing except the identical articles by it received from Julius Bros. or goods, accounts, and money which represented similar articles or property so obtained. From this it followed that all the insurance on goods destroyed or injured was likewise in equity the property of Julius Bros., and therefore of their trustee.

The prime object of suit being to obtain the insurance moneys, a temporary injunction was sought and first obtained in the bankruptcy proceedings. This brought to the front the defendants Alexander Levy and Harry Julius, copartners trading as Levy & Julius. The Julius is a brother of the original bankrupts. He has claimed (at this trial and always) that his firm had loaned \$2,000 to Julius Bros. Company to relieve the pressing necessities of that corporation occasioned by delay in collecting the insurance moneys aforesaid. That in order to secure his \$2,000 he had received an assignment of all the insurance moneys. Said insurance moneys amounted to \$3,350; i. e., \$3,000 for loss on goods, and \$350 for injuries to fixtures, machinery, and furniture.

Undoubtedly the relations between Levy & Julius and Julius Bros. Company were intimate and friendly, for, although Levy & Julius had an assignment of all the insurance moneys, so much thereof as was not necessary to secure the aforesaid loan of \$2,000 was paid direct to Julius Bros. Company. The balance was withheld by the insuring companies owing to the pendency of this action. Thereupon on general consent, or without serious opposition, the insurance fund was brought into this court; Levy & Julius were made parties to the suit; the insurance companies were discharged, and Levy & Julius ultimately permitted to withdraw the moneys on bond. In the meantime, and during the pendency of this action, Julius Bros. Company was petitioned into bankruptcy and duly adjudicated in February, 1913. Pressman became the trustee of that company, and it appears that he has received and sold the very machinery traced (as above set forth) from Julius Bros. He has been made a party defendant.

The foregoing are believed to be all the material facts, and it seems necessary to add by way of comment, or further finding only the following: The machinery, furniture, and fixtures described in the bill of sale from firm to corporation have been successfully traced into the hands of the defendant Pressman, trustee. Three hundred and fifty dollars paid by insurance companies for injury to said machinery, etc., has been traced into the hands of the defendants Levy & Julius, as copartners.

The defendant Harry Julius, as an original contributor to what may be called Mr. Sundheimer's fund, as an original shareholder in Julius Bros. Company and as a relative intimately acquainted with the necessities of George and Simon Julius, had every reason to believe that all the machinery, furniture, etc., of Julius Bros. Company had been the machinery, etc., of Julius Bros., and that all the goods, accounts receivable, and money of Julius Bros. Company represented the proceeds, collections, sales, and reinvestments of similar properties of Julius Bros. There is, however, no evidence to show that Harry Julius did actually form an opinion on these subjects, but, if he is a reasonable man and had thought about it, he knew the facts from which the result just indicated would inevitably follow.

No portion of the goods of Julius Bros. has been found in specie, nor do any of the accounts originally assigned from firm to corporation any longer exist.

Harry L. Herzog, of New York City, for complainant.

Malcolm Sundheimer, of New York City, for Levy and Julius.

HOUGH, District Judge (after stating the facts as above). [1] That what was done by Julius Bros. amounted to a conveyance with intent to hinder, delay, or defraud their creditors or some of them has been decided in this court on the discharge proceedings. This equity case grows out of the bankruptcy, and it would be entirely improper for me not to recognize the decision on discharge as the law of this case, nor am I inclined so to do.

[2] Under section 14 of the Bankruptcy Act (relating to discharge), it is, however, possible that a discharge may be denied, yet that which was conveyed in fraud cannot be recovered. This because section 67e only pronounces such conveyances "null and void" when not made to "purchasers in good faith and for a present fair consideration." In my judgment the conveyance of Julius Bros. "property to the corporation of Julius Bros. Company was plainly not made for a present fair consideration."

[3, 4] The good faith of the transaction is to be measured by the same standard of care that must be applied to a creditor in accepting payments or transfers as payments from an insolvent debtor. Transactions known by the purchaser to be out of the usual and ordinary course of business tend to negative good faith. Remington on Bankruptcy, vol. 1, § 1496, and cases cited.

[5] The conveyance, therefore, is not within the saving clause of section 67e. Complainant is entitled to a decree as prayed for to the effect that the bill of sale made on June 7, 1910, be declared null and void. He is also entitled to a decree that the property transferred or the proceeds thereof be paid over to him if in the possession or under the control of any of the defendants in this cause. The limits of this doctrine are, I think, properly set forth in *Standard National Bank v. Garfield National Bank*, 70 App. Div. 46, 75 N. Y. Supp. 28, and cases cited. Therefore complainant may further take decree awarding to him everything in the possession of Pressman, as trustee

in bankruptcy, for it is plain that Pressman has nothing that did not come out of the fraudulent conveyance.

[6] At the trial I was disposed to think that the rights of creditors of Julius Bros. Company should be considered, but this suit was begun before the corporation became bankrupt; the trustee of Julius Bros. has all the rights of a creditor, armed with execution unsatisfied, and the institution of a suit in equity is notice to all the world. Therefore the present complainant is entirely within the rule laid down by the case last cited. I am not, however, able to see that complainant is entitled to recover any of the insurance moneys on policies issued to Julius Bros. & Co. Let it be conceded that that corporation was a fraudulent grantee. Nevertheless it had title, and, having title, it had an insurable interest in the goods of or in the possession of the corporation. When it insured those goods, a personal contract was made between the corporation and the insurers; neither the insurance nor the proceeds thereof can be called proceeds of conveyed or transferred goods. At the hearing I was inclined to look upon insurance as proceeds of the goods insured, but the decisions since brought to my attention are wholly the other way. They are all cited in *Forrester v. Gill*, 11 Colo. App. 410, 53 Pac. 230, and the best discussion of the matter is under the great name of Chief Justice Sharswood of Pennsylvania, in *Nippes' Appeal*, 75 Pa. 472. Nor is there (after all) anything novel in this doctrine; it is entirely in line with the rule that a shipowner, when claiming limitation of liability under the act of 1851, is not bound to bring into the limitation proceedings the insurance on his vessel. The reasoning by which this result has long been reached is the same as that of Sharswood, C. J., in the case last cited.

It results that complainant may take a decree against Pressman as trustee, and also against the bankrupts for any difference between what Pressman has and the asserted value of that which was conveyed, to wit, \$1,550; but he cannot recover against any one, nor more particularly from Levy and Julius, the proceeds of the insurance moneys. There will be no costs.

FIDELITY TRUST CO. v. D. T. McKEITHAN LUMBER CO. et al.

(District Court, E. D. South Carolina. January 16, 1914.)

1. LOGS AND LOGGING (§ 3*)—MORTGAGE OF STANDING TIMBER—PROVISION FOR SINKING FUND.

A provision of a mortgage on standing timber, requiring the mortgagor to pay into a sinking fund provided for therein \$2.50 per thousand feet of timber cut by the mortgagor, *held* to apply only to the timber described in the mortgage, and not to timber on another tract of land, which the mortgagor did not then own, but held an option to purchase which it afterward exercised.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

2. REFORMATION OF INSTRUMENTS (§ 45*)—MORTGAGE—MUTUAL MISTAKE.

The mortgagor *held*, on the evidence, entitled to the reformation of a mortgage by the insertion of a provision which was agreed upon between the parties, but omitted through mutual mistake.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157-193; Dec. Dig. § 45.*]

3. ESTOPPEL (§ 78*)—EQUITABLE ESTOPPEL—PAROL AGREEMENT MADE ON DELIVERY OF BONDS OF CORPORATION.

Holders of bonds of a corporation, delivered after their date, *held estopped*, by an agreement made at the time of delivery, to claim interest except after the date agreed upon.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 204-210; Dec. Dig. § 78.*]

4. DEEDS (§ 99*)—CONSTRUING INSTRUMENTS TOGETHER—DEED AND CONTRACT THEREFOR.

A deed executed pursuant to a prior written contract therefor, in so far as it covers matters dealt with by the contract, controls as the final agreement of the parties, but as to any matter of ambiguity, or referred to in and to be performed by the contract, but not covered by the deed, the contract may be referred to as governing the rights of the parties.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 261-265; Dec. Dig. § 99.*]

5. DEEDS (§ 114*)—CONSTRUCTION—PROPERTY CONVEYED.

A deed by a lumber company to all of its property (except choses in action acquired and debts owing to it prior to April 1, 1911, etc.), "including all accounts, debts, claims, and demands for or on account of lumber sold since April 1, 1911," *held* to entitle the purchaser to all such accounts and claims outstanding at the time of delivery of the deed, but not to cash previously received for lumber sold after April 1st.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 316-322, 326-329, 388; Dec. Dig. § 114.*]

6. CORPORATIONS (§ 625*)—DISSOLUTION—LIABILITY OF STOCKHOLDERS.

Where a corporation has been dissolved, and its assets distributed, an unpaid creditor, after establishing his claim, can recover from a stockholder only to the extent of assets received by the stockholder in the distribution.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2473; Dec. Dig. § 625.*]

7. LOGS AND LOGGING (§ 2*)—SALE OF TIMBER LAND—RIGHTS OF PURCHASER—MISREPRESENTATION BY VENDOR.

Officers of two lumber companies, in good faith, supplied to a prospective buyer, who afterward did purchase, estimates of the quantity of timber on the property of the companies previously made by two cruisers, selected, one by the companies, and the other by another intending purchaser. The contract of sale was not made until two months afterward, and the sale was not concluded for another two months, during all of which time the purchaser had full opportunity to examine the property. The deed recited that the property was the same recently cruised by such two persons, and stated their estimate, but contained no warranty or further representation of quantity. *Held*, that neither the vendors nor their officers were liable because of a deficiency in quantity below the cruiser's estimate.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 1-5; Dec. Dig. § 2.*]

8. LOGS AND LOGGING (§ 3*)—CONVEYANCE OF STANDING TIMBER—CONSTRUCTION.

A deed conveyed the standing timber on a tract of land, but expressly stated that the timber undertaken to be conveyed was the same conveyed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to the grantor by a certain described and recorded deed. The latter deed was made expressly subject to the rights of third persons named, to whom a prior owner had conveyed all the timber, with the right to enter upon the land and cut and remove the same, with a warranty of the timber for the term of 20 years. *Held*: (1) That, under the rule of decision in South Carolina, the latter deed must be construed as conveying only so much of the timber as should be cut and removed within 20 years from its date; and (2) that the grantee in the latest subsequent deed took with notice that the timber conveyed to it was that remaining on the land at the expiration of such 20 years.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

In Equity. Suit by the Fidelity Trust Company, trustee, against the D. T. McKeithan Lumber Company, J. M. Barr, W. R. Bonsal, and D. T. McKeithan. Hearing on various issues raised by answers between the corporation defendant and complainant, and between such defendant and its codefendants.

Mitchell & Smith, of Charleston, S. C., and Williams, Thomas & Williams, of Baltimore, Md., for complainant.

Louis G. Addison, of Columbus, Ohio, James Simons, of Charleston, S. C., and Willcox & Willcox, of Florence, S. C., for defendants.

SMITH, District Judge. In this cause a bill was filed by the complainant to obtain the instruction of the court upon certain legal questions in the interpretation of the trust instrument with regard to the performance of its duties thereunder. The complainant is the mortgagee trustee. To the bill of complaint there were made as parties defendant the D. T. McKeithan Lumber Company, the mortgagor, and the three individual defendants, Bonsal, Barr, and McKeithan, as being the sole beneficiaries under the terms of the deed of trust by way of mortgage, as they were the holders of all the obligations thereby secured. An answer was filed by the defendant the D. T. McKeithan Lumber Company, and a separate and independent joint and several answer was filed by the three individual defendants. The questions as to the construction of the mortgage upon which the complainant sought the direction of the court came to a hearing and were decided by a decree filed in this court on the 21st day of May, 1913. Other questions were raised by the answers of the codefendants as against each other, as well as one against the complainant. The individual defendants, Barr, Bonsal, and McKeithan, alleged that their codefendant, the D. T. McKeithan Lumber Company, was engaged in cutting a large quantity of timber from a tract of land of 2,700 acres, known as the Bright Williamson timber, upon which, when cut, it was required, under the terms of the mortgage, to pay the sum of \$2.50 per thousand feet into the sinking fund provided for by the mortgage, as to be paid to the trustee under the mortgage. The other defendant, the D. T. McKeithan Lumber Company, has filed an answer and supplemental answer setting up a number of counterclaims under rule 31 of the rules in equity (198 Fed. xxvii), which answer and supplemental answer were duly served upon the codefendants, the individual defendants

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

herein, who filed a general reply thereto. These counterclaims in brief are five in number and set up the following contentions:

(1) That the deed of trust by way of mortgage should be reformed so as that the clause therein providing for certain payments to be made out of the sinking fund therein provided for, and which has been construed by this court by its decree already filed not to include and cover the payment of the annually recurring interest upon any bonds except those which mature in the year of payment, should be reformed so as to permit and require the payment by the trustee out of the sinking fund of the annual interest on all the bonds outstanding, whether they mature in the current year or not.

(2) That the plaintiff had paid and redeemed \$20,000 at par value of the bonds secured by the deed of trust by way of mortgage, and was entitled under the terms of deed to have the mortgagee release and discharge from the lien of the mortgage an equal pro rata or proportion of the mortgaged properties; that, although request had been made of the trustee so to do, it had failed to perform its duty in that regard, under the terms of the deed of mortgage.

(3) That the individual defendants, as holders of all the bonds secured by the mortgage, had taken the same with notice that the D. T. McKeithan Lumber Company had been led to believe that its mill would be completed and ready for operation by the 1st day of October, 1911; that, by reason of the representation on behalf of the corporations from which the defendant had purchased the property to that effect, it had delivered the bonds to its individual codefendants upon the understanding that, inasmuch as the mill had not been completed and ready for operation until the 1st day of January, 1912, one-half of all the coupons on the bonds payable on the 1st day of April, 1912, should not be presented for payment, but should be canceled.

(4) That part of the consideration given by the defendant the D. T. McKeithan Lumber Company for the purchase of the mortgaged premises was the agreement on the part of its vendors, the Williams-McKeithan Lumber Corporation of Virginia and the Williams & McKeithan Lumber Company of South Carolina, that all accounts and claims for lumber sold since April 1, 1911, should be paid to the vendee; that the aggregate amount of lumber sold since that date up to the date when the final conveyance was made to the vendee and the vendee put in possession was \$60,958.53, of which the estimated balance remaining after the payment of freight was \$42,670.97, of which about \$11,887.92 had been paid, leaving unpaid \$30,783.05; that the codefendants, the individual holders of the bonds, had taken the bonds with full knowledge of the obligation to pay this amount, and its failure, and that the amount so due should be taken off from the bonds in the hands of its codefendants.

(5) That misrepresentations of a most material question had been made as to the quantity of timber, in consideration of the purchase of which the bonds secured by the deed of trust by way of mortgage had been given; that the D. T. McKeithan Lumber Company was entitled to an abatement in price to the extent of this deficiency; and that the individual bondholders had received and accepted the bonds with full

knowledge of the fact that the said bonds had been given in part payment of that timber, and of the deficiency therein, and that the plaintiff is entitled to have a decree for the amount of such deficiency, and that the same should be deducted from the amount of the bonds in the hands of the individual codefendants.

(6) The counterclaim interposed in the supplemental answer and counterclaim, to the effect that the bonds held by the individual codefendants were in like manner responsible in the hands of the individual codefendants for a failure of consideration in the nonconveyance and delivery to the D. T. McKeithan Lumber Company by the vendor corporation, before referred to, of the timber upon a large tract of 3,088 acres of timber mentioned therein, and of the failure to include in the deed of conveyance the timber upon five smaller tracts of land also mentioned therein; that, for the damages or failure of consideration thereby inuring to the D. T. McKeithan Lumber Company, the individual codefendants, as holders of the bonds, should be decreed to have the amount of such damage or deficiency deducted from the amount of their bonds.

There is involved in one of the counterclaims for a failure of consideration the claim that, at the time of the purchase of this property, representations were made which are, for the purposes of the prayer of the counterclaim binding upon the individual defendants to the effect that one of the tracts of land sold, to wit, that lying along the Great Peedee river, was in a contiguous connected tract, with a solid boundary; that it appeared that such was not the case; one portion was separated by an intervening tract, which very much affected the value of the timber thereon by reason of the increased cost of manufacturing and marketing, and that was an element of loss to be considered in estimating the amount of the failure of consideration.

The case having come to a hearing upon these issues, the testimony propounded by the parties has all been heard, and counsel on behalf of all parties interested have been heard, and it is thereupon now adjudged and decreed as follows:

[1] First. With reference to the contention raised by the three defendants that the codefendant, the D. T. McKeithan Lumber Company, should be required to pay the sum of \$2.50 to the trustee mortgagee on account of the sinking fund provided for in the mortgage, the court finds, as a conclusion of fact, that the timber on the Bright Williamson tract was not owned at the date of the mortgage by the mortgagor; that it is not specifically described or included within the property mortgaged or covered by any of the express terms thereof; that, as already decreed by this court, the mortgage must be understood as referring to its date and to the property then held and possessed by the mortgagor. In this case the mortgagor possessed only an option to purchase this timber. This option had been given years before for the payment of a sum of money very much less than the amount to be paid for the timber itself, should the option be exercised. It was entirely within the discretion of the mortgagor whether it should or should not exercise its option. The money to be paid for the timber, if it did exercise the option, was in no wise included within the

property mortgaged. The mortgagee and the beneficiaries under the mortgages had no interest in this money. This investment in the timber was not a part or in substitution of any property subject to the mortgage, but was the investment therein by the mortgagor of a sum of money which it was in no way bound to make, under the terms of the mortgage. If it had never seen fit to exercise the option, the amount of the property mortgaged would not have been diminished. The court holds that, under the terms of the option, it was not bound to exercise it so as to enhance the amount of property mortgaged. It is therefore decreed, as a conclusion of law, that the timber upon the Bright Williamson tract is not subject to the terms of the mortgage, and the mortgagor is not bound to pay into the hands of the trustee, as part of the sinking fund provided for by the terms of the mortgage, the sum of \$2.50 per thousand upon any part of the timber cut and removed therefrom.

[2] Second. Under the first above-mentioned counterclaim made by the defendant the D. T. McKeithan Lumber Company, the court finds as a conclusion of fact from the testimony in the cause, as well that on behalf of the D. T. McKeithan Lumber Company as on behalf of the individual defendants by their own personal testimony and admissions on the stand, that the failure to provide in the mortgage that the interest upon all the outstanding bonds accruing in any and every current year should be paid out of the sinking fund was a mutual mistake; that it was agreed and understood by all the parties that such should be the provision, and the failure to incorporate such a provision, and the so phrasing of the provision in the mortgage as that it should not be paid, was an unintentional oversight or error of the parties or their draftsman. It is therefore decreed that the mortgage deed should be reformed so as that the mortgagor, the D. T. McKeithan Lumber Company, and the mortgagee, the Fidelity Trust Company of the city of Baltimore, both of whom are parties to this cause, shall within 30 days from the date of this decree jointly and interchangeably execute and deliver a supplemental deed in due and proper form, amending and reforming the deed of trust by way of mortgage set up and referred to in the bill of complaint in the seventh clause thereof, beginning with the clause in the ninth line, which begins with the word "such," by modifying the same so as to read as follows:

"Such moneys so paid shall be used by the trustee for the payment of interest upon all outstanding bonds as the said interest may accrue and become due and also to the retirement of any bonds that shall be due with interest on the same at the date of retirement."

It is further ordered that such supplemental deed, when executed, shall be duly recorded by the mortgagor at its own expense in all the counties proper for the record of the same, with leave to have a marginal note or memorandum on the record of the original deed of trust or mortgage referring to the place of the record of the supplemental and reforming deed hereby directed, and that a due report of the execution and record of the same, together with a copy of the supplemental deed and a statement of the places of record, be filed in this court.

Third. So far as the claim contained in the second of the above-enumerated counterclaims is concerned, viz., that the trustee should be decreed to release an amount of the property covered by the mortgage equal in pro rata proportion to the amount of the bonds paid, the court finds as a conclusion of fact that there is no sufficient testimony before the court to find that any bonds have been paid and discharged, or that any request has been made of the trustee to release and discharge from the lien of the mortgage any pro rata proportion of the property covered by the same, or that there has been any adjustment and ascertainment of the property so to be released. It is thereupon decreed that, as to the counterclaim contained in the answer upon this point, the defendant the D. T. McKeithan Lumber Company is not entitled to any decree in its behalf on said counterclaim, and the same is refused, but without prejudice to any application said defendant may make at the foot of this decree upon due notice to be allowed to prove and establish the payment of any such bonds paid prior to the date of this decree, and for an order thereon establishing and decreeing the release from the mortgage of the due proportion of the property mortgaged.

[3] Fourth. The question made under the third counterclaim interposed by the answer of the defendant the D. T. McKeithan Lumber Company is that the coupons upon the bonds secured by the mortgage maturing the 1st of April, 1912, and now in the hands of the three individual defendants, be annulled to the extent either of one-half of the said coupons or of one-half in amount of each separate coupon, so as that the interest to be paid upon the mortgage shall be the interest accruing only from the 1st day of January, 1912.

The testimony upon this case, taken as a whole, leads to the conclusion that there was a very serious contention or series of contentions between the individual defendants and the D. T. McKeithan Lumber Company as to many matters claimed by the D. T. McKeithan Lumber Company as against the defendants upon an allegation of their liability to perform certain alleged undertakings of the vendor corporations, to wit, the Williams-McKeithan Lumber Corporation of Virginia and the Williams & McKeithan Lumber Company of South Carolina. The D. T. McKeithan Lumber Company had refused to deliver to the vendor corporations or the individual defendants the bonds secured by the mortgage as being a part of the purchase money for the mortgaged property, upon the ground that they should not be delivered until certain claimed liabilities had been performed and satisfied. In February, 1912, after sundry conferences and disputes, apparently an agreement was reached between the D. T. McKeithan Lumber Company and the individual defendants (excepting the defendant J. M. Barr), which agreement was embodied in a letter written by George E. Dargan, the attorney for the D. T. McKeithan Lumber Company, to the Honorable F. K. Pendleton, New York City, dated February 15, 1912, in which it was stated that four matters had been agreed to, namely, that the bonds should be delivered to the individual defendants who held the interim certificates; that the stock of the corporation should be transferred to the individual defendants,

both of which were to be done by the D. T. McKeithan Lumber Company; that then a certain tract of land, known as the Stucky land, of 300 acres should be conveyed to the D. T. McKeithan Lumber Company, the cost thereof to be paid by the individual defendants; and lastly that all interest on the bonds of the company up to January 1, 1912, should be renounced. The contents of that letter, as stating the agreement of the parties on those points, the court finds as a conclusion of fact was known to and acquiesced in by the individual defendants at the time, except the defendant J. M. Barr. In pursuance of that agreement, the D. T. McKeithan Lumber Company on the 22d of February, 1912, did deliver to the defendant D. T. McKeithan, to be delivered to his individual codefendants, the bonds and the stock, and those bonds and that stock were subsequently delivered. Having received the bonds and stocks in that way and under that agreement, the court finds as a conclusion of law that the individual defendants would be estopped now from claiming any interest to the 1st of January, 1912. In the case of the defendant J. M. Barr, he was not shown to have given any assent at the time to that agreement, but the evidence does show to the court that he received his bonds after he had been notified by his individual codefendants of the terms upon which they had been sent for delivery, and, under those circumstances, in the opinion of the court he is likewise estopped; and the D. T. McKeithan Lumber Company is therefore, under those circumstances, entitled to an abatement of interest to the amount of the interest due from the date at which interest began to run on the 1st day of October, 1911, to the 1st day of January, 1912.

It is therefore decreed that upon the payment by the D. T. McKeithan Lumber Company, within 30 days from the date of this decree, to the defendants of all interest represented by the coupons maturing on the 1st of April, 1912, and accruing from the 1st of January, 1912, together with interest from the date of the maturity of such coupons to the actual date of payment, the same shall be delivered up and be canceled for delivery to the trustee.

During the argument of the cause it was orally stated that all the coupons maturing the 1st of April, 1912, have been already paid. If such be the case, leave is hereby given to the defendant the D. T. McKeithan Lumber Company to move at the foot of this decree, upon due notice, for an order that an abatement equivalent to the abatement hereby ordered be made to be deducted from the coupons maturing the 1st of April, 1914.

Fifth. The next question raised by the counterclaims, viz., the fourth above mentioned, is the right of the D. T. McKeithan Lumber Company to have these defendants pay, in the way of being credited on the bonds or coupons, the sum of \$30,783.05, claimed by the D. T. McKeithan Lumber Company to be due to it as representing the proceeds of lumber sold subsequent to the 1st of April, 1911. On this point the pleadings before the court would not call for any such decree. The parties who made the agreement were not these three individual defendants. They were two corporations, known as the

Williams-McKeithan Lumber Corporation of Virginia and the Williams & McKeithan Lumber Company of South Carolina. Neither of those corporations are before the court, and a charge of this kind, involving the liability of these corporations to the D. T. McKeithan Lumber Company, under an agreement such as set up in the pleadings and in the testimony produced, would not entitle the D. T. McKeithan Lumber Company to a decree under the pleadings in this case, inasmuch as the court holds that for that purpose primarily the two corporations making the covenant or undertaking are necessary parties to the determination of the amount thereunder. But in this case the parties have entered, through their counsel, into a stipulation in which they agreed, in writing, filed in the cause, that all questions and controversies growing out of the transaction set forth in the bill and answers hereto shall be fully heard and determined in this cause to the same extent and as fully as if independent suits were brought by the various parties hereto for that purpose, and that no party shall be deprived or prevented from having all questions heard which could arise or be heard upon original bills. Nor shall any party to this suit be prejudiced in the hearing of this cause by the form of the action. The stipulation proceeds that neither the bondholders, J. M. Barr, W. R. Bonsal, and D. T. McKeithan, nor the D. T. McKeithan Lumber Company shall be prevented from having any and all causes of action, defenses, and questions, which either or any of them might litigate or raise in an independent suit, heard and determined in this suit, to the end that all disputes, questions, and controversies existing between the said D. T. McKeithan Lumber Company, the said J. M. Barr, W. R. Bonsal, and D. T. McKeithan, and the trustee, the Fidelity Trust Company, shall be heard and determined in this suit. The court understands that stipulation as going to the effect that the parties agreed that all questions upon the answers and counterclaims, as properly alleged and set out in this proceeding, shall be determined in like manner as the court might determine the same, if the same had been propounded by original proceedings in the shape of original bills of complaint for the purposes set up in the said counterclaims, and to which the defendants had been properly made parties.

The testimony shows that the two vendor corporations, above referred to, are, as to one of them at least, the Williams-McKeithan Lumber Corporation of Virginia, no longer existing. The testimony is that that corporation has been dissolved and its charter surrendered. Wherever a company goes out of existence or becomes insolvent or in any wise unable to respond, any one having a legal claim against that corporation has the right to assert it against the corporation, and, in case of adjudication in his favor, has a right upon the judgment recovered in equity to pursue the individual stockholders for the satisfaction and payment of that judgment to the extent of assets received by the stockholder which he was not entitled to receive as being primarily subject to the payment of debts and liabilities of the corporation. Under these circumstances, the court understands the stipulation to mean that the D. T. McKeithan Lumber Company

would have the same right upon the counterclaim, for failure of consideration or any other counterclaim, to pursue these individual defendants as it would have had if it had recovered the judgment against the corporation, except that any matter of defense may be set up to the counterclaim, no judgment having been recovered; and, for any such claim as in this suit the D. T. McKeithan Lumber Company shall make it appear to the court that they would be entitled to recover judgment against such corporation, they have a right to pursue these individual defendants, as stockholders, to the extent of assets received applicable to that judgment, for the purpose of having the same paid. The testimony shows that E. M. Poston, trustee, entered into a contract with the Williams & McKeithan Lumber Company of South Carolina and the Williams-McKeithan Lumber Corporation of Virginia on the 6th day of May, 1911, for the transfer of certain properties. This contract is absolute in form, but required certain matters to be carried out by both sides to the contract, and contained a stipulation at the end that, if E. M. Poston, trustee, failed to carry out his part of the contract in 60 days from the date of it, he shall forfeit as liquidated damages in full, without further liability, the sum of \$5,000 paid by him to the other parties to the contract at the time of the making of the contract. In pursuance of this contract, there was subsequently executed a deed of conveyance in full, or purporting to be in full, from the Williams & McKeithan Lumber Company and the Williams-McKeithan Lumber Corporation to the D. T. McKeithan Lumber Company; the latter being the corporation organized by E. M. Poston, trustee, to receive this conveyance under the terms of the contract of 6th of May, 1911. This last deed of conveyance to the D. T. McKeithan Lumber Company is not dated. It will take effect, therefore, from the date of its actual execution and delivery, and the only evidence upon the face of the deed as to that date is the date of its probate, which was the 3d of July, 1911, which the court construes to be, for the purposes of this case, the date of the execution and delivery of that deed.

[4] The evidence is that that deed was executed in pursuance of the contract, and it being later in date than the contract, and executed in pursuance of it, the court holds that, as to all matters in that deed which cover matters included in the contract, the deed of conveyance represents the consummation of the intent of the parties and the final construction of the contract at that time, and supersedes the contract; that as to any matters of ambiguity in the deed, or as to any matters referred to and to be performed in the contract, not covered by the terms of the deed, the contract would be referred to as the contract between the parties.

[5] On this question of the right to the proceeds of the lumber sold after the 1st of April, 1911, the language of the deed is that the vendors convey and sell to the vendee, the McKeithan Lumber Company, all the property of every kind and description whatsoever belonging to the said Williams-McKeithan Lumber Corporation of Virginia, whether the same be real, personal, or mixed (except choses in action acquired and debts owing to the corporation contracted prior

to the 1st of April, 1911, and claims for insurance on property destroyed by fire on the 3d day of April, A. D. 1911), including all accounts, debts, claims, and demands for or on account of lumber sold since April 1, 1911. The individual defendants claim that the proper construction of that language is that they were to sell the lumber, so to say, as for a going corporation, upon the 1st of April, 1911; that the agreement of the 6th of May, 1911, was an option which might or might not be exercised by the holder of the option; that, pending the exercise of that option, it was necessarily incumbent upon the vendor corporations to carry on their business, and, in order to carry on their business, they were necessarily bound to make the necessary expenditures therefor, and that therefore this language should have incorporated in it, as a necessary and reasonable sequence of the character of the contract, that this conveyance was to be made as of the 1st of April, and while the purchaser, if he exercised his option, would be entitled to the benefits of the sales of all lumber made after that date, it would necessarily be bound to pay all expenses necessarily incident to the sale of that lumber; that to hold otherwise would be to cast upon the vendor the loss of having for 60 days to carry on the business wholly at his own expense for the benefit of the vendee. While this may be a plausible argument to show that the contract, as made, was a very imprudent one for the vendor to make, yet that cannot control the plain language of the deed of conveyance purporting to be for valuable consideration, and under that the court holds as a conclusion of law that the vendee, the McKeithan Lumber Company, was entitled under that deed to all accounts, debts, claims, and judgments for or on account of lumber sold after the 1st of April, 1911; and, construing it strictly according to its terms, it means only such proceeds for sale of lumber as were on the 3d of July represented by unpaid bills or accounts receivable, not by any cash that may have been paid for the lumber sold in the interim. Although this may be the construction of that clause, it does not follow that the defendants are individually bound to have any amount due thereunder credited upon their bonds. The testimony shows that the Williams-McKeithan Lumber Corporation of Virginia, whose property was sold, had at the time of the sale an existing mortgage upon that property for \$300,000, and that the bonds referred to in the contract of purchase to the extent of \$300,000 of first mortgage bonds, to be secured by the mortgage on the same property by the D. T. McKeithan Lumber Company, were used in payment of the bonds secured by the then existing mortgage. This existing lien would be a lien on the property of the corporation not to be paid as any other debt, but to be paid in full in precedence over other debts, and the mortgage debt then existing would take precedence in payment out of the assets of the Williams & McKeithan Lumber Corporation of any unsecured obligation to pay to the D. T. McKeithan Lumber Company the proceeds of lumber sold after 1st of April, 1911, as contained in this deed.

As a conclusion of law it is therefore adjudged that the McKeithan Lumber Company is not entitled to have the individual defendants

credit, upon the bonds or the coupons thereon held by them, any amount that may be hereafter ascertained to be due under this clause of the deed of conveyance.

[6] Inasmuch, however, as under the stipulation this proceeding is to be treated as if the D. T. McKeithan Lumber Company were pursuing these individual defendants as stockholders, the question would then be as to how far they can be required to respond for assets in their hands outside of these bonds to the extent of any amount due under this clause of the deed of conveyance. The court holds that, in order to arrive at a conclusion on that point, the testimony would have to establish, first, who were the stockholders entitled to the assets of the Williams & McKeithan Lumber Corporation, and then the proportion and the assets received by each over and above the payment of the debts of that corporation, for which only they would be bound to respond. There is no sufficient testimony in this case for the court to make a final decree upon that point. It appears that there were other stockholders, certainly three, in addition to the stockholders now before the court, but the evidence is not definite as to what amount of assets has been received by each of these stockholders as representing assets to which they were entitled, as stockholders, over and above the bonds used for the payment of the bonded indebtedness and other debts. It is therefore decreed that it shall be referred to D. B. Gilliland, Esq., one of the standing masters of this court, to take the testimony that may be propounded by the parties to show: (1) Who were all the stockholders entitled to the purchase money agreed to be paid by E. M. Poston, trustee, and paid by the D. T. McKeithan Lumber Company, under the terms of the deed of conveyance; next, how much of those assets were applied to the payment of debts; and, lastly, how much of those assets were distributed among the stockholders either directly or indirectly, and how much thereof was received by the individual defendants herein, as being received by way of dividends representing their interest as stockholders in the corporation for which they would be bound to respond upon proper proceedings instituted against the stockholders for that purpose, and that he report the testimony and his conclusions of fact thereon to this court.

[7] Sixth. The fifth above-mentioned counterclaim interposed by the defendant the McKeithan Lumber Company is that it is entitled to a general, and at this date unascertained, deficiency in the purchase money paid for the purchase of the property described in the mortgage and in the deed of conveyance of the 3d of July, 1911, because of misrepresentations under which they purchased; that they purchased upon representations that there was a large amount of timber on these lands, which was grossly incorrect; that they had purchased upon representations that as to one large body of these lands they were composed of connected and adjacent tracts, which was incorrect in that a considerable acreage was separated from the rest by an intervening tract of land owned by separate third independent parties, and which was in no wise connected for the purposes of a lumber business in the sense of a utilization of the tract as a whole for that

purpose. It appears from the testimony that the witness E. M. Poston, who acted on behalf of what appears to have been the real purchaser in this case, the New York Coal Company, was approached by the sales agent of the Williams & McKeithan Lumber Company and offered these properties upon the suggestion of Mr. Williams, president of that company, and that upon this suggestion several interviews thereafter followed between Mr. Poston and Mr. Williams and the individual defendant McKeithan, and later the individual defendant Bonsal. The individual defendant Barr appears to have been no party to any of these negotiations. These negotiations were in the usual form of the offering of property. Mr. Poston made a trip to the situs of the property in South Carolina, and there met the defendant McKeithan and the witness Williams, the president of the company, and the negotiations then instituted were finally consummated, first by the contract of purchase dated 6th of May, 1911, and later by the deed of conveyance dated 3d of July, 1911. The D. T. McKeithan Lumber Company claims that the individual defendants by reason of their position as stockholders and officers, viz., as directors, mainly interested in the Williams & McKeithan Lumber Company of South Carolina and the Williams-McKeithan Lumber Corporation of Virginia, in some wise occupied the position of quasi trustees, as promoters bringing about the purchase or the sale, or as officers, first, of the vendor corporations, and then of the vendee corporation, and exercising a double duty and double responsibility, so to say, and they are to be held, therefore, as to any representations made to that high degree of responsibility which attaches to persons who hold the office of trustee. That is true as to officers of corporations and as to promoters, where the promoter, as such, occupies the position of an officer; in cases where he occupies a double position with regard to his interest, it is the application of the old doctrine that no man can be both vendor and purchaser where the rights of others are concerned. In order to be held to that high degree of responsibility, he must be in a position in which confidence and trust and power is lodged in him as representing and protecting these two antagonistic interests. The promoter or officer or independent owner, who sells his property and does not occupy that position, is held to no such responsibility.

The court finds as a conclusion of fact in this case that Mr. Poston and his associates in this case rested upon their own responsibility; that they relied, not upon the codefendants in this case as constituting their officers or trustees, but were treating with them in the purchase of this property at arm's length; that they were intelligent business men, well aware of their rights and well qualified and able to protect them, and they are not entitled in this case to rely upon any rule of responsibility, as that the individual codefendants held towards them any position as quasi trustees. The defendants Bonsal and Barr, so far from that, I find, had nothing whatsoever to do with these negotiations prior to their consummation in the contract of sale and deed of conveyance. That they acted wholly as directors and stockholders for the protection of their own interest personally, and that of their

own companies, and they undertook in no wise any responsibility whatsoever to the D. T. McKeithan Lumber Company or to Poston and his associates, and they are not bound to any liability therefor. The testimony shows that when Mr. Poston came there had been made a so-called cruise or examination of the timber upon these properties; that this examination or cruise had been made for purposes entirely disconnected with this sale; that the witness Mortimer, who is now in interest with the D. T. McKeithan Lumber Company and has been shown by no testimony whatsoever, by any interest or otherwise, to be swayed by motives of twisting results for the benefit of the individual codefendants in this case, had proposed to buy an interest in the Williams & McKeithan Lumber Company of South Carolina. Before completing that purchase, he desired to be satisfied of the intrinsic value of the properties of that corporation; in order to satisfy him on that point, it was agreed between that corporation and himself that an investigation and examination of these properties should be made by two cruisers or timber examiners, one of whom was to be selected by Mortimer as representing one adverse interest, and the other was to be selected by the Williams & McKeithan Lumber Corporation as representing another adverse interest. These were so selected; a Mr. Divine, who appears to have been utterly unknown to anybody connected with the Williams & McKeithan Lumber Corporation, was selected by Mortimer as representing his adverse interest, as a person personally known to him; and a Mr. Morris was selected by the Williams & McKeithan Lumber Corporation. They began their investigation in September, 1910, long before any offer of these properties was made or suggested to Poston, and their investigations continued and were concluded at or about the time that Poston made his first trip to South Carolina to examine the properties. The testimony establishes that that investigation was for the purpose of ascertaining the intrinsic amount of timber owned by the company upon the lands in question and described in the deed of conveyance, and that it was conducted, from the testimony, perfectly fairly, honestly, and uprightly, and without any intention whatsoever of misrepresenting facts or circumstances for the purpose of the sale to Poston or any one else. That those results were not obtained by any of the three individual defendants, or by any officer of the Williams & McKeithan Lumber Corporation of Virginia, for secret motives, but were made for the purpose of arriving at a true result, and any acceptance by them of that was in absolute good faith. Upon the arrival of Mr. Poston in South Carolina, he was shown, together with his companion Mr. McManigal, the cruise sheets, cruise tabulations, and sketch maps embodying the results made by these examiners. I find as a conclusion of fact that these were shown to them, not in the way of absolute representations, but for the purpose of information in like manner as any vendor seeking to sell his property would furnish information to the vendee to whom he desired to sell it. It is ordinary and usual for the vendor to take an optimistic view of the extent and value of his properties, and his information as to that effect, when given in good faith and for the purpose only of informing the mind

of his vendee, does not constitute a representation or warranty as to value. These papers were laid before Mr. Poston and his associates. They had every opportunity to investigate and check; they were laid before them in March, early in March; the contract to purchase was not made until the 6th of May thereafter, and that contract to purchase beyond the amount of \$5,000 was not obligatory on them to complete until the 5th of July, 1911, so that they had four months within which to advise themselves to any extent they saw fit as to the reliability of the information given them by the proposed vendors as an inducement to them to take up the matter of purchase. I find as a conclusion of fact that the action of the third defendant McKeithan, in any statement of representation that he made, was made in absolute good faith and in conviction of its verity, and that he has exercised towards E. M. Poston, trustee, and his associates and the D. T. McKeithan Lumber Company no conduct involving a breach of good faith, so far as the transfer of this property is concerned, for which he would be liable.

With regard to the other two defendants, Barr and Bonsal, I hold that they made no representations that the testimony discloses of any kind, and that they are not bound individually as holders of these bonds by any statements made by McKeithan, by Williams, or the cruisers as to what they believed to be the true amount of timber on this property. I hold further that in this case the words in the contract of sale to the effect that the property contemplated to be sold under this agreement includes all the timber holdings of the said Williams-McKeithan Lumber Corporation of Virginia, known as the Pee-dee river and Lynch's creek tracts, recently cruised by Messrs. Morris and Divine at 222,000,000 feet of stumpage, are words of description, not words of representation or warranty. The deed of conveyance itself contains no warranty as to the amount of timber. It grants and conveys all the property, including the lands, trees and timber, rights of way, and easements thereafter mentioned and described, and then specifically describes the timber living and dead in general terms upon certain specifically described pieces of land. I find as a conclusion of law that under the law of South Carolina the conveyance of that standing timber was a conveyance of the freehold or real estate, and that in such a conveyance, unless the quantity of timber be stated and warranted, there is no warranty in the absence of fraud or misrepresentation. That in this case, if the purchaser had desired to have the quantity of his timber secured according to what he deemed a representation, it was his duty to have required it inserted in the deed in the shape of something equivalent to a warranty; that he is not entitled in this case to set up for a deduction of the purchase money a deficiency in quantity of the timber, where he has not required a warranty, upon any action against him for the purchase money, in the absence of fraud or misrepresentation, and I find as a conclusion of fact that in this case there was neither fraud nor misrepresentation.

It is therefore adjudged and decreed that under the terms of the deed of conveyance of the 3d of July, 1911, and the preceding con-

tract of sale of the 6th of May, 1911, construed as the court has heretofore indicated they only can be construed together, the D. T. McKeithan Lumber Company is not entitled, under the evidence in this case, to any decree against either the vendor corporations or these individual defendants for any alleged discrepancy in the amount of timber on the land between what they deemed to have been shown in the information furnished them and what they may now find to be actually thereon. That counterclaim is accordingly dismissed.

Seventh. The last counterclaim is upon the ground that as to several specific tracts therein mentioned, to wit, the tracts known as the Strother tract, the Mary Law tract, the Crosswell tract, the Weatherly tract, and the Gardner tract, such tracts were not specifically included in the deed of 3d of July, 1911. I find that in the memorandum made by Mr. Poston himself on the 18th of March, 1911, at the occasion of his first trip to Charleston, those tracts were specifically called to his attention, and he was specifically notified that they were part of the tracts, the timber on which was claimed by the Williams & McKeithan Lumber Corporation of Virginia, and to be sold to him. They were not inserted by any specific description in the deed of conveyance, but that was no more the fault or negligence of the vendors than of Mr. Poston himself. He had in his hands a specific detailed statement which he claims was dictated by him from information furnished him at that time, in which every one of those tracts were mentioned, and it is entirely his own negligence that those tracts were not specifically included in the later deed, for he had the information in his own hands, as given to him at the time that those tracts were to be included in the deed. The court finds as a conclusion of law, however, that, under the language of the conveyance itself, the timber on those tracts, as owned by the Williams & McKeithan Lumber Corporation of Virginia, passed to the D. T. McKeithan Lumber Company, and that company is now entitled to the same, and, being now entitled to the same under the language of the conveyance, it is not entitled to any decree for any alleged deficiency for any failure to receive the same.

[8] This leaves the last question of the deficiency of the timber on the tract known as the 3,088-acre tract. That tract is specifically in terms described in the deed of conveyance, and at the date of conveyance the timber on it is undertaken to be conveyed to the D. T. McKeithan Lumber Company. In the deed of conveyance, however, in the description of this tract of land, it is expressly declared that the trees and timber undertaken to be conveyed by that deed are the same that were conveyed by Armstrong J. Howard to the Williams & McKeithan Lumber Company by deed dated July 29, 1904, and duly recorded in Darlington county in Book 39, p. 685. That deed has been put in evidence (or a certified copy thereof) by the D. T. McKeithan Lumber Company, and the deed from Armstrong J. Howard, as here put in evidence, is expressly made subject to all the rights of Edward W. and Carolina B. Mixer and their heirs and assigns under and by virtue of the deed of S. Marco and I. Lewenthal to them, dated March 19, 1892, and duly recorded in the same county, Book 12, p.

799. The conveyance from Marco and Lewenthal to the Mixers was also put in evidence by the D. T. McKeithan Lumber Company, and that deed undertakes to convey to the Mixers all the timber of whatsoever kind, to have and to hold the same to the Mixers in fee. The deed then proceeds to grant unto the Mixers the right and privilege to enter at their will upon the lands, to move and carry away that timber, and proceeds then with a warranty to the Mixers from Marco and Lewenthal of the timber for the term of 20 years from the date. The D. T. McKeithan Lumber Company's position is that that deed to the Mixers was an absolute deed of transfer and conveyance to them of the timber described therein in fee; that it having been conveyed to them the subsequent conveyance from Howard to the Williams & McKeithan Lumber Company was incapable of transferring any interest, the timber being already vested in the Mixers; and that therefore, when the Williams & McKeithan Lumber Corporation of Virginia undertook to convey to the D. T. McKeithan Lumber Company the timber upon the same tract of land, it could convey nothing more than Armstrong J. Howard conveyed to the Williams & McKeithan Lumber Company, which was, according to their construction, no right to any timber, and that the reference in the deed to the D. T. McKeithan Lumber Company, which is the reference in the description of the timber conveyed to the McKeithan Lumber Company to this deed to Howard, and thereby to the deed of the Mixers as part of the description, cannot be taken as modifying the clear language of the deed in conveying this timber in the conveyance of the 3d of July, 1911, and the warranty by the Williams & McKeithan Lumber Company of South Carolina and the Williams-McKeithan Lumber Corporation of Virginia to the D. T. McKeithan Lumber Company of the same. The general rule of law is that the vendee is charged with notice of all that appears upon the face of the deed to him, or which can be reasonably gathered by reference therefrom. The warranty in the deed of conveyance of the 3d of July, 1911, is to the effect that the vendors warrant all and singular the aforesaid property unto the said D. T. McKeithan Lumber Company, its successors and assigns. The warranting being of so much property by a reference to the description of the property, I hold that, if in the description of a piece of property it be declared that that property, as described, is subject to a mortgage for so much money, the warranty of the said premises would mean a warranty of title subject to that mortgage; that the vendee would be bound to take notice upon the face of his deed of the existence of that mortgage, and the warranty would be construed with reference to the description, and the warranty would go, therefore, only to the extent of the property subject to the mortgage. In this case the difficulty about it is that the description of the timber is positive, qualified only at the end of it by declaring that it was the same as was conveyed by Armstrong J. Howard to the Williams-McKeithan Lumber Corporation. Construing the deed as a whole, the court is of opinion that that was a fair notification to the D. T. McKeithan Lumber Company that what was conveyed was only the timber that was conveyed by Howard,

and, if no timber was conveyed by Howard, they were so informed, and they took only whatever was conveyed, and the warranty extended no further. I am further of the opinion that, under the decisions of the Supreme Court of South Carolina, the deed of conveyance from Marco and Lewenthal to the Mixers, taken as a whole, would be construed to be not an indefinite and perpetual deed of conveyance of the standing timber, but a deed of conveyance of the standing timber subject to its being cut, moved, and carried off within 20 years from the date of the deed. The deed is inartificial, and, under the common-law interpretation of deeds, the warranty would not be effective in derogation of the previous absolute estate conveyed; but as I understand the general result of the decisions of the Supreme Court of South Carolina, upon such deeds as constituting a rule of property, in the construction of such deeds existing in South Carolina the deed of conveyance of standing timber of this kind is to be construed as a whole, and if there is anything upon the face of it which indicates an intention to limit the previous absolute continuous perpetual conveyance of standing timber, as contradistinguished from the conveyance of the land itself, the court will resort to that to determine the extent of the estate conveyed. Interpreting the deed of conveyance in this case from the standpoint of that rule of construction as a rule of property indicated by the Supreme Court of South Carolina, I am of the opinion that the deed of conveyance of this standing timber from Marco and Lewenthal to the Mixers was a conveyance of that property, subject to the condition that it carried only so much as they cut and removed within 20 years from the date of that conveyance, and that all timber thereon not cut and removed within 20 years from that date did not go under that deed, and under the evidence in this case would appear to have passed to the Williams & McKeithan Lumber Company, and is the property of the D. T. McKeithan Lumber Company in this case. I hold, therefore, that no deficiency by reason of that has been established in this case, and the defendants are not entitled to a decree thereunder.

Under the circumstances of this case, the defendant D. T. McKeithan Lumber Company having received affirmative decrees on some of its counterclaims, and no defense set up by the codefendants having been sustained, the costs of this case will be paid as follows: The trustee having come into court and asked for instructions and having brought the defendants in court, as to the questions raised in the bill of the trustee the costs will be paid by the trustee, with the right, under the terms of the mortgage, to deduct the same out of any fund which, under the terms of the mortgage, is applicable to the costs and expenses of the trustee in the performance of his duty. The other costs in the case will be paid, two-fifths by the individual defendants, McKeithan, Bonsal, and Barr, and the other three-fifths by the defendant the D. T. McKeithan Lumber Company. The costs will be taxed by the clerk, and any difference as to the amount thereof to be paid by the respective parties will be settled by the court.

Any party to this cause shall be at liberty to apply at the foot of this decree, upon proper notice, for any further order or decree necessary to carry into effect the principles hereby adjudged.

CASEY v. BAKER et al.

(District Court, N. D. New York. March 21, 1914.)

1. BANKRUPTCY (§ 209*)—FRAUDULENT TRANSFER—ACTIONS—PARTIES.

Under Bankr. Act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 1511]) § 70e, providing that the trustee may avoid any transfer which any creditor might have avoided, and section 47, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3439), as amended in 1910 (Act June 25, 1910, c. 412, § 8, 36 Stat. 840 [U. S. Comp. St. Supp. 1911, p. 1501]), requiring trustees to collect and reduce to money the property of the estate, under the direction of the court, it is the duty of a trustee on request, if properly indemnified, to bring suit to set aside a fraudulent transfer; and, if he refuses to do so, any interested party may bring the suit in his own name, making the trustee a defendant, or he may be permitted to prosecute in the name of the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 318; Dec. Dig. § 209.*]

2. REMOVAL OF CAUSES (§ 37*)—DIVERSE CITIZENSHIP—REARRANGEMENT OF PARTIES.

In a judgment creditor's suit by a citizen of New York against citizens of Massachusetts to set aside an alleged fraudulent conveyance in which the fraudulent grantor's trustee in bankruptcy, also a citizen of Massachusetts intervened as defendant, and admitted plaintiff's judgment, there was no diversity of citizenship making the cause removable to a United States court, as the interests of the trustee and plaintiff were on the same side of the controversy, and the parties must be arranged as their interests in the controversy appear.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 80; Dec. Dig. § 37.*]

3. REMOVAL OF CAUSES (§ 52*)—SEPARABLE CONTROVERSY.

In such case there was no separable controversy between plaintiff and the trustee.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 102, 103, 105; Dec. Dig. § 52.*]

4. REMOVAL OF CAUSES (§ 59*)—PETITION—PARTIES.

Under Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1094 [U. S. Comp. St. Supp. 1911, p. 141]) § 28, relative to the removal of causes to a United States court, where there are several defendants interested in the controversy, and there is no separable controversy, one defendant alone cannot remove the cause.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 112, 113; Dec. Dig. § 59.*]

5. REMOVAL OF CAUSES (§ 74*)—AMOUNT INVOLVED.

In a suit by the owner of a judgment recovered more than four months before bankruptcy to set aside an alleged fraudulent conveyance by the bankrupt, in which the trustee in bankruptcy intervened and admitted plaintiff's judgment, but in effect denied the fraud, though he demanded judgment in his favor for all property if the conveyance was set aside, the amount in controversy was the amount of plaintiff's judgment; and, it being less than \$3,000, the cause was not removable.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 130, 131; Dec. Dig. § 74.*]

In Equity. Action by John Casey against Charles I. Baker and others. On motion by plaintiff to remand the cause to the state court from which it was removed on the petition and motion of Edward N. Lacey, trustee in bankruptcy of Charles I. Baker. Motion granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

James E. Sennett, of Granville, N. Y. (Daniel J. Finn, of Glens Falls, N. Y., of counsel), for plaintiff.

Daniel Naylor, Jr., of Schenectady, N. Y., and Visscher, Whalen & Austin, of Albany, N. Y., for defendant Lacey as trustee.

William W. Morrill, of Troy, N. Y., for defendants Baker.

RAY, District Judge. September 18, 1911, the plaintiff here, John Casey, recovered a judgment against defendant Charles I. Baker, in the Supreme Court of the state of New York, which was duly docketed in the county of Washington, state of New York, October 26, 1911, and January 17, 1912, an execution on said judgment was issued, and February 2, 1912, returned wholly unsatisfied. This judgment was for the sum of \$2,619.35, damages, and costs.

September 22, 1911, four days after the rendition of said judgment in favor of Casey, said Charles I. Baker confessed judgment in favor of the defendant here, Horatio L. Baker, in the sum of \$4,397.16 damages and \$16.58 costs, total, \$4,413.74, which was docketed in said clerk's office September 23, 1911.

September 23, 1911, said Charles I. Baker and defendant Addie L. Baker, his wife, were the owners of certain real estate and certain personal property in said county of Washington, N. Y., of the value of \$7,000.

September 23, 1911, the same day that the judgment of \$4,413.74 in favor of said Horatio L. Baker was docketed in said Washington county, and on which day said judgment became a lien on said real estate if the docket of the judgment preceded the transfer about to be mentioned, said Charles I. Baker and Addie L. Baker, by a deed of conveyance dated and recorded that day, conveyed said real estate to said Horatio L. Baker with, says the complaint herein, the intent on the part of the grantors to hinder, delay, and defraud the just creditors of said Charles I. Baker, particularly the said Casey, and such conveyance was received by said Horatio L. Baker with the same intent and purpose, and such conveyance was made and delivered by the grantors and accepted and received by the grantee in trust for the use and benefit of said Charles I. Baker. The complaint also alleges that such conveyance was without consideration, and part of a collusive and fraudulent conspiracy to prevent the collection of the said Casey judgment. The complaint also alleges that October 16, 1911, the said Charles I. Baker, without consideration and with the same intent and purpose and in execution of the same conspiracy, turned over his personal property, above referred to, to said Horatio L. Baker. The complaint is silent as to the value of the property so transferred, but describes it, and demands a decree setting aside the conveyances and appointing a receiver, and—

"Fifth, that the said receiver be authorized and directed to sell and dispose of said real and personal property, or so much thereof as shall be necessary, and out of the proceeds thereof to pay the aforesaid judgment and the costs of this action, and expenses, and hold the balance for the further order of this court."

This complaint is duly verified. The summons and complaint were served by publication, pursuant to an order of Judge Whitmyer dated

April 8, 1912. The affidavit on which it was granted stated the residence of the then defendants to be Cambridge, state of Massachusetts. They had formerly resided at Granville, Washington county, state of New York, and removed to Cambridge, Mass., in October, 1911. The defendants appeared by William W. Morrill, of Troy, N. Y., and answered in June, 1912, but made no application or notice, and took no proceedings to move the cause into the United States court. They admitted the transfers; alleged that Charles I. Baker owned the real estate subject to the inchoate dower right of the wife, and also the personal property, but denied the fraud and conspiracy, and alleged that the transfers were in good faith and for a valuable and sufficient consideration—

"and for the purpose of partially repaying an indebtedness existing at the time of said respective transfers from said Charles I. Baker to the said Horatio L. Baker and for no other purpose whatever."

The defendant Edward N. Lacey was not then a party to the action. January 3, 1913, and more than a year after such transfers, and some months after the commencement of said action to set aside the transfers of such real and personal property so made by the said Charles I. Baker, said Charles I. Baker was adjudicated a bankrupt in the United States District Court in the State of Massachusetts, and January 24, 1913, Edward N. Lacey, of Boston, Mass., was duly appointed trustee of his estate in bankruptcy, and qualified as such. He has not been appointed ancillary trustee in the Northern District of New York, and the court in bankruptcy in said district in which the property affected by this action is situated has not been called upon to make any order in the premises, and has not made any.

March 15, 1913, an order was made, on application of said Lacey, not before this court, by Justice Henry T. Kellogg, in the Supreme Court of the State of New York, viz.:

"Ordered, adjudged, and decreed that said trustee, Edward N. Lacey, be and he hereby is allowed to intervene and plead in the above-entitled action, and serve such pleadings as he may deem proper; such pleadings to be served within _____ days from the date hereof."

In March, 1913, and after such order was granted said Lacey interposed an answer as follows:

"United States District Court. Northern District of New York.

"John Casey, Plaintiff, against Charles I. Baker, Addie L. Baker, Horatio L. Baker, and Edward N. Lacey, as Trustee, etc., Defendants.

"The defendant Edward N. Lacey, as trustee of the estate of Charles I. Baker, bankrupt, for his answer to the plaintiff's complaint, respectfully shows to this court, and alleges:

"First. That the defendant Charles I. Baker, a resident of the city of Cambridge, Mass., was duly adjudicated a bankrupt on or about January 3, 1913, in the United States District Court of Massachusetts, and that on or about the 24th day of January, 1913, the defendant Edward N. Lacey was duly appointed trustee of the estate and property of said Charles I. Baker.

"Second. That the defendant Edward N. Lacey, duly qualified to act as such trustee, and is now acting as the trustee of the estate of said bankrupt.

"Third. The defendant admits that on or about the 26th day of October, 1911, a judgment for the sum of \$2,619.35, damages and costs, in the Supreme Court of this state, against the defendant Charles I. Baker, was duly docketed in the clerk's office of Washington county, and that thereafter and on the

17th day of January, 1912, an execution against the personal and real property of the said Charles I. Baker was issued upon said judgment to the sheriff of Washington county, in which county said judgment against said Charles I. Baker was rendered, and where the said judgment roll is filed, and that thereafter and on the 2d day of February, 1912, the said execution was returned wholly unsatisfied by said sheriff to the county clerk of Washington county.

"Fourth. The defendant further admits that on or about the 22d day of September, 1911, the said defendant Charles I. Baker, confessed judgment to the defendant Horatio L. Baker, in the sum of \$4,397.16 damages and \$16.58 costs, which judgment so confessed was filed in the clerk's office of Washington county on September 22, 1911.

"Fifth. The defendant further admits that on or about the 23d day of September, 1911, the said defendant Charles I. Baker, and the defendant Addie L. Baker, wife of said Charles I. Baker, were the owners in fee simple and possessed of the real estate and personal property described in the complaint (or, more exactly, the said Charles I. Baker was the owner of said personal property, and was the owner of said real estate, subject to the inchoate dower interest of the said Addie L. Baker therein), and that on said day they conveyed by deed in writing the said real estate to the defendant Horatio L. Baker, which deed was recorded in the office of the clerk of Washington county on September 23, 1911, in Book 153 of Deeds, at page 417; that said deed recites the nominal consideration of \$1.

"Sixth. The defendant further admits that on October 16, 1911, the defendant Charles I. Baker, by bill of sale, bearing date on that day, transferred to the defendant Horatio L. Baker the personal property described in the complaint.

"Seventh. The defendant denies that he has any knowledge or information sufficient to form a belief as to the truth of any one or all of the other allegations in said complaint contained, and therefore denies the same.

"For a further and separate answer and defense herein, the defendant, realleging and reiterating the allegations contained in paragraphs 1 and 2 of the answer herein, further alleges:

"First. That the defendant Edward N. Lacey, as trustee of said estate of Charles I. Baker, is entitled to the possession of all the real property and personal property of said bankrupt, and that he has a legal and equitable title thereto, and holds the same as trustee for the benefit of the general creditors of the estate of Charles I. Baker, a bankrupt.

"Second. That the plaintiff has no lien on or claim to any of the property, either real or personal, of the defendant Charles I. Baker.

"Wherefore, the defendant demands that it be adjudged that he, as the trustee of the estate and property of said Charles I. Baker, a bankrupt, have title to all the property, both real and personal, of said Charles I. Baker, as described in the complaint herein if said transfers should be set aside; that an order may be made by this court, authorizing the said trustee to take and hold all the property of said bankrupt for the benefit of his general creditors, and for such other and further relief in the premises as to the court may seem just and proper.

"Daniel Naylor, Jr., Attorney for Defendant Edward N. Lacey.

"Office and P. O. Address, Rooms 2, 3, and 4, Myers Block, Schenectady, N. Y."

The record shows that Lacey is a lawyer of the city of Boston. He admits certain allegations of the complaint as shown, but the "Seventh" subdivision of such answer shows that, notwithstanding the sworn complaint in this action, he has not informed himself of the facts sufficiently to form a belief on the crucial question involved, viz., that of the fraud, and he goes so far as to deny that there was any fraud. He thus takes a position antagonistic to the claim of the plaintiff, a creditor of Charles I. Baker, and denies that he, or the estate he represents, has any interest in the real estate and personal property of

Charles I. Baker, alleged to have been fraudulently transferred as set up in the complaint herein. He says, by reference to the allegations of the complaint, that he has not sufficient information to form a belief as to the existence of fraud in the conveyance, and he therefore denies the same.

This trustee for the benefit of *all* the creditors of said bankrupt, Charles I. Baker, as a second and further *defense* alleges:

"Second. That the plaintiff (that is, Casey, with a judgment against Baker of over \$2,600, which this trustee admits) has no lien on *or claim to any of this* property, either real or personal, of the defendant Charles I. Baker."

This court has always supposed that a general creditor with a judgment against a bankrupt has *some claim* to the property of the bankrupt owned by him prior to and at the time of his bankruptcy. He has no title but the trustee holds for the creditors, and every creditor has a "claim to the property." Before he interposed this answer and defense, denying in effect that he, as trustee for the creditors, has any interest in the property sought to be recovered, and praying that, if the transfers are set aside, he have the proceeds, he presented a petition to the Supreme Court of the state of New York for the removal of this cause into the District Court of the United States for the Northern District of New York, and such order was granted and the record filed in this court. The plaintiff moves to remand to the state court on the following grounds:

"(1) Because the defendants, other than the defendant Edward N. Lacey, are residents and citizens of the state of New York, and plaintiff is a resident and citizen of the state of New York, and that there is involved in this suit no separable controversy which is wholly between the citizens of another state on the one hand and the citizens of the state of New York on the other hand.

"(2) Because the matter in dispute in this action does not exceed, exclusive of interest and costs, the sum of \$3,000.

"(3) Because Edward N. Lacey, as trustee in bankruptcy of Charles I. Baker, is a mere formal party to this action, with no real interest therein, and is a mere intervener who presents no new or independent interest or question in this suit.

"(4) That this application was made after Charles I. Baker and Horatio L. Baker, two of the defendants herein, had appeared and answered in the state court and submitted themselves to the jurisdiction of that court, and after the right of said two defendants to remove said case had expired.

"(5) Because the application of Edward N. Lacey as trustee was not made in good faith or for the purpose of protecting any rights of said defendant, but was made in the interest of the defendants Charles I. Baker and Horatio L. Baker, and for the purpose of hindering and delaying the plaintiff in the prosecution of this action.

"(6) All of which facts are apparent in the record in this case."

While the complaint in this action is silent as to the value of the real and personal property described therein, and the conveyance and transfer of which are alleged to have been in fraud of creditors and are sought to be set aside, the affidavits or petition on removal placed same at \$7,000, and this is not denied by any affidavit or proof on this motion to remand. The subject-matter of this suit is the property mentioned and the transfers of same, and the matter in controversy is the title to such property. There is no controversy over plaintiff's judgment. If the conveyances are avoided and set aside as in fraud

of creditors, the title of such property of the value of \$7,000 is restored to the owners, and by operation of law vested in the trustee in bankruptcy.

[1] By section 70a of the act, entitled "An act to establish a uniform system of bankruptcy throughout the United States" approved July 1, 1898, 30 Stat. 544, c. 541 (U. S. Comp. St. 1901, p. 3418), amended February 5, 1903, 32 Stat. 797, c. 487 (U. S. Comp. St. Supp. 1911, p. 1493), June 15, 1906, 34 Stat. 267, c. 3333 (U. S. Comp. St. Supp. 1911, p. 1508), and June 25, 1910, 36 Stat. 838, c. 412 (U. S. Comp. St. Supp. 1911, p. 1493), it is provided that:

"The trustee of the estate of a bankrupt, upon his appointment and qualification * * * shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt. * * * (4) property transferred by him in fraud of his creditors."

And section 70e of said act provides:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

By section 47 of said act, as amended in 1910, which relates to the duties of trustees, it is provided:

"Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them on property of such estate; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

In re Downing, 201 Fed. 93, 119 C. C. A. 431 (C. C. A., Second Circuit), it is held that the bankrupt's trustee has a transferable interest in real estate owned by the bankrupt and transferred by him in fraud of creditors, though such transfer was made more than four months prior to the institution of the bankruptcy proceedings, and that the trustee may sell such interest with the right to sue to set aside such fraudulent transaction. Here, from the record, it is apparent that the trustee is opposing, and intends to oppose, the setting aside of these alleged fraudulent transfers. He is opposing the general creditors of the bankrupt in a suit instituted by one of them having a judgment and execution returned unsatisfied, and being thereby in a position to attack such transfer by coming into court and joining hands with the bankrupt and his fraudulent transferee to deny the rights of creditors to have the transfer set aside. This trustee when appointed found a suit pending against the bankrupt brought by a judgment creditor to set aside a fraudulent (alleged) transfer of property of the value of \$7,-

000, and which, if recovered, will go into the estate for the benefit of all creditors. This suit, in equity, was pending in the state court. The trustee petitioned that court to come in and plead, assert his rights, if any. Allowed to come in and plead, he denied that the transfers were fraudulent, and in effect denied that he, as trustee or otherwise, has any interest in the property, but still he asks judgment that, if the transfers at the suit of the judgment creditor are set aside, he receive the proceeds. He thus, in a court of equity, for this is a court of equity and the suit is on the equity side of the court, submits himself to the jurisdiction of this court by removing the cause here, and places himself in the attitude of a party entitled to bring suit, and whose duty it was to bring suit on request, if properly indemnified, but who refuses to do so. In such case any person interested in having the suit instituted and prosecuted may bring same in his own name, and maintain it for the benefit of himself and all others interested, making the one who should have instituted the suit a party defendant. While nominally a defendant, Lacey, as trustee, is in truth so far as interest is concerned the plaintiff. If there be a recovery he as trustee will be entitled to the proceeds, subject to liens for the benefit of all general creditors. He claims the property if recovered, but denies the right of any one to recover it.

[2] Arranging the parties with Casey as the complainant and the three Bakers and Lacey as trustee as defendants, we have the necessary diversity of citizenship, but if we arrange the parties with Casey and Lacey as trustee as complainants, on that side of the controversy being Lacey's real and true interest, with the three Bakers as defendants, and we do not have the necessary diversity of citizenship, as Lacey as trustee, a complainant when so arranged, resides in and was appointed trustee in the state of Massachusetts where all the defendants reside and hence one complainant and all the defendants are residents of the same state. It is well settled that for the purpose of the removal of a cause the court may and must arrange the parties on the different sides of the controversy as their interests in the controversy appear.

[3] Again, do we have here a *separable controversy*, which enabled Lacey, the trustee in bankruptcy, to remove the cause from the state court into the District Court of the United States; the other defendants not joining in the application for removal, but having appeared and answered. Lacey, as trustee, has no possible interest in this suit or controversy unless the transfers made by Charles I. Baker and wife to Horatio L. Baker were made and received in fraud of creditors. The defendant Charles I. Baker owned the real estate subject to the inchoate dower interest of his wife, the defendant Addie L. Baker, and said Charles I. Baker owned the personal property. Both are necessary and material parties, as their transfers are attacked and subject to be annulled, declared fraudulent, and set aside. Horatio L. Baker is a necessary and a material party as he derived his title, if any, from Charles I. Baker, and his present paper and record title is attacked and sought to be set aside. There is no controversy in fact between the defendant Edward N. Lacey as trustee of the estate in

bankruptcy of Charles I. Baker, who removed the cause, and the plaintiff, John Casey, as their interests are the same, on the same side of the controversy, and hence, in a litigation between them no question involved in this suit can, could, or would be determined. Lacey represents the creditors. As trustee in bankruptcy he is to collect in all property, etc., including that fraudulently transferred at any time before bankruptcy. His duties and responsibilities are quite plainly indicated in *Re Reinboth et al.* (C. C. A., Second Circuit) 157 Fed. 672, 674, 85 C. C. A. 340, 342 (16 L. R. A. [N. S.] 341) where it is said:

"The referee misconceived the law. A trustee may be charged with the value of assets which never came into his possession if he failed in his duty to get them into his possession. Trustees in bankruptcy, like executors and administrators, are bound to use due diligence to get in the assets of the estate—to secure possession of the tangible property and collect the debts. If they fail in their duty, they may be charged in their accounts with the value of the assets thereby lost. If they take no steps to secure property or collect debts, of which they have knowledge, they are presumptively negligent. The burden is upon them to explain their failure to act. *Harrington v. Keteltas*, 92 N. Y. 40; *O'Connor v. Gifford*, 117 N. Y. 275, 22 N. E. 1036; *Anderson v. Piercy*, 20 W. Va. 282; *Sterling v. Wilkinson*, 83 Va. 791, 3 S. E. 533; *Tuttle v. Robinson*, 33 N. H. 120; 3 *Williams on Executors*, 331. The ground upon which the referee excluded the evidence being unfounded, his action in doing so was erroneous. The evidence as to the ownership of the property and as to its sale as an alleged pledge should all have been received. As it was excluded, we cannot tell how far it would have gone. Certainly it need not have gone far, in view of the trustee's action in suffering the bond to be canceled, and in failing to obey the direction of the court, to throw upon him the burden of showing that he did his duty."

And when the trustee declines to take such action as he is required by law to take, a creditor may take such action in the name of the trustee. *Chatfield v. O'Dwyer* (C. C. A., Eighth Circuit) 101 Fed. 797, 42 C. C. A. 30, 4 Am. Bankr. Rep. 313.

If necessary, in this case the creditor, Casey, may be permitted to prosecute this action in the name of the trustee. He, of course, would be required to indemnify the trustee and estate. In such event the trustee would be the real plaintiff and a resident of Massachusetts with the defendants. The presence of this trustee as a party is probably essential to a full and complete determination, but his interests in the controversy devolved on him by operation of law, as seen, are that of a complainant.

In *Wilson v. Oswego Township*, 151 U. S. 56, 63, 14 Sup. Ct. 259, 262 (38 L. Ed. 70), it is held:

"The removal in this case was had under the second section of the act of 1875, but under which clause of that section does not distinctly appear. The first clause of the section relates to removals of controversies that are not separable, and in which all the parties on one side of the suit are citizens of different states from those on the other side, which is a necessary condition to enable the Circuit Court to take jurisdiction of the entire suit. Under this clause, all of the plaintiffs, if there are more than one, or all the defendants, there being more than one, must, in order to remove the suit, unite in the petition therefor; and it is settled by the authorities that to enable a suit to be removed under this first clause of the section, when the ground for removal is diversity of citizenship, the party to the suit on the one side, whether consisting of one or more persons, must have a state citizenship different from that of the party on the other side, whether consisting of one or more persons, and that, for the purpose of removing the suit, these

parties may be placed 'on different sides of the matter in dispute according to the facts,' so that all those on one side will be 'citizens of different states from those on the other,' and that, this being done, *those on either side may remove the suit, provided that all unite in the petition therefor.*"

The District Court of the United States has original jurisdiction of all suits of a civil nature, at common law or in equity—

"where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and * * * or, (b) is between citizens of different states," etc. Act March 3, 1911, c. 231, 36 Stat. 1087 (U. S. Comp. St. Supp. 1911, p. 129).

[4] Section 28 of the Judicial Code (36 Stat. c. 231, p. 1094) provides as to removal of causes:

"Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the District Courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the District Courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any state court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the District Court of the United States for the proper district."

If there be one defendant he may remove the cause. If more than one, then all uniting may remove it. If there be a controversy involved wholly between citizens of different states and such controversy can be fully determined as between them then, either one or more of the defendants may remove if such controversy be a separable one. But if there be a plaintiff on one side residing in the state where the suit is brought and several defendants having an interest in the controversy residing in some state or states other than that of the residence of the plaintiff, and there is no separable controversy, then one defendant alone cannot remove. *McNaul v. West Indian Securities Corporation et al.* (C. C.) 178 Fed. 308; *Miller et al. v. Clifford et al.* (C. C. A., First Circuit) 133 Fed. 880, 67 C. C. A. 52, 5 L. R. A. (N. S.) 49; *Abel v. Book et al.* (C. C.) 120 Fed. 47. The syllabus in the *McNaul Case*, *supra*, reads:

"A cause is not removable by *one* of several defendants on the ground of diversity of citizenship alone, where no separable controversy is alleged or shown."

Ward, Circuit Judge, now of the Circuit Court of Appeals, Second Circuit, said:

"The petition for removal alleges that the plaintiff is a citizen of the state of New York, that the petitioner is a citizen and resident of the state of Massachusetts, and that the other defendants who have been served with process are citizens of Delaware and New Jersey. The only ground suggested for removal is that the controversy is wholly between citizens of dif-

ferent states. As all the defendants have not joined in the petition for removal, the cause must be remanded.

"The petitioner contends that the practice in this circuit is to permit one defendant to remove, and cites *Mutual Life Insurance Co. v. Champlin* [C. C.] 21 Fed. 85, and *Garner v. Second National Bank* [C. C.] 66 Fed. 369. These were cases where a separable contest existed between the plaintiff and one or more of the defendants, which could be fully determined as between them. No such ground is relied upon in the petition, nor is any separable controversy specified."

In the *Miller Case*, supra, the syllabus reads:

"Where a suit does not present a separable controversy, it can only be removed on a petition in which all the defendants join."

In the *Abel Case*, supra, the syllabus is:

"Where, in an action to annul certain conveyances against several defendants, there was no separable controversy, and one of the defendants originally entitled to remove the cause to the federal courts had waived his right by failing to exercise it within the time prescribed, a subsequent joint application for removal could not be granted."

In *Miller et al. v. Clifford et al.*, supra, the court said:

"As we have found that the case does not present a separable controversy, it follows that, in order to effect a removal of it, all the defendants must join in the application for such removal. There can be no doubt but that this is the present rule of the Supreme Court. *Railway Co. v. Martin*, 178 U. S. 248, 20 Sup. Ct. 854, 44 L. Ed. 1055; *Whitcomb v. Smithson*, 175 U. S. 635, 20 Sup. Ct. 248, 44 L. Ed. 303; *Railway Co. v. Dixon*, 179 U. S. 140, 21 Sup. Ct. 67, 45 L. Ed. 121; *Gableman v. Railway Co.*, 179 U. S. 337, 21 Sup. Ct. 171, 45 L. Ed. 220. In this case only one of the defendants has sought to remove the cause. No separable controversy being stated against the petitioning defendant, and all the defendants not having joined in the petition, the case must be remanded to the state court."

In *Buck v. Felder* (D. C.) 196 Fed. 419, there was a separable controversy.

In this case there can be no pretense of a separable controversy between Lacey as trustee and the complainant. When Casey brought the suit Baker, the judgment creditor, who is alleged to have made the fraudulent transfers, was not in bankruptcy, and Lacey as trustee had no existence. He has been appointed trustee since, and comes in as an intervening defendant and asserts his right to the fund or property in case it is recovered. His right in such case is fixed by law and not disputed. If he desires to stand in the suit as a defendant opposing the recovery of this property, he should be removed by the court appointing him. If he desires to do his duty under the law, he should ask to join or be substituted as complainant and allow Casey to be to the expense of prosecuting the suit or indemnify the trustee in doing so. If he desires to antagonize Casey in recovering this property for the benefit of general creditors, he is not a proper party defendant. He has no individual interest in the property and the interest devolved on him by operation of law on his acceptance of the trust was and is identical with that of the complainant Casey. His only right or interest is to recover the property if transferred in fraud of creditors. This fact the court must recognize in determining whether or not there is a separable controversy. It may be that the complainant should ask the court in bankruptcy for an order giving this trustee directions,

and also request the court to allow an amendment to the complaint setting up the bankruptcy, the appointment of this trustee, and his refusal to unite or act as a party complainant in case he maintains his present attitude of hostility to the interests of the creditors. If it turns out that the judgment of Horatio L. Baker was and is valid; that the transfers were made in payment thereof, or that such judgment became a valid lien under the New York statutes, then in the latter event, even if the transfers are set aside and Horatio L. Baker's judgment is sustained, he will be protected. In such case the general creditors would only reach the surplus. But whatever course may be pursued by these parties hereafter, it is certain that this trustee has no separable controversy with the complainant by coming in and pleading certain matters which have occurred since the suit was brought and setting up his rights, which the complainant has not denied and cannot deny. Clearly this trustee raises no separable controversy by allying himself with the defendants in opposition to the duties and interests which the law casts upon him. He has no interest in the property in question, or its proceeds, or in the controversy, unless the conveyances, or one of them, were fraudulent as to creditors. If he denies that, as he does, he asserts no interest and raises no controversy which entitles him to remove, for he is not interested in such a controversy. If he alleges and claims that the conveyances, or one of them, were fraudulent, then he must be arranged on the side of the complainant as a complainant, and he has no controversy with the complainant. If he does that, then he, as a resident of the state of Massachusetts, cannot assert diversity of citizenship as a ground of removal, as he admits the Casey judgment.

[5] In *Hillyer et al. v. Le Roy et al.*, 179 N. Y. 369, 72 N. E. 237, 103 Am. St. Rep. 919, it is held by the Court of Appeals of this state:

"1. Bankruptcy—When Judgment against Bankrupts Not Affected by Bankruptcy Proceedings—Judgment Creditors may Enforce Judgment by Execution or Bring Equitable Action Thereon—Rights in Latter Action. Where a judgment has been recovered and docketed more than four months prior to the filing of a petition in bankruptcy by the judgment debtors, the effect thereof is to impress upon the real estate of the judgment debtors a lien, not only as to such which was then actually held by them, but as to any that had been transferred by them in fraud of their creditors; the judgment creditors may enforce their judgment by a sale of the land under execution, or they may bring an action in equity to obtain a decree which adjudges transfers, made by the judgment debtors, to have been void, which compels the fraudulent transferees of the real estate to account to them to the extent of their judgment, together with the mesne rents and profits of the real estate from the time of the commencement of the action in equity, and which appoints a receiver to enforce their rights by a sale of the land, or so much thereof as may be necessary, to satisfy the claim.

"2. Equitable Action on Judgment—Not a Waiver of Original Judgment—Powers and Duties of Receiver Therein. The bringing of the action in equity cannot be regarded as constituting any waiver, or abandonment, of the benefit of the original judgment; the judgment in the equitable action has relation only to the rights of the plaintiffs under their original judgment, and narrows the office of the receiver to a sale of the real estate and the application of the proceeds to the satisfaction of the indebtedness; the receiver takes no title to the real estate, nor does he acquire any rights in the land for the benefit of creditors generally.

"3. Trustee in Bankruptcy—Right to Bring Action on Judgment Not Vested

Therein—When Judgment Debtors Cannot Raise the Question. The right to maintain the equitable action does not become vested in the trustee in bankruptcy, since the judgment creditors, having a lien, which was not within the operation of the Bankruptcy Act, were at liberty to pursue any remedy they had for the enforcement of that lien, unfettered by the bankruptcy adjudication; the judgment debtors, however, are in no position to interpose the objection where it was not pleaded as a defense, and they simply set up, in a supplemental answer, their discharge in bankruptcy."

And in *Thomas, as Trustee in Bankruptcy, v. Roddy et al.*, 122 App. Div. 851, 107 N. Y. Supp. 473, it is held:

"A trustee in bankruptcy being vested by section 70 of the Bankruptcy Act with all property transferred by the bankrupt in fraud of creditors, and being authorized to recover the same or its value from the transferee, may maintain an action to set aside a fraudulent conveyance by the bankrupt, although the same was made more than four months prior to the filing of the petition in bankruptcy. Under said section the trustee represents all the creditors, and may maintain an action to set aside any transfer which any creditor might have brought.

"The right of a trustee to sue under said section 70 is not restricted by subdivision 'e' of section 67, relating to conveyances made within four months, with an intent to hinder, delay, and defraud creditors.

"In order to bring an action under section 70 to set aside fraudulent conveyances made more than four months prior to the petition in bankruptcy, the trustee need not show that creditors of the bankrupt were in a position to attack the conveyance.

"Nor does the fact that creditors may attack the conveyance deprive the trustee of that right, especially so when the creditors have not commenced an action and are made parties defendant by the trustee without objection upon their part."

Treating this as an action by Casey, the complainant, to assert his lien and enforce it against the property fraudulently transferred by Baker, and nothing more, and the lien, within *Hillyer et al. v. Le Roy et al.*, supra, is established, as the judgment is conceded by the trustee, and, so treating and considering the case, the amount in controversy, exclusive of interest and costs, is the amount of Casey's judgment, less than \$3,000, and the cause is not a removable one. And in such event, even if the amount in controversy were sufficient, there is no controversy at all between Casey and the trustee, as this Casey judgment is conceded and its status as a lien is fixed by *Hillyer et al. v. Le Roy et al.*, supra, and the pleading of a mere legal conclusion by the trustee, especially one contrary to the law, and therefore not correct, viz., that the trustee is entitled to the property or its proceeds if the conveyance is set aside, presents no separable controversy. The removing party must show facts presenting a real separable controversy. The situation is this: The complainant says the transfers by Baker were in fraud of my rights and of creditors and are voidable; I have a lien on the property of some less than \$3,000, and I desire to have the property sold in satisfaction of such lien and to have such transfer first set aside. The Court of Appeals of the state of New York says that Casey does have such a lien if the transfer was fraudulent, and that he may have it set aside and enforce his lien. The trustee in bankruptcy denies: First, that the transfer was fraudulent; in which case he has no possible interest; and, second, if it is proved to have been fraudulent, I am entitled to the proceeds of a

sale. This would be true as to the surplus over and above valid liens, but not as to Casey's judgment. Casey, if we treat the action as one to enforce his lien, has no concern with the surplus and no controversy with the trustee. Casey's judgment was obtained and docketed more than four months prior to the bankruptcy, and hence is not void or voidable as a lien on the property of the bankrupt transferred in fraud of creditors, under any provision of the bankruptcy act. But the trustee himself negatives the existence of any controversy with Casey by denying the fraudulent character of the transfers. In such case Horatio L. Baker owns the property free and clear of Casey's claim, and he, not the trustee, must defend the title, and he, and not the trustee, has a controversy with Casey, and he, Horatio L., has not sought a removal of the cause.

Motion to remand granted.

PAINE LUMBER CO., Limited, et al. v. NEAL et al.

(District Court, S. D. New York. November, 1913.)

1. CONSPIRACY (§ 8*)—COMBINATION IN RESTRAINT OF TRADE—RIGHT TO SUE—THIRD PERSONS.

At common law a third person had no right of action for damages because of an agreement or combination in restraint of trade.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 7-11; Dec. Dig. § 8.*]

2. CONSPIRACY (§ 8*)—AGREEMENTS IN RESTRAINT OF TRADE—ENFORCEMENT.

In a suit to restrain the enforcement of an agreement in restraint of trade, it is not sufficient at common law to show that an agreement may create a monopoly, may be in restraint of trade, or may be opposed to public policy, since, agreements of that nature being unenforceable, the law will not aid their enforcement, but they are not illegal in the sense of giving a right of action to third persons for injuries sustained.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 7-11; Dec. Dig. § 8.*]

3. INJUNCTION (§ 114*)—AGREEMENTS IN RESTRAINT OF TRADE—SHERMAN ANTI-TRUST ACT—ENFORCEMENT.

Though an agreement between members of certain carpenters' and wood-workers' unions binding their members not to work with building trim manufactured in nonunion factories was in restraint of trade, and in violation of the Sherman Anti-Trust Law (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], and General Business Law N. Y. (Consol. Laws, c. 20) § 340, prohibiting such agreements, a suit to enjoin the enforcement thereof could be maintained only at the instance of the United States or the state of New York, and not by a third person injured thereby.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 202-220; Dec. Dig. § 114.*]

4. CONSPIRACY (§ 30*)—PREVENTION OF COMPETITION—"ACT INJURIOUS TO TRADE."

Penal Law N. Y. (Consol. Laws, c. 40) art. 54, § 580, subd. 6, provides that, if two or more persons conspire to commit any act injurious to trade or commerce, each of them is guilty of a misdemeanor. *Held*, that the gist of the offense is an agreement to prevent competition regardless of the in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tention of the parties; the prevention of competition in business being an "act injurious to trade" within the statute.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 53-57; Dec. Dig. § 30.*]

5. INJUNCTION (§ 114*)—COMBINATION IN RESTRAINT OF TRADE—RIGHT TO SUE.

Though an agreement between certain carpenters' and woodworkers' unions to refuse to use building trim manufactured in nonunion factories was in restraint of trade and constitute a misdemeanor in violation of Penal Law N. Y. (Consol. Laws, c. 40) art. 54, § 580, subd. 6, prohibiting a conspiracy to commit acts injurious to trade or commerce, a private individual was not entitled to a suit to restrain the enforcement of such agreement, in the absence of proof that it was aimed at or affected him injuriously as distinguished from the general public.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 202-220; Dec. Dig. § 114.*]

In Equity. Suit by the Paine Lumber Company, Limited, and others, against Elbridge H. Neal and others. Bill dismissed.

Austin, McLanahan & Merritt, of New York City (Walter Gordon Merritt, of New York City, and Daniel Davenport, of Bridgeport, Conn., of counsel), for complainants.

Eidlitz & Hulse and William Butler, both of New York City (Frederick Hulse, of New York City, of counsel), for defendants Members Mfg. Woodworkers' Ass'n and another.

Charles Maitland Beattie and William P. Maloney, both of New York City, for defendants Neal and others.

Charles J. Hardy and Frederick P. Whitaker, both of New York City, for defendant James Elgar, Inc.

MAYER, District Judge. Contemporaneously with the final hearing of this suit, Irving v. Joint District Council, 209 Fed. 471, was argued on final hearing before Judge Ward. In that case equitable relief was sought on behalf of a single firm because of acts claimed to be specifically directed against that firm pursuant to a combination or conspiracy and resulting in damage to it.

Here both the complaint and the relief sought are more comprehensive. There is no question involving an existing strike. The record is barren of any proof of acts of violence, nor is there satisfactory proof that the agreements and acts complained of were, at the time of the commencement of the suit, directed against these particular complainants. Plainly and briefly stated, the suit is brought on behalf of nonunion manufacturers to settle in a private litigation an economic question of ceaseless importance in respect of which in the particular trade here involved there has been a long and bitterly (though peacefully) fought struggle; each side contending for what it believed to be its rights and welfare.

The bill was verified in February, 1911, and process was duly served shortly thereafter.

The complainants, eight in number, and residents of states other than New York, are manufacturers of wood trim, sash, and other similar wood products. Six of these complainants have and have had

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

business with customers in New York, and two allege that they are ready and able to dispose of their products in New York City if the channels of commerce are kept free from unreasonable obstruction.

Twenty-four defendants named in the bill are alleged to be officers or agents of a voluntary association, known as the United Brotherhood of Carpenters and Joiners of America. Huber, the president, and Duffy, the secretary of the association, were not served with process, and are therefore not before the court. The other twenty-two defendants, representatives of labor, are sued individually and as officers or agents of an association known as the Joint District Council of New York and Vicinity of the United Brotherhood of Carpenters and Joiners of America. Five defendants are union manufacturers of trim, door, and sash in New York City. The remaining defendants, over one hundred in number, are master carpenters whose business is to install trim, doors, sash, and other woodwork in buildings.

The bill of complaint sets forth, among other things, an agreement between the Master Carpenters and the Joint District Council (Exhibit B). The object of that agreement is:

"To prevent any strike or lockout, and to insure a peaceable adjustment and settlement of any and all grievances, disputes and differences that may arise between any employer in the Master Carpenters' Association and the mechanics affiliated with the Joint District Council of Greater New York."

The agreement sets out the terms upon which the employers will employ and the employes work, and provides for the arbitration of disputes. It is one of these terms (which the parties have settled upon) to which complainants object. It reads:

"There shall be no restriction against the use of any manufactured material except nonunion or prison-made."

The bill likewise sets forth an agreement between Manufacturing Woodworkers' Association and the Joint District Council (Exhibit C). The purpose of the agreement is thus stated:

"The intent of this agreement is to lay foundation for peace in the mill work industry, and the bringing about of uniformity as to hours, wages and general conditions, and to provide for the settlement of any and all grievances that may arise between the Manufacturing Woodworkers' Association, parties of the first part, engaged in the manufacturing of doors, sashes, window frames, moulding, interior trim, etc., and the International Union, United Brotherhood of Carpenters and Joiners of America, general offices, Indianapolis, Indiana, and its subordinate union known as Joint District Council of New York, parties of the second part."

The arbitration of disputes is provided for, and the agreement further sets forth the terms and conditions upon which work will be carried on. The important provisions to be noticed are one whereby the unions agree "that none of their members will erect or install nonunion or prison-made material," and another whereby the employers agree that the members of the Brotherhood of Carpenters are "to be employed exclusively in the mills of the Manufacturing Woodworkers' Association."

The vital offense alleged in the bill (Complt., par. 25) is that, with the exception of the "contractors" (the Master Carpenters), all the defendants "have for many years past been engaged in an oppressive

and malicious scheme or conspiracy to prevent the pursuit or exercise of the trade of carpentry by any person in any state of the United States who is not a member of said United Brotherhood and one of its subordinate bodies, and contrary to the laws of Congress of July 2, 1890, relating thereto, and the laws of the state of New York, to prevent and restrain each of your orators and all other employers of any carpenters not belonging to said brotherhood from engaging in interstate trade or commerce to sell or supply goods for sale, delivery, use, and installation where outside of the state of their manufacture, because they so employ one or more carpenters who are not members of said brotherhood, and to thereby compel and coerce each of your orators and all other woodworking mills and employing carpenters or builders in the United States of America, by the injury so unlawfully inflicted on their respective businesses, to operate what is called a closed or union shop, and to discharge and refuse to employ any carpenter who is not a member of and does not pay tribute to and submit to the regulations and restrictions of said United Brotherhood and some one of its local affiliated unions."

The Master Carpenters being excepted from the charge of conspiracy, the charge is therefore made only against the 22 agents of the Joint District Council, the 4 members of the Woodworkers' Association, and David W. O'Neil.

It is further alleged that in pursuance of and for the purpose of making effective the combination and conspiracy:

1. The brotherhood and Joint District Council have adopted the rule that no member of the brotherhood should use or work upon nonunion trim, and a violation of the rule subjects the member to the penalty of a fine. This allegation is admitted.

2. The brotherhood has an understanding with the other trades that such trades will join in sympathetic strikes if requested so to do where nonunion trim is being used. This is denied by the representatives of the unions and not established.

3. The alleged conspirators have instigated and joined in strikes where the complainants' materials were being used. This is denied, except that it is admitted in the answer of the Joint District Council's agents that members of the brotherhood have refused to work on the complainants' products. The testimony shows that on several occasions members of the brotherhood have quit work on jobs when complainants' material was being used.

4. Builders and architects have been coerced by fear of strikes caused by the conspiracy of certain of the defendants to refuse to purchase complainants' products. This is denied by the labor defendants. It is entirely clear from the record that the known attitude of the union toward nonunion trim has deterred owners and builders who wish to employ brotherhood men to erect trim from purchasing that which they refuse to erect, and this course has been taken for self-protection and in view of the exigencies of this trade situation.

5. The Joint District Council would not enter into any agreement with the Master Carpenters until some clause enjoining the use of nonunion material was inserted, and the Master Carpenters were coerced

to enter into the agreement (Exhibit B). The Master Carpenters answer that the representatives of the workmen insisted upon a clause substantially as is contained in the agreement, but they and the labor defendants deny that the carpenters were coerced into making the agreement. The situation disclosed amounts to all intents and purposes to coercion even though the purpose of the Master Carpenters was commendable and to accomplish industrial peace.

6. The agreement (Exhibit C, *supra*) between the Woodworkers and Joint District Council was made. This allegation is admitted.

7. "Unfair lists" have been circulated among architects, builders, and contractors of New York City. This is denied, and there is no proof of any instances where complainants have been placed on "unfair lists."

8. Printed lists containing the names of firms and corporations who employ union labor in their mills have been circulated in New York City by the alleged conspirators preceded by a statement whose purpose was to indicate the desirability of employing union men in order to avoid labor troubles. The labor defendants admit that such lists have been prepared and in some cases preceded by the statement above referred to, but assert that the use of such statement had been discontinued before the commencement of this action. No proofs were submitted disproving that assertion.

The testimony is voluminous, but I think the essential facts may be summarized as follows: (1) The journeymen carpenters in the borough of Manhattan and in parts of the borough of Brooklyn very generally belong to the Brotherhood of Carpenters. (2) Owing to the fact that members of the brotherhood refuse to work with nonunion members and to the further fact that employers in the building trades deem it wise to employ brotherhood men, it is difficult and under ordinary circumstances impracticable to erect carpenter work in the borough of Manhattan and in parts of the borough of Brooklyn except with union labor. (3) That the Brotherhood of Carpenters has a by-law that its members will not erect material made by nonunion mechanics. (4) The Brotherhood of Carpenters has given notice that its men will abide by this by-law. (5) The by-law is enforceable by fine. (6) On several occasions in the past few years the members of the brotherhood have quit work where complainants' products were being used and where the products of other so-called nonunion mills were being used. (7) The enforcement of the by-law in question by the Brotherhood of Carpenters and the provision in the agreement with the master carpenters relative to the use of nonunion trim have lessened the sale of complainants' products in the borough of Manhattan and in some parts of the borough of Brooklyn. (8) The workmen have adopted and pursued the policy complained of to better their condition in a continuing economic struggle, with no malice to the particular complainants herein, but as part of a plan to accomplish a nation-wide unionization in their trade. (9) The contractors or master carpenters have entered into their trade agreements after elaborate negotiation and for the purpose of establishing and maintaining peaceful relation which shall obviate strikes and other disturbing labor troubles.

The relief sought by complainants is:

1. That the defendants (other than the Master Carpenters) be enjoined from "combining, conspiring, and confederating together to refuse to handle or work upon material produced or manufactured by the complainants, or any of them, because they are not made under union conditions, and from publishing, circulating, enforcing, and attempting to enforce the provisions of the by-laws of the District Council of New York and vicinity, which provide as follows: 'Any member proven guilty of using the products of any person, firm or mill who have been declared unfair by their district council, or working for any person, firm or mill who have thus been declared unfair, shall be fined \$10 for each offense.' And from publishing, circulating, enforcing, and attempting to enforce that part of the by-laws of the United Brotherhood of Carpenters and Joiners of America, which provide as follows: 'It shall be the duty of all district councils and local unions wherever possible to prevent the members under their jurisdiction from encouraging the use of any unfair material by handling the same.' And from enforcing or attempting to enforce or inflicting or threatening to inflict any injury, penalty, or liability, where in the nature of a fine, or suspension, or expulsion from any labor organization, or otherwise, against any person who works upon materials furnished by any of your complainants, or against any person who works for any employer who purchases materials from any of your complainants, or against any person who works upon any building where the materials of any of your complainants are being installed, or about to be installed. From inducing or attempting to induce any person or persons whomsoever to decline employment or cease employment, or not to seek employment under any person, firm, or corporation, because such person, firm, or corporation may have purchased or proposed to purchase materials from the complainants or any of them, or because of materials furnished by the complainants or some of them were being used on or in connection with some building where said persons are doing work, and from in any way inducing or attempting to induce any person or persons to refuse to install, handle, or work upon materials manufactured by your complainants, or any of them. And from making, communicating, or circulating any statement, orally or in writing, that the defendants, or members of any union of workmen, will refuse to work upon any material unless said materials are constructed under strict union conditions. And from requesting customers, or those who might become customers of the complainants, not to purchase the products of your orators, or any of them, because they do not employ members of said United Brotherhood of Carpenters and Joiners of America exclusively at the work of carpentry, or do not use the union label of said United Brotherhood, and from requesting any persons who might be customers of the complainants, or any of them, to buy union materials, so that no controversy or difficulty can arise on account of the use of nonunion woodwork. From giving notice, verbally or in writing, to any person, firm, or corporation, to refrain from purchasing merchandise or carrying out contracts for the purchase of merchandise manufactured by your complainants, or any of them, under threats that if such merchandise is purchased, or said contracts carried out, they will cause the person so notified loss or trouble, or that they will cause persons employed by such persons so notified to withdraw from their employment, or that they would cause persons employed by others upon buildings where said persons so notified are doing work to withdraw from all work upon said buildings. From publishing, circulating, or otherwise communicating, either directly or indirectly, in writing or orally to each other, or to any other person, firm, or corporation, any statement or notice of any kind or character whatsoever, calling attention to the fact that the complainants, or any of them, or their products, or any of them, are or were, or have been declared unfair, or are on any unfair list, or that your complainants, or any of them, should not be patronized or dealt with, or their products purchased, used, handled, worked upon or dealt in because made in an open or nonunion shop. And from conspiring, agreeing, or combining together to restrain or destroy the interstate business or trade of the complainants, or any of them, in order to compel them to refuse to employ any carpenters who are not members of said United

Brotherhood, and from doing any and all acts in furtherance of said combination, and any and all acts to interfere with or discourage the sale or disposition of the products of the factories of the complainants, or any of them, or the installation or handling thereof, for the purpose of compelling the complainants, or any of them, to refuse to employ any carpenters who are not members of said United Brotherhood. And from using any and all ways, means, and methods of doing any of the aforesaid forbidden acts and from doing any of the forbidden acts, either directly or indirectly, or through by-laws, orders, directions, or suggestions to committees, associations, officers, agents, or otherwise.

"2. That section 2 of article 4 and the second paragraph of article 3 of said agreement (Exhibit B), entered into on or about the 30th day of October, 1909, between the Master Carpenters' Association of the City of New York, party of the first part, and the Joint District Council of Greater New York, party of the second part, be declared void as imposing an unlawful restraint upon trade, contrary to the laws of the state of New York in such case made and provided, and contrary to the laws of the United States relating to restraints of interstate commerce, and as constituting a part of the wrongful combination or conspiracy to injure your orators.

"3. And that the parties to said agreement (Exhibit B), their attorneys, agents, and associates, be enjoined from carrying out or pursuing said section 2 of article 4 and the second paragraph of article 3 of said agreement so far as the same forbid the purchase, use, or installation of products manufactured by any of your orators, and inducing or persuading, or attempting to induce or persuade, any person, firm, or corporation to extend, renew, observe, carry out or comply with the terms of said section 2 of article 4 so far as the same prohibit the purchase, use, or installation of nonunion woodwork by the members of the Master Carpenters' Association and provide for the refusal of the members of said district council to work upon the same."

At the outset the jurisdiction is attacked because of lack of necessary diversity of citizenship; but that question, I think, is disposed of in this court by the order of Judge Coxe for a preliminary injunction and by Judge Ward's opinion in 180 Fed. 896. I think there is grave doubt as to whether the relief prayed for in paragraph 2, *supra*, can be granted in a private suit to which the Joint District Council, one of the signers of the agreement, Exhibit B, is not a party. It will also be noted that, while the effect of Exhibit C is sought to be restrained, there is no application to declare void the agreement itself. Counsel, however, on the argument urged a decision on the substantial questions involved, and the importance of the subject-matter invites such a decision.

For the complainants to succeed they must establish: (1) An agreement offensive to the common law or a state or federal statute; (2) or any acts done in pursuance thereof; and (3) such injury as will warrant injunctive relief in a litigation between private parties.

[1] Assuming the agreement and its operation to be a combination in restraint of trade, the common law gives no right of action to a third person.

[2] "In considering the legal questions arising in this case, it must be borne in mind at the outset that it is not sufficient to show that the agreement in question may create a monopoly, may be in restraint of trade, or may be opposed to public policy. Agreements of that nature are invalid and unenforceable. The law takes them as it finds them, and as it finds them leaves them; but they are not illegal in the sense of giving a right of action to third persons for injuries sustained." *Nat. Fireproofing Co. v. Mason Builders' Ass'n*, 169 Fed. at page 263, 94 C. C. A. 539, 26 L. E. A. (N. S.) 148.

[3] The remedy, if any, must therefore be found in statutes which, as I understand the trend of modern decisions, are said to be declaratory of the common law but afford new or additional remedies. This brings us to a consideration of the federal so-called Sherman Anti-Trust Law and the New York state Anti-Trust Law (General Business Law, § 340). I agree with Judge Ward, in his opinion filed contemporaneously herewith, that:

"There can be no question, first, that a combination does exist between the various local unions which constitute the United Brotherhood; second, that one of the purposes of the combination is to compel the unionization of all manufacturing carpenter shops; third, that the object is to restrain competition between open shops and union shops; and, fourth, that this object is to be accomplished principally by an agreement to refuse to work on any job where nonunion trim is used."

I further agree that the combination in the case before him results in directly restraining competition between manufacturers and operates to restrain interstate commerce in violation of the above referred to federal and state statutes.

As the agreement (Exhibit B) between the Joint District Council and the Master Carpenters and the agreement (Exhibit C) between the Manufacturing Woodworkers' Association and the United Brotherhood and the Joint District Council are but steps in the course of the combination and effective extensions of its purpose and results, I am of the opinion that these agreements are also condemned by the two statutes referred to—and this irrespective of the motives which actuated any of the defendants, masters or workmen.

But injunctive relief may be had under either statute only at the instance of the United States or the state of New York, as the case may be, and therefore complainants cannot recover in this suit. *Nat. Fire-proofing Co. v. Mason Builders' Ass'n*, supra.

[4] As I cannot agree with the contention of the counsel for complainants that either subdivision 5 of section 580 or section 530 of the Penal Law is applicable to the case at bar, there thus remains for consideration only subdivision 6 of section 580 of the Penal Law of New York. Subdivision 6 of section 580 of article 54 of the Penal Law (formerly section 168, subd. 6, of Penal Code) has long been on the statute book. It provides:

"If two or more persons conspire to commit any act injurious * * * to trade or commerce * * * each of them is guilty of misdemeanor" (formerly part of section 168 of the Penal Code).

The prevention of competition in business has been held to be an act injurious to trade in contemplation of law. *Kellogg v. Sowerby*, 190 N. Y. 370, 83 N. E. 47; *People, etc., v. Sheldon*, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690.

It is further held by the New York Court of Appeals:

"A civil action is maintainable by one who suffers injury as the result of a conspiracy forbidden by the criminal law to recover the damages which he has sustained at the hands of the parties to the combination."

See, also, *In re Debs*, 158 U. S. at page 593, 15 Sup. Ct. 900, 39 L. Ed. 1092.

Under this statute the motive of the parties is immaterial. The gist of the offense is the agreement to prevent competition.

"In order to guard against any possible misapprehension, however, on another trial, it is proper to say that we do not think that good motives on the part of those who enter into a combination in restraint of trade save it from the condemnation of the law of this state. *People v. Sheldon*, supra. The fact that the parties to an agreement of such a character may have honestly believed that it would be beneficial instead of injurious to commerce does not render it legal. The law denounces it if it is designed to prevent competition and will have that effect whatever the intent of the parties." *Kellogg v. Sowerby*, supra.

[5] Without wishing to speculate obiter, it would seem that, if there be a conspiracy to commit any act injurious to trade or commerce, the offense is indictable, irrespective of injury to a particular person. The theory is that the people at large are injured and the redress is in their hands, acting through constituted authority. But before a private litigant may recover he must show either that he has suffered special injury as the proximate result of the wrong or that the conspiracy was directed against him. *Cranford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514; *Kellogg v. Sowerby*, supra; *National Fireproofing Co. v. Mason Builders' Association*, supra. As I read the *Kellogg* Case, there might have been a criminal prosecution because of the agreement, irrespective of Kellogg's rights or status; but Kellogg could not recover money damage if it could be shown that, at the formation of the conspiracy, it was not intended to injure him. Conspiracy is a continuing crime, however, and, once the agreement is formed, it seems to me that if particular acts are directed against a particular person so that he suffers a direct or special injury, he is the victim of a conspiracy and, however impersonal the original situation may have been, the intent to injure may be inferred from the fact that injury is directly inflicted by specific acts on the particular person and in pursuance of the agreement to do acts to injure trade or commerce by preventing competition. But the public generally, as distinguished from one specially injured, must look to the sovereign for redress. So, here, it is true that the complainants may be injured by the general situation; but theirs is not a special injury in the sense of *Cranford v. Tyrrell*, supra, nor of the *Irving* Case. Assuming, for the purpose of illustration, the agreement complained of to be unlawful, it was impersonal and intended to accomplish a general result as distinguished from selecting these particular complainants as the object of its operation. *National Fireproofing Co. v. Mason Builders' Association*, supra.

In such circumstances the policy of the lawmaking power (here, Congress and the New York Legislature) seems to be to remit these problems to the responsible and duly selected public officials. A decree in a litigation at the instance of the government or the state is binding universally to all practical intents and purposes. It is presumably in the public interest as distinguished from any individual interest and operates for the benefit of all (as distinguished from meeting a particular instance of wrong or injury) on a method or manner of conducting business whether the complaint be against employer or employé.

Of the many cases cited I find none authoritative where a general

business situation in the case of employers or a general trade situation in the case of employes was corrected by injunction at the instance of private suitors. Ample remedy is provided at common law or by statute for recovery of money damage in actions by private litigants. The courts have time and again extended the equity arm to prevent the commission or continuance of injury directed against particular persons and have protected employers against violence and sympathetic strikes; but where the purpose of an injunction is, as in the case at bar, to attempt to control a large body of men generally to work or not to work on a class of goods or in a kind of manufacture (as distinguished from a specific instance or instances as above discussed), the remedy of injunction is not to be granted in a litigation between private parties.

Finally, it may be remarked that, in any event, on this branch of the case, the complaint does not seek an injunction against the Master Carpenters nor does the proof justify the granting thereof.

The bill is dismissed, with costs.

BOISE v. TALCOTT.

(District Court, S. D. New York. April 8, 1914.)

1. FACTORS (§ 47*)—LIEN—POSSESSION.

The validity of a factor's lien is determined by the factor's actual or constructive possession of the property.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 65-71; Dec. Dig. § 47.*]

2. BANKRUPTCY (§ 188*)—FACTOR'S AGREEMENT—VALIDITY—LIEN.

Where a factor's agreement provided that, in consideration of certain advances made and to be made by defendant, he was given possession of the bankrupts' goods, accounts receivable, etc., was to have the whole future management of the business so long as the arrangement continued, and a percentage on sales, and immediately on taking possession he gave wide publicity to the same, informing commercial agencies, creditors, etc., placing signs about the premises conspicuously bearing his name as factor for the corporation, the contract was valid, and afforded him a lien for his advancements not only as against the goods then in possession of the bankrupts, but on those subsequently purchased.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286-289, 291-295; Dec. Dig. § 188.*]

3. BANKRUPTCY (§ 279*)—FACTOR'S AGREEMENT—ACCOUNTING.

Where a factor's agreement gave defendant entire possession and charge of the business of a corporation, together with a lien for advances on accounts receivable, stock, etc., the corporation's trustee in bankruptcy was entitled to an accounting from defendant for all the merchandise consigned to him, or its value, for the accounts collected for goods sold, and for the loans and advances made and to be made during the continuance of the agreement.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 419-424; Dec. Dig. § 279.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Action by Edward B. Boise, as trustee in bankruptcy of the estate of Daly & Schaefer, Incorporated, against James Talcott. Judgment for defendant.

Fried & Czaki, of New York City, for complainant.

James, Schell & Elkus, of New York City (Abram I. Elkus and Wesley S. Sawyer, both of New York City, of counsel), for defendant.

HAZEL, District Judge. This is an action by the trustee in bankruptcy of Daly & Schaefer, Incorporated, to recover the value of merchandise, consisting of laces, embroideries, and silks, alleged in the bill to be owned by the bankrupt estate, and claimed by the defendant, who was engaged as a commission merchant, and who also acted as factor and banker in the dry goods trade, to have come into his possession under a factor's agreement dated December 28, 1908, by which he agreed to finance Daly & Schaefer, Incorporated, to 40 per cent. of the cost value of the stock contained in its place of business, and to 75 per cent. of the net value of the accounts receivable, in return for which he was to receive a commission. It is shown that pursuant to said agreement Daly & Schaefer consigned to the defendant the stock on hand and the accounts receivable, and that the defendant immediately entered upon the premises of the bankrupt, took possession of the merchandise, procured the lease of the premises to be assigned to him, paid the rent, put up signs in various places on the premises to indicate his factorship, and at the same time advanced \$50,000 to pay for merchandise delivered, and subsequently made large advances. A sign conspicuously bearing the words, "James Talcott, Factor for Daly & Schaefer, Inc.," was placed at the entrance to the building occupied by the bankrupt company, while other signs similarly worded were placed on the doors and transom leading to the loft occupied by it; and in the office at a desk occupied by the representative of the defendant was a sign bearing the name James Talcott, which could be seen by those entering and approaching the desk.

Upon taking possession of the premises under the factor's agreement the defendant immediately notified the Dun, Bradstreet, and Woods commercial agencies to insert notices thereof in their subsequently issued reports to the trade, and it appears that said commercial agencies afterwards gave out information to inquirers apprising them of the fact that the defendant had agreed to finance Daly & Schaefer, and was its factor.

It appears that just before making the factor's agreement in question the bankrupt was financed by the firm of Salen & Schroder, petitioning creditors in the bankruptcy proceeding, doing business in New York and Paris, and that it was indebted to them in the sum of \$38,000, which indebtedness by agreement in writing became subordinated to the lien of the defendant. The material provisions of the factor's agreement are:

"1st. Daly & Schaefer hereby constitute and appoint James Talcott their sole factor and selling agent, and hereby agree to consign to him for sale upon commission the entire stock of goods now owned or held by them, and

all goods which at any time hereafter, during the continuance of this agreement, they may purchase, manufacture or receive for sale. All sales of said goods shall be made by James Talcott; the goods shall be invoiced in the name of 'James Talcott, Factor for Daly & Schaefer'; and all accounts shall be payable to James Talcott.

"2nd. Daly & Schaefer hereby agree to sell, assign and transfer to James Talcott all the outstanding accounts now owned by them and shall notify their customers of such assignment.

"3rd. All books used in the business of said department shall be the property of James Talcott, who shall have supervision of all accounts. James Talcott shall also supervise all credits and keep the accounts of said business at his main store, 108 Franklin street, New York City, and shall attend to the collection of accounts and all necessary details in connection therewith at his own expense; and James Talcott further agrees to pay the rent of premises selected by him in which said business is to be conducted.

"4th. Daly & Schaefer agree to pay all other expenses which shall be incurred in the said business including salaries of salesmen and other employes, except as aforesaid, stationery, postage, telegrams, all office, selling, packing, cartage, storage, and incidental expenses, and premiums for insurance. All insurance shall be in the name of James Talcott.

"5th. James Talcott shall have exclusive supervision and control of all of said consigned goods and shall decide all questions as to the credit to be given to purchasers, and all correspondence, books, accounts, remittances, checks, bills receivable and proceeds of sale, as well as the said goods, shall be in the exclusive possession and control of James Talcott as factor aforesaid.

"6th. James Talcott hereby agrees to loan on demand in check or acceptance to Daly & Schaefer an amount which shall not exceed forty (40%) per cent. of the net cost of the goods then in his possession, it being understood that during the months of March and September the amount of goods so advanced upon will not exceed eighty-five thousand (\$85,000) dollars and during the remaining ten months of the year it shall not exceed sixty thousand (\$60,000) dollars. If the merchandise on hand shall depreciate in value the amount of said depreciation shall be deducted from time to time the amount to be loaned to Daly & Schaefer as aforesaid.

"7th. James Talcott further agrees to loan on demand in check or acceptance to Daly & Schaefer an amount equal to seventy-five (75%) per cent. of the net value of the outstanding accounts assigned to him after having first deducted from the gross amount of said outstanding accounts ten (10%) per cent. for discount.

"James Talcott also agrees to loan on demand in check or acceptance to Daly & Schaefer an amount equal to seventy-five (75%) per cent. of the net value of the outstanding accounts arising from the sale of the said consigned goods, after having first deducted from the gross amount of the sales, (1) ten (10%) per cent. for discount (2) all amounts previously loaned on the goods so sold, expenses and commissions, and (3) all failed, or suspended or uncollectible or past due accounts.

"8th. It is agreed that the total amount to be loaned by James Talcott as hereinbefore provided, shall not exceed at any one time the sum of one hundred thousand (\$100,000) dollars.

"9th. It is agreed that James Talcott shall not guarantee sales, and that all sales shall be made at the risk of Daly & Schaefer.

"10th. Interest shall be charged and credited on the account current between James Talcott and Daly & Schaefer, at the rate of six per cent. (6%) per annum.

"11th. For his services as factor, supervisor, and selling agent, rendered in pursuance of this agreement, as aforesaid, James Talcott shall receive ten (10%) per cent. commission on the first one hundred seventy thousand (\$170,000) dollars of sales, which amount is guaranteed by the said Daly & Schaefer, and five (5%) per cent. on sales over and above that amount, said commission to be computed on the net amount of sales of the consigned goods. James Talcott shall be entitled to the same commission on any insurance moneys which may be payable under any insurance of said consigned goods.

In case any goods so consigned shall not be sold by James Talcott, and the part remaining unsold shall be redelivered to Daly & Schaefer or delivered or transferred to other parties, whether at the termination of this agreement or otherwise, and whether by agreement or direction of Daly & Schaefer, or by act of law, Daly & Schaefer shall pay to James Talcott for his services in connection with the unsold goods a commission of one (1%) per cent. of the total amount due James Talcott for loans, advances, expenses or otherwise, at the time the consignment account is closed, and in addition two (2%) per cent. of the then market value of the said goods so redelivered or transferred.

"12th. As security for any and all loans, and any and all advances made by James Talcott to Daly & Schaefer (whether or not said loans or advances shall be within or shall exceed the limits above mentioned) and for his expenses and his said commissions, and for all outlays of every sort, including all legal expenses and reasonable counsel fees, and for all liabilities which shall be made or incurred by James Talcott in connection with the said business, or by reason of any act done or omitted by Daly & Schaefer, James Talcott shall at all times have a general lien upon all goods now consigned to him or which may at any time hereafter be consigned to him and on all goods now owned or held by Daly & Schaefer, or which at any time hereafter they may in any manner purchase, manufacture or acquire, and upon all proceeds of sales thereof, and upon any and all accounts, notes, drafts, bills receivable or evidences of debt arising from any such sales.

"13th. Daly & Schaefer, subject to the approval of James Talcott, may designate the persons to be employed in and about the sale of the said consigned goods, and in and about the office of the said company, but James Talcott shall not be liable for any of the acts or omissions of any of the persons employed in pursuance of any such designation, and the business of the said agency shall be at all times under the exclusive management and control of the said James Talcott.

"14th. The lease of any premises which shall be used for the transaction of any business under this agreement shall be in the name of, or shall be assigned to James Talcott, and James Talcott shall have actual and exclusive possession and control of the said premises, and of all goods consigned to him thereat.

"On the termination of this agreement and at the request of James Talcott, Daly & Schaefer shall accept an assignment of the unexpired term of the lease of any premises which may be held by James Talcott as aforesaid.

"15th. There shall be conspicuously placed upon any premises which shall be used for the transaction of any business under this agreement, at the entrance thereof or at other place, a sign as follows:

"James Talcott, Factor for Daly & Schaefer.

"16th. It is understood and agreed that James Talcott shall have no connection with and no liability for or upon any purchases, orders or contracts for goods made, given or entered into by Daly & Schaefer, and they shall not be entitled to pledge the credit of James Talcott for any purpose whatever.

"17th. The rights of James Talcott under this agreement, including the right to have, hold and sell the said consigned goods as aforesaid, and to collect and receive the proceeds thereof, and to his said commissions, shall not be affected by any devolution or transfer of the rights or interests of Daly & Schaefer, whether such devolution or transfer shall be by act of the parties or by act of law."

The said agreement was to continue until terminated by either party upon 30 days' notice to the other. Throughout its continuance, and up to the time of filing the petition in bankruptcy, the business was conducted at 19 West Thirty-Fourth street, upstairs; the different amounts of money advanced by the defendant (there was due him at the time of the bankruptcy \$120,608.15) being largely used to pay creditors for goods bought and to continue the business. At the time

of bankruptcy the receiver therein took possession of the property and merchandise on the said premises, but subsequently released the same to the defendant under a stipulation providing for the institution of this action to determine the rights of the parties thereto.

The theory of the complainant is that the factor's agreement was a pretense and sham resorted to for the purpose of cheating and defrauding creditors; the intention at the time of making it being, not that the defendant should be the factor and selling agent, but that the entire transaction should be given the semblance of legality, and that the agreement should ostensibly describe a factor's lien in order to render possible the concealment of the property from creditors in the event of bankruptcy. But this claim of bad faith and the claim of a secret lien are not supported by the proofs. On the contrary, I find that in accordance with the agreement large sums of money were, from time to time, advanced in good faith by the defendant, and possession taken by him in good faith of the goods on the premises at the time of making the agreement, and also of the goods thereafter purchased and consigned to him by the purchasing company.

[1] Complainant concedes that the defendant had a valid lien on the accounts for goods sold, which accounts were made payable to him, and hence the principal question to be determined is whether the defendant, for advances made, has a valid lien upon the goods, comprising the stock at the time the bankruptcy proceedings were instituted, which were brought by the bankrupt during the continuance of the factor's agreement and consigned in writing to defendant. The decision of this question depends, I think, entirely upon whether or not such goods were in the possession of the defendant. The law is well settled that liens of this description belong to the class known as possessory liens, the validity of which is determinable by the fact of actual or constructive possession of the property by the lienor.

[2] In *Ommen v. Talcott*, 188 Fed. 401, 112 C. C. A. 239, a selling agent, factor, or commission merchant was defined by Judge Lacombe as:

"One who sells goods which another person has delivered to him for that purpose and receives compensation for his services by commission or otherwise."

Complainant contends that the case at bar is practically controlled by the case just cited, and by *Ryttenberg v. Schefer* (D. C.) 131 Fed. 313, but I am of a different opinion. In the *Ommen Case* the wording of the signs displayed was not such as to impart to the creditors notice of the factorship agreement. In fact, the signs remained as before, save that in addition to the name of the company a few small signs bore the words, "James Talcott Annex." The Circuit Court of Appeals said with regard to this that there was nothing to show that the defendant, or any one in his behalf, was ever in possession, custody, or control of any of the business or property until just before the bankruptcy, and, in criticism of the use of the word "Annex" on the signs to designate a factorship, stated that such wording of the sign rather indicated that Talcott was transacting a business of

his own on the premises occupied by the company than that he was carrying on the business of the company. There was no testimony to show that the defendant had placed a custodian in charge of the business and property, or that any notice whatever of the factor's agreement had been given to commercial agencies; and there seemed, in the opinion of the court, to be a design to conceal the true relationship of the parties.

In the Ryttenberg Case it was substantially held by Judge Holt that for advances made a lien attached to the goods consigned to the defendant, which were in his possession, but that no lien attached to goods bought by the bankrupt and remaining in his possession on his own premises, or to the proceeds realized on their sale. There is, however, in the case at bar stronger evidence in relation to possession by the defendant of the goods bought by the bankrupt, for the defendant here does not wholly rely upon his factor agreement, as in the Ommen and Ryttenberg Cases, nor upon mere constructive possession, but he took possession in good faith, and through one Blum, employed by him as clerk or custodian, who was present daily at the premises during the working hours, he practically supervised and controlled the business. The lease of the premises, as heretofore pointed out, was assigned to the defendant, the rent paid by him, and notice given to the public of his interest in the business as factor by appropriate signs and placards placed where they were most likely to be observed. In fact the precise features upon the absence of which the Circuit Court of Appeals laid stress in the Ommen Case as negating possession and a valid lien are thought to be here present.

There is still additional evidence tending to show possession in the defendant at the time of bankruptcy, i. e., the possession by the bankrupt of the keys of the premises, the daily opening and closing thereof by his representative, the consignment to him of credits, and the general assignments to him, as well as the large advances made by him from time to time to pay for goods bought and to continue the business. It is also shown that notice of the lien was given to banks with foreign connections, and that many local creditors and a large number of foreign creditors were aware of the existing arrangement, and indeed, it seems to me that sufficient publicity as to the factor's agreement was given to put both foreign and domestic creditors upon inquiry regarding the financial responsibility of Daly & Schaefer, and that they should have made such inquiry at its principal place of business and at the places of deliveries. Such evidence, I think, is entitled to consideration as bearing upon the asserted possession by the defendant of the goods in question, and as to the probability of creditors receiving notice of such possession had they made inquiries in the channels best known to the trade as to the financial responsibility of Daly & Schaefer.

A factor's agreement, by which a lien is given for commissions on sales and for advances on accounts and merchandise purchased, is not an innovation in the conduct of business, especially of the kind in which Daly & Schaefer was engaged. Indeed, there is abundant evidence to prove that there is a custom or usage in this country of

financing businesses and acting as factor for them. Twelve witnesses have testified to the existence of such a custom or usage, and have stated that information as to the existence of such liens or arrangements is usually given to creditors and others by signs conspicuously placed on the premises where the business is conducted, indicating that the goods of the merchant are in the possession of a factor, and that it is customary to put a representative of the factor in charge of the business and premises, and to notify the prominent commercial agencies of the arrangement. It is my opinion, based on the evidence, that the agreement in question and the subsequent acts of the parties in the present case were in pursuance of an honest intention to create a valid lien for the advances made; and this view is entertained by me notwithstanding the provision in the agreement that Daly & Schaefer were to pay the wages of employés, and had reserved the right to hire the salesmen to sell the goods consigned to the defendant.

The plaintiff argues that there is here no valid lien as against unsecured creditors because the agreement purported to include property not in possession, that is, it included the entire stock of a going concern and stock subsequently acquired. In answer to this contention it is sufficient to point out that the principle of the cases cited, of which *Zartman v. First Nat. Bank*, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083, is an example, does not strictly apply to the facts under consideration. In those cases mortgages on property not actually subject to the control of the mortgagors, such as the after-acquired property, were invalid as to a trustee in bankruptcy, but it is important to note that in those cases the possession of the mortgaged property remained in the mortgagor until default in the payment of principal or interest, while in the case of a factor the goods are immediately consigned to him, and he becomes the possessor thereof and sells the same. If the creditors have notice of the manner in which the business is conducted, and that a lien is created, then they presumably deal with the merchant with their eyes open, and not in reliance upon ownership, but rather in reliance upon advances of money made by the factor from time to time in the conduct of the business. Viewed in this light, there is no substantial merit in the contention, assuming the transaction in question to have been an honest one, that the creditors were helpless and at the mercy of Daly & Schaefer and the defendant; for by virtue of the factor's agreement, not only was the business to be continued, but presumably from the loans and advances to be made thereunder the creditors were to receive payment for their goods.

[3] The complainant also contends that according to the evidence, irrespective of any claim of lien by defendant, he has the right to possession on the ground that the transaction was a fraudulent transfer and preference, in violation of the provisions of the Bankruptcy Act; but what has already been said in answer to the previous contention applies here, and no recovery on this ground is warranted. The trustee, however, is entitled to an accounting from the defendant for all the merchandise consigned to him, or its value, and for the accounts collected for goods sold, and for the loans and advances made during the continuance of the factor's agreement.

While other points were elaborately discussed in the briefs submitted on both sides, it is not thought necessary to further advert thereto, in view of the conclusion reached by me that the defendant had a valid lien on the property which is the subject of this controversy.

A decree may be entered in accordance with this decision, but without costs to either party.

Ex parte PETKOS.

(District Court, D. Massachusetts. April 18, 1913.)

No. 736.

1. ALIENS (§ 54*)—RIGHT TO ENTER—IMMIGRATION AUTHORITIES—DETERMINATION—APPEAL.

Jurisdiction of the immigration authorities to determine the right of aliens to enter the United States is exclusive and final; their decisions not being reviewable by the federal courts unless it appears either that the alien has not been accorded a fair hearing, or that the action of the authorities has been arbitrary or that discretion has been abused.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

2. ALIENS (§ 54*)—RIGHT TO ENTER—"FAIR HEARING."

Fair hearing of an alien's right to enter the United States means a hearing before the immigration officers in accordance with the fundamental principles that inhere in due process of law, and implies that the alien shall not only have a fair opportunity to present evidence in his favor, but shall be apprised of the evidence against him, so that at the conclusion of the hearing he may be in a position to know all of the evidence on which the matter is to be decided; it being not enough that the immigration officials meant to be fair.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

3. HABEAS CORPUS (§ 23*)—RIGHT TO ENTER—DECISION—FAIR HEARING.

Relator, an alien, was denied right to enter the United States and ordered deported because he was afflicted with psoriasis, a skin disease which the immigration tribunals decided "as a matter of common knowledge" caused an odor so offensive as to make the sufferer obnoxious to persons about him. These authorities in fact had no actual knowledge of the character of the disease, which in fact is the commonest form of skin disease, attended with no odor and characterized by whitish scales on the skin, which, except in rare cases, do not appear on exposed parts of the body and which does not interfere with the sufferer's ability to labor. Relator was never apprised of the evidence on which he was to be deported and was afforded no opportunity to rebut the same. *Held*, that he was not accorded a fair hearing before the immigration authorities, and was entitled to habeas corpus and to have a hearing on the merits before the court.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 17; Dec. Dig. § 23.*]

Habeas corpus on petition of Felix Petkos to obtain relator's release from custody under deportation warrant. Writ granted.

Edward P. Barry, of Boston, Mass., and John R. McHugh, of Boston, Mass., for petitioner.

William H. Garland, Asst. U. S. Atty., of Boston, Mass., for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

MORTON, District Judge. This is a petition for writ of habeas corpus, whereby the petitioner, an alien immigrant, seeks to secure his discharge from the custody of the immigration officials at the port of Boston, by whom he is now detained for deportation. The order for deportation was made in the first instance by a Board of Special Inquiry, upon the grounds that:

The petitioner was afflicted with "psoriasis, a chronic noncommunicable skin disease which will cause him to seek treatment from time to time;" that "it is a well-known fact among laymen that the odor of this particular disease is at times so annoying that, it would seem to the Board, it would be very difficult for him to get employment in a place where there may be men working in close proximity to him. We therefore considering all the facts and circumstances surrounding this case, vote to exclude him, first, as likely to become a public charge, and, second, as being afflicted with a physical defect which will affect his ability to earn a living."

The decision of the Revisory Board was:

"Previous decision sustained for previous reasons, except it is the opinion the appearance of the disease rather than the odor will be offensive."

The petitioner then appealed to the Secretary of Commerce and Labor, by whom the order of deportation was affirmed, apparently upon the findings of the subordinate boards. No evidence was submitted to the immigration authorities as to the characteristics of psoriasis or its effect upon a person's ability to earn a living.

The petitioner offered testimony at the hearing on this petition that psoriasis is the commonest form of skin disease, constituting one-third of all skin diseases; that it is attended with no odor and is characterized by whitish scales on the skin; that, except in rare cases, it does not appear on the exposed part of the body, such as the face or hands; and that, so far as known to the medical witness who testified for the petitioner, and whose experience covered five or six hundred cases, it never disables a person from working. This testimony was not controverted, and the facts appear to be in accordance therewith.

The petitioner does not contend that the hearing before the immigration officials was conducted in an unfair manner, or that he was not accorded an adequate opportunity to present such evidence as he desired, nor does he deny that he is afflicted with psoriasis. He insists that the disease cannot in any way affect his ability to earn a living, and that the record returned here by the Immigration Commissioner shows that both the Board of Special Inquiry and the Revisory Board based their conclusions to the contrary on arbitrary and erroneous assumptions as to facts, not within their knowledge, and of which there was no evidence whatever.

[1] Congress has created a special set of tribunals to hear and determine all questions relating to the admission of immigrants. The jurisdiction of these tribunals is, within their province, exclusive and final. No appeal from them lies to the United States courts. The law courts have undertaken to re-examine proceedings in immigration cases sufficiently to make certain that the person whose deportation has been ordered received a "fair hearing," that the action of the immigration officials was not "arbitrary," and that they did not abuse the discretionary powers vested in them; but that is all. Whether in a

given case the evidence warrants an order of deportation is a matter as to which the responsibility rests entirely with the immigration tribunals. Their findings in that respect cannot be reviewed or set aside by courts of law, unless so entirely unsupported by evidence as to be not merely wrong but unreasonable, and to constitute an abuse of discretion and a denial of due process of law.

"If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no further. Those facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all." *Holmes, J., Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369.

In *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040, it was held that the petition of an excluded immigrant for a writ of habeas corpus which did not allege any "abuse of authority" by the immigration officials was, on its face, insufficient, even though it alleged that the petitioner was a citizen of the United States.

"The denial of a fair hearing is the only foundation for any jurisdiction in this court to interfere on habeas corpus." *Dodge, J., in Re Jem Yuen*, 188 Fed. 351.

"But this court has never held, nor must we now be understood as holding, that administrative officers, when executing provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere 'in due process of law' as understood at the time of the adoption of the Constitution." *Harlan, J., Japanese Immigrant Case*, 189 U. S. 86, at page 100, 23 Sup. Ct. 611, at page 614 (47 L. Ed. 721).

[2] Under these decisions, the petitioner was entitled to a "fair hearing," in accordance with "the fundamental principles that inhere 'in due process of law.'" Has he received one? I see no reason to doubt that the immigration officials meant to be fair; but that, it seems to me, is not enough. No case has been called to my attention in which it has been decided that intentional unfairness must be shown in order to entitle the petitioner to relief. A hearing may in fact be unfair without any intention that it shall be so. A "fair hearing" implies that a party concerned shall not only have an opportunity to present evidence in his favor (which was fully accorded in this instance), but also that he shall be apprised of the evidence against him, so that at the conclusion of the hearing he may be in a position to know all the evidence on which the matter is to be decided.

[3] In this case the immigration tribunals decided "as matter of common knowledge," in the first instance, that psoriasis causes an odor so offensive as to make the sufferer obnoxious to persons about him, whereas in fact it appears to have no odor at all; and, in the second instance, that, although the disease has no odor, its appearance would be so repulsive as to interfere with the petitioner's ability to get work, whereas in fact the disease rarely shows itself on the exposed parts of the body.

There was here no conflict of evidence, as in the cases cited for the respondent; nor did the inspectors base their action on the appearance of the immigrant, as in *Nishimura Ekiu v. United States*, 142 U. S. 651, 660, 12 Sup. Ct. 336, 35 L. Ed. 1146. They acted on their own mistaken assumption that they knew about a matter, of which there

was no evidence, and which appears to have been beyond their knowledge. Whether this is called an "abuse of discretion," or an "unreasonable conclusion," or "arbitrary conduct," it was plainly unfair and injurious to the petitioner. He could not foresee that the immigration officials would assume to be familiar with the characteristics of psoriasis, still less that their assumption of knowledge would lead them into such fundamental errors concerning it as appear in their findings, and to a conclusion, apparently erroneous, and certainly unsupported by any evidence. He was never apprised of the evidence on which he is to be deported and has had no opportunity to meet it. It is not that the decision was wrong, but that it was reached by wrong methods, and, as it seems to me, in disregard of fundamental principles.

I find and rule that the petitioner has not had a fair hearing before the immigration authorities; that under the rule laid down in *Chin Yow v. United States*, supra, the jurisdiction of this court has attached; that the writ of habeas corpus must issue; and that there must be a hearing on the merits before this court.

So ordered.

MAGEE v. VAUGHAN.

(District Court, E. D. Pennsylvania. March 16, 1914.)

No. 2584.

1. EVIDENCE (§ 272*)—DECLARATIONS AGAINST INTEREST—AUTOMOBILE ACCIDENT—CONTROL.

Plaintiff having been run into and injured by the alleged negligence of defendant's chauffeur in operating an automobile, defendant's counsel stated to the jury that defendant denied that he owned the automobile and that the chauffeur was employed by him. Plaintiff testified without objection that defendant stated at the time of the accident that, if "the insurance company" did not make good the damage to the carriage, he would. *Held*, that evidence that defendant refused to sign a statement because he did not know what effect it might have on his relations with the "insurance company that covers me in this case" was admissible as a declaration against interest, from which the jury might infer that defendant was in such control of the automobile as would render him liable against which he had protected himself by insurance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1105-1107; Dec. Dig. § 272.*]

2. APPEAL AND ERROR (§ 1048*)—RULINGS ON EVIDENCE—PREJUDICE.

Where, in an action for injuries in a collision with defendant's automobile, he persistently disclaimed responsibility and denied that he had ever admitted liability and that plaintiff had considered him responsible or made any claim against him, he was not prejudiced by question asked him on cross-examination as to whether he did not know that plaintiff had sued him for \$20,000, on the theory that the amount for which plaintiff sued should have been withheld from the jury; the court having charged that the jury must not consider the fact that defendant was insured, nor be influenced by the amount of damages claimed in plaintiff's statement.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.*]

3. DAMAGES (§ 130*)—EXCESSIVENESS—PERSONAL INJURIES.

Plaintiff, an unmarried woman, 49 years of age, of refinement and intelligence, physically vigorous and with a fondness for outdoor exercise, was run into and injured by defendant's automobile. Her knees were so injured that she was confined to her bed for some weeks, obliged to use a crutch, and finally a cane, in order to walk, which she thereafter did with difficulty. There was a difference between medical experts as to the extent of the injuries, but there was ample evidence that they would continue for considerable time in the future, even if they were not permanent. *Held*, that a verdict allowing plaintiff \$3,625, which included expenses for medical attendance and nursing, was not so excessive as to indicate that the jury were influenced by the fact that they were informed that plaintiff was suing for \$20,000.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357-367, 370; Dec. Dig. § 130.*]

At Law. Action by Mary C. Magee against Ira Vaughan. On motion for new trial. Denied.

John W. Brock, Jr., of Philadelphia, Pa., and John C. Robinson, of New York City, for plaintiff.

Ruby R. Vale, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The reasons urged in support of the motion at the argument were presented by counsel under the following heads:

(1) The court should have withdrawn a juror because of improper references by plaintiff's witnesses and counsel for plaintiff.

(2) The verdict is excessive.

Under the first head, the defendant relies upon alleged objectionable remarks in the trial of the case which related to: (a) The fact that the defendant was indemnified against damage by an insurance company; and (b) the fact that the plaintiff in this action sought to recover in her statement of claim the sum of \$20,000.

[1] The action was based upon the alleged negligence of the defendant's chauffeur in operating an automobile in such manner that a carriage containing the plaintiff was struck and overturned and the plaintiff injured. In opening for the defense in accordance with the practice in this court, after counsel for plaintiff had outlined his case to the jury, counsel for defendant stated to the jury that the defendant denied *inter alia* that the automobile in which the defendant was riding was owned by him, and that the chauffeur was employed by him. This statement made it necessary for the plaintiff to show that the defendant was owner of the automobile or had such control of it as to make him liable for the acts of the chauffeur. The plaintiff, when questioned by her counsel as to statements made by the defendant immediately after the accident, testified as follows:

"Q. Did he at any time say anything to you about your damages, your being compensated for it? A. Never to me. He said at the time if the insurance company did not make good Mrs. Baird's carriage he would, the damages to the carriage. He said at the time if the insurance company did not make good the damages to Mrs. Baird's carriage that he would. He said that the day of the accident."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

No objection to this testimony was made by defendant's counsel. Subsequently Mr. Steiner, one of counsel for the plaintiff, took the stand, and upon being questioned as to a conversation had with the defendant at an interview concerning the accident, at which Mr. Steiner wrote down what the defendant said, testified upon examination by plaintiff's counsel as follows:

"I said, 'I would like to make a statement of what you told me.' I wrote it down, what he told me.

"Q. In his presence? A. The answers to my questions.

"Q. In his presence? A. In his presence, yes. When I had written it, I read it to him, and asked him, 'Now, is that correct?' He said, 'Yes.' I said, 'Now, Mr. Vaughan'—

"Q. You wrote on that paper? A. Yes, I had the paper there in my hand that it was written on at that time. I said, 'Mr. Vaughan, I don't want to press you for your signature.' I recognized that Mr. Vaughan seemed to be a very substantial man. I said, 'I don't want to press you for your signature, but I would like to have this paper signed.' He said, 'Well, I don't want to sign that statement because I don't know what effect it might have on my relations with the insurance company that covers me in this case.' I said, 'If you feel you don't want to sign it, of course I won't urge it; but I feel confident you are a man—"

Counsel for defendant then objected and moved to withdraw a juror. The evidence was admitted and the motion overruled. As eventually transpired in the case, it appeared that the defendant was not the owner of the automobile, but that it belonged to his brother, who was in Europe, and he (the defendant), with his brother's permission, was using it for his own business and pleasure, and the chauffeur, who was employed by the brother, was under his direction and control and employed in operating the automobile for him. Under these circumstances, the evidence was clearly admissible as a declaration against interest from which the jury might draw an inference of ownership or of such control over the automobile as would place a liability upon the defendant from which he had protected himself by insurance. As the evidence was admissible for that purpose, the fact that it might be inadmissible on other grounds and tend to prejudice the minds of the jury in arriving at a verdict is not sufficient reason for excluding it.

[2] The second ground is as to the reference that the plaintiff sought to recover in her statement of claim the sum of \$20,000. If the question were not proper on cross-examination and it appeared that the defendant had been prejudiced thereby, I think, under the decisions, the motion should be granted. During the examination of the defendant, however, he persistently disclaimed any responsibility for the accident and denied that he had ever in any way admitted liability, and denied that the plaintiff considered him responsible for her injuries, as she had never made any claim against him. Upon cross-examination, after persistently testifying that there was nothing said to him about being responsible and that the plaintiff made no claim at all against him, he testified as follows:

"A. I know I had an accident. I presume they looked to me for the consequences. I know I was willing to do anything I could, and told them so at the time. I did all that I could for them.

"Q. We do not think so. That is the reason this suit is here. A. I have done all I could.

"Q. You never gave them a dollar? A. I have never been asked for a dollar."

In this stage of the testimony by the defendant, plaintiff's counsel asked the question which is now considered objectionable; the examination being as follows:

"Q. You were sued for \$20,000 in this suit. Have you any doubt about that? Where is the complaint? A. Nobody has asked me for it. * * *

"Q. You know you were sued by Miss Magee for \$20,000? A. Yes.

"Q. You know the papers in that suit were brought against you? A. Yes, sir.

"Q. They were served on you, rather? The papers in that suit were served on you personally? A. Yes, sir."

It was apparent that the defendant was endeavoring to impress the jury with what he had stated as being the fact, namely, that no demand was ever made upon him, and the questions would have been entirely admissible upon cross-examination as going to the veracity of the witness, if counsel for the plaintiff had not included in his question the amount of damages demanded in the statement of claim. The question, therefore, is whether the defendant was prejudiced by having the jury know that he was being sued for \$20,000. In view of the verdict, I do not consider that they were in any way affected as to amount by this evidence. The court was careful to instruct that they must not take into consideration the fact that the defendant was insured, and they must not be influenced by the amount of damages claimed in plaintiff's statement, but must base their finding entirely upon the evidence.

[3] The plaintiff was an unmarried woman 49 years of age, of refinement and intelligence, physically vigorous, and with a fondness for outdoor exercise, and accustomed prior to the accident to long walks and golf for recreation. The evidence shows that her knees were injured by the accident; that she had been confined to her bed for some weeks; that she had been obliged to use a crutch, and finally a cane; and that the use of her legs was impaired to such extent that, while able to walk about, she did so with considerable difficulty. There was the usual difference of opinion between the medical experts for the plaintiff and those for the defendant, but it was apparent that the effect of the injuries remained at the time of the trial, and there was ample evidence to support the conclusion that they would continue with a woman of the plaintiff's age for a considerable time in the future even if they were not permanent. Under these conditions, the compensation awarded to the plaintiff [\$3,625], which included her expenses for medical attendance and nursing, cannot be said to be excessive, nor to indicate that the jurors were in any manner influenced by the fact that they knew that she was claiming \$20,000 damages. That there would be a verdict for the plaintiff in some amount was justified and almost inevitable under the evidence, so that it is apparent that the fact that there was a verdict for the plaintiff was not in any way influenced by the introduction of evidence as to either of the alleged objectionable grounds.

The motion for a new trial is denied.

Ex parte JOYCE.

PROUT v. BILLINGS.

(District Court, D. Massachusetts. July 14, 1913.)

No. 759.

1. ALIENS (§ 54*)—EXCLUSION OF IMMIGRANTS—REVIEW BY HABEAS CORPUS.

The courts have no jurisdiction to review the action of the immigration authorities in rejecting an alien, unless he has been denied a fair hearing by such authorities.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

2. ALIENS (§ 54*)—EXCLUSION OF IMMIGRANTS—REVIEW BY HABEAS CORPUS.

Under Immigration Act Feb. 20, 1907, c. 1134, § 10, 34 Stat. 901 (U. S. Comp. St. Supp. 1911, p. 505), providing that the decision of the board of special inquiry based upon a certificate of the examining medical officer shall be final as to the rejection of aliens affected with tuberculosis or other mental or physical disabilities, the fact that cogent evidence was not submitted to the board, that its decision was believed to be erroneous, or that its rulings transgressed the ordinary rules of evidence as applied in the courts, did not justify an application to the District Court to retry the case upon habeas corpus proceedings, as it must appear that the hearing was essentially unfair, or that it violated some fundamental principal of law, without the observance of which no just determination of the question at issue was possible.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

3. ALIENS (§ 42*)—EXCLUSION OF IMMIGRANTS—MEDICAL BOARD—DISQUALIFICATION.

A medical inspector, who examined an alien in the first instance and certified that she was feeble-minded, was not thereby disqualified from sitting as a member of the medical board, as that board is not an appellate tribunal to correct the errors of the medical inspector, but merely furnishes information to the board of special inquiry, which is to decide the case.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 101; Dec. Dig. § 42.*]

4. ALIENS (§ 44*)—EXCLUSION OF IMMIGRANTS—POWER OF BOARD OF SPECIAL INQUIRY.

A board of special inquiry in admitting or rejecting an alien is not bound by the opinion of the medical board, and in reaching a decision should consider all the evidence brought to its attention.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 102-104; Dec. Dig. § 44.*]

5. ALIENS (§ 54*)—EXCLUSION OF IMMIGRANTS—POWER OF BOARD OF SPECIAL INQUIRY.

The hearing before a board of special inquiry, which rejected an alien was not so manifestly unfair as to justify a review of the board's action on habeas corpus, because the members of the medical board who certified that she was feeble-minded were unable to converse with her on account of her ignorance of the English language, or because one of such members was the medical inspector who examined her in the first instance and certified that she was feeble-minded.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

6. ALIENS (§ 44*)—EXCLUSION OF IMMIGRANTS—POWER OF BOARD OF SPECIAL INQUIRY.

A board of special inquiry may, in rejecting an alien, rely solely on the medical report and certificate if it chooses to do so; but, if it so relies, because it feels obliged to follow such report without considering other evidence, it commits an error of law of such a fundamental character that its decision is unfair to the alien and ought not to stand.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 102-104; Dec. Dig. § 44.*]

7. ALIENS (§ 54*)—EXCLUSION OF IMMIGRANTS—POWER OF BOARD OF SPECIAL INQUIRY.

An alien who has been excluded by a board of special inquiry under a fundamentally erroneous view of the law has not had a fair hearing and may be reheard on habeas corpus.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 112; Dec. Dig. § 54.*]

8. ALIENS (§ 54*)—EXCLUSION OF IMMIGRANTS—POWER OF BOARD OF SPECIAL INQUIRY.

An alien petitioning for a writ of habeas corpus is bound to show that the hearing before the immigration authorities, by whom she was rejected, was not fair, and this burden was not met, where the record and evidence left it uncertain whether the board of special inquiry excluded her because it understood that the law required it to do so on account of the medical certificate, or because, after considering all the evidence and exercising its own judgment, it concluded that she was feeble-minded.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 112; Dec. Dig. § 54.*]

Petition for a writ of habeas corpus on behalf of Nora Joyce, by one Prout against George B. Billings. Petition denied without prejudice.

See, also, 212 Fed. 285.

William C. Prout, of Boston, Mass., for petitioner.

William H. Garland, Asst. U. S. Atty., of Boston, Mass., for respondent.

MORTON, District Judge. This is a petition for a writ of habeas corpus on behalf of Nora Joyce, an alien immigrant who is detained by the immigration officials at the Port of Boston for deportation.

[1, 2] Of course, this court has no jurisdiction of the matter unless the alien has been denied a fair hearing by the immigration authorities. *Low Wah Suey v. Backus*, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165. All questions which arise in immigration cases must be tried out before the immigration tribunals. The fact that cogent evidence was not submitted to them, or that their decision is believed to be erroneous, is no ground for an application to this court to retry the case upon habeas corpus proceedings. The decision of the board of special inquiry is final in this class of cases. Immigration Act, § 10.

The petitioner does not complain of the conduct of the board of special inquiry by which she has been excluded, except that it based its final action solely upon a medical certificate which she says was unfairly made for the following reasons: First, that Dr. Safford, who had examined her in the first instance and certified that she was feeble-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mind, sat as a member of the medical board which made said certificate; and, second, that Dr. Safford in his original certificate, and the medical board in its certificate, found her to be feeble-minded without, as she now contends, being able to converse with her, on account of her ignorance of the English language, sufficiently to make a fair determination of her mental ability.

[3, 4] The tribunal by which the right of an alien to enter is to be determined is the board of special inquiry. As I understand the act, the medical board is not an appellate tribunal to correct the errors of the medical inspector; its members are merely called upon to furnish information to the board of special inquiry which is to decide the case, their opinion, as contained in their required certificate, or as given orally at the hearing, is evidence to be considered by the board of special inquiry. The board of special inquiry is not bound by the opinion of the medical board, and ought, in reaching a decision, to consider all evidence which is brought to its attention. If this be a correct view of the law, the fact that Dr. Safford had already expressed an opinion did not disqualify him from acting as a member of the medical board. *U. S. ex rel. Pazos v. Redfern* (C. C.) 180 Fed. 500, does not apply.

It is not sufficient to justify the interference of this court that the rulings of the board of special inquiry transgressed the ordinary rules of evidence as applied in courts of law. It must appear that the hearing was essentially unfair, or that it violated some fundamental principle of law without the observance of which no just determination of the question at issue was possible. When such facts do appear, this court will not hesitate to interpose to protect the person wronged; and it seems to me that, in view of the extreme importance of the decisions of immigration tribunals to the individuals affected thereby, the courts ought to interpose more readily than would otherwise be the case when any real unfairness is shown.

[5] The facts that Dr. Safford had previously examined the alien and stated that she was feeble-minded, and that the medical board of which he was a member certified that she was feeble-minded without being able to converse with her, might affect the weight of the evidence, but would hardly render it inadmissible. It may be that a mere inspection of the applicant disclosed that she had not normal intelligence. I certainly cannot say that the hearing was "manifestly unfair" (*U. S. ex rel. Rosen v. Williams*, *infra*) because this evidence was received.

[6, 7] The doubt about the case arises from the fact that, as stated in the answer, "said decision (of the board of special inquiry) was based *solely* upon the report and certification of a duly constituted medical board which was then and there convened to rehear and examine the said Nora Joyce." If this means that the board of special inquiry *chose* to rely "solely upon the (medical) report and certificate," no legal error has been made; if it means that the board *felt obliged* to follow the medical report, without considering any other evidence upon the alien's mental condition, an error in law of such a fundamental character has been made that the decision based upon it was

unfair to the applicant and ought not to stand. An applicant who has been excluded by a board of special inquiry under an erroneous view of the law has not had a fair hearing and may be reheard on habeas corpus proceedings. *Gonzales v. Williams*, 192 U. S. 1, 24 Sup. Ct. 171, 48 L. Ed. 317; *U. S. ex rel. Mylius v. Uhl* (D. C.) 203 Fed. 152; *U. S. ex rel. Castro v. Williams* (D. C.) 203 Fed. 155; *U. S. ex rel. Rosen v. Williams*, 200 Fed. 541, 118 C. C. A. 632.

[8] Upon the record and evidence here, it is uncertain whether the board of special inquiry excluded the petitioner because it understood the law to be that it must do so on account of the medical certificate, or whether it excluded her because, after considering all the evidence and exercising its own judgment, it concluded that she was feeble-minded. It devolves upon the petitioner to establish that the hearing before the immigration authorities was not a fair one. She has not done so; and the petition must therefore be denied, but without costs and without prejudice to her right to bring a new petition if she expects to establish that the immigration authorities acted under such a mistake of law as has been referred to.

Ex parte JOYCE.

(District Court, D. Massachusetts. August 12, 1913.)

No. 769.

1. ALIENS (§ 54*)—DETENTION AND RETURN OF IMMIGRANTS.

Under Immigration Act Feb. 20, 1907, c. 1134, § 24, 34 Stat. 906 (U. S. Comp. St. Supp. 1911, p. 513), providing for the detention of aliens for examination by a board of special inquiry, section 25, authorizing such board to determine whether an alien shall be allowed to land or be deported and providing that the decision of the appropriate immigration officers, if adverse to the alien's admission, shall be final, section 10, providing that the decision of the board based upon the certificate of the examining medical officer shall be final as to rejection for feeble-mindedness, and section 17, providing for a medical examination by medical officers of the public health and marine hospital service, who shall certify for the information of the immigration officers and boards of special inquiry any physical and mental defects or diseases observed in any such alien, the final decision upon applications of aliens for admission rests with the board of special inquiry subject to appeal where an appeal is allowed, and the board is not bound to act in accordance with the medical certificate, and hence it was fundamental error to exclude other evidence, and a fair hearing had not been had.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 112; Dec. Dig. § 54.*]

2. HABEAS CORPUS (§ 110*)—DETENTION OF IMMIGRANTS—BAIL.

Where a writ of habeas corpus has been issued and served, and an alien denied admission by the immigration officers is in the custody of the court for rehearing of the case, she may be admitted to bail.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 99; Dec. Dig. § 110.*]

Petition for writ of habeas corpus by W. C. Prout on behalf of Nora Joyce. Writ issued.

See, also, 212 Fed. 282.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

William C. Prout, of Boston, Mass., for petitioner.

William H. Garland, Asst. U. S. Atty., of Boston, Mass., for respondent.

MORTON, District Judge. This case was heard upon the petition, answer, statement of agreed facts, and certain rules for the guidance of medical inspectors which were put in evidence.

[1] It appears to be the established practice of the immigration authorities for a case to be reheard, when occasion requires, by successive boards of special inquiry. The later boards apparently rehear and determine such cases on the merits. The decisions of the preceding boards, either are not considered as final adjudications of the matter, or are regarded as having been set aside by the convening of the later board to hear the case. There is no controversy but that the final determination of Nora Joyce's application for admission was made by the second board of special inquiry, which acted upon the certificate of the medical board, under the belief that the findings in the certificate were conclusive, and that no other evidence upon the alien's mental condition could be received. Taking this view of the law, the immigration authorities denied the alien's request to permit a medical examination by outside physicians, at her expense, and prevented her from obtaining and submitting such evidence to the board of special inquiry which finally decided her case. A prior petition for a writ of habeas corpus was filed on behalf of this alien, and was dismissed without prejudice for the reasons stated in the opinion therein.

The Immigration Act provides (section 24) that every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry. Section 25 further provides that:

"Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported, * * * and the decision of any two members of a board shall prevail, * * * the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final. * * *"

By section 10 of the act, the decision of the board of special inquiry, "based upon the certificate of the examining medical officer, shall be final as to the rejection of aliens afflicted with" feeble-mindedness. The medical examination of arriving aliens is provided for in section 17 of the act. It is to be made by medical officers of the United States Public Health and Marine Hospital Service, "who shall certify for the information of the immigration officers and the boards of special inquiry hereinafter provided for, any and all physical and mental defects or diseases observed by said medical officers in any such alien." The United States Public Health and Marine Hospital Service is to be reimbursed by the immigration service for "all expenditures incurred in carrying out the medical inspection of aliens."

These sections, it seems to me, leave the final decision upon applications of aliens for admission with the boards of special inquiry,

subject to appeal in cases where an appeal is allowed by the act. In this case, the exclusion having been based upon a medical certificate, and upon the ground of mental disability, the decision of the board of special inquiry was final.

For the reasons above given, and those stated in my opinion on the first petition in behalf of this immigrant, it seems to me that the board of special inquiry made an error of law in assuming that it was bound to act in accordance with the medical certificate. There can be no doubt that the error of law was fundamental. It led the immigration authorities to refuse the alien's request for an opportunity to obtain evidence in her behalf, and to refrain from making any independent decision of the case. I therefore find and rule that there has not been a fair hearing of the matter before the immigration authorities, that the petition for a writ of habeas corpus must be allowed, and the writ must issue.

[2] After the writ has been issued and served and Joyce is in the custody of this court for a rehearing of the case, in accordance with the decision in *Chin Yow v. U. S.*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369, she may be admitted to bail in the sum of \$500, and the case itself may go on the list for September 8th for a hearing on the merits. At that time I will hear and determine the question whether she is entitled to admission.

THE EDWARD R. WEST.

(District Court, W. D. Washington, S. D. February 23, 1914.)

No. 859.

1. SEAMEN (§ 10*)—PROVISIONS—SHORTAGE.

Seamen *held* entitled to an allowance for shortage of provisions furnished on a voyage from Callao, Peru, to Grays Harbor, below the quantities specified in Rev. St. § 4612 (U. S. Comp. St. 1901, p. 3120).

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 34-38; Dec. Dig. § 10.*]

2. SEAMEN (§ 10*)—PROVISIONS—ALLOWANCE FOR SHORTAGE.

The provision of Rev. St. § 4568 (U. S. Comp. St. 1901, p. 3099), that, if the allowance of any of the provisions to which any seaman is entitled under section 4612 (U. S. Comp. St. 1901, p. 3120) is reduced by any quantity not exceeding one-third of the quantity specified, he shall be entitled to receive as compensation a sum not exceeding 50 cents per day, but, if the reduction is of more than one-third, he may be allowed \$1 per day, applies to a shortage in any separate article of food specified, and not to a reduction of less or more than one-third of the entire quantity.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 34-38; Dec. Dig. § 10.*]

In Admiralty. Suit by Fred Benson, Harry W. Morse, Edward Jones, Wallace Stanners, and Charles Peterson against the schooner *Edward R. West*; the *Slade Shipping Company*, claimant. Decree for libelants.

Stewart & Tucker, of Aberdeen, Wash., for libelants.

Bridges & Bruener, of Aberdeen, Wash., for claimant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CUSHMAN, District Judge. [1] Libelants complain that, while seamen on the schooner Edward R. West, an American vessel, for the entire voyage of 63 days from Callao, Peru, to Grays Harbor, they were not furnished food of the proper quality or quantity, as provided in section 4612 (Federal Stat. Ann. vol. 6, p. 930 et seq. [U. S. Comp. St. 1901, p. 3120]), though they demanded of the master the regular schedule of provisions; that the allowance was reduced by more than one-third; and that proper substitutes were not furnished. Suit is brought under section 4568, R. S. (Fed. Stat. Ann. vol. 6, p. 893 [U. S. Comp. St. 1901, p. 3099]). These sections provide:

Scale of provisions to be allowed and served out to the crew during the voyage:

Article	Totals for Week	Article	Totals for Week
Water	28 Qts.	Rice	$\frac{3}{8}$ Pts.
Biscuit	$3\frac{1}{2}$ Lbs.	Coffee (green berry)	$5\frac{1}{4}$ Oz.
Beef, salt	$3\frac{3}{4}$ Lbs.	Tea	$\frac{7}{8}$ Oz.
Pork, salt	3 Lbs.	Sugar	21 Oz.
Flour	$1\frac{1}{2}$ Lbs.	Molasses	$1\frac{1}{2}$ Pts.
Canned meat	2 Lbs.	Dried fruit	9 Oz.
Fresh bread (daily)	$1\frac{1}{2}$ Lbs.	Pickles	$\frac{3}{4}$ Pts.
Fish, dry, preserved		Vinegar	1 Pt.
or fresh	1 Lbs.	Cornmeal	8 Oz.
Potatoes or yams	7 Lbs.	Onions	12 Oz.
Canned tomatoes	1 Lbs.	Lard	7 Oz.
Peas	$\frac{2}{3}$ Pts.	Butter	7 Oz.
Beans	$\frac{2}{3}$ Pts.	Mustard, pepper and salt sufficient for seasoning	

Substitutes.

One pound of flour daily may be substituted for the daily ration of biscuit or fresh bread; two ounces of desiccated vegetables for one pound of potatoes or yams; six ounces of hominy, oatmeal, or cracked wheat, or two ounces of tapioca, for six ounces of rice; six ounces of canned vegetables for one-half pound of canned tomatoes; one-eighth of an ounce of tea for three-fourths of an ounce of coffee; three-fourths of an ounce of coffee for one-eighth of an ounce of tea; six ounces of canned fruit for three ounces of dried fruit; one-half ounce of lime juice for the daily ration of vinegar; four ounces of oatmeal or cracked wheat for one-half pint of cornmeal; two ounces of pickled onions for four ounces of fresh onions.

When the vessel is in port and it is possible to obtain the same, one and one-half pounds fresh meat shall be substituted for the daily rations of salt and canned meat; one-half pound of green cabbage for one ration of canned tomatoes; one-half pound of fresh fruit for one ration of dried fruit. Fresh fruit and vegetables shall be served while in port if obtainable. The seamen shall have the option of accepting the fare the master may provide, but the right at any time to demand the foregoing scale of provisions. Section 4612, pp. 932 and 933, vol. 6, Fed. Stat. Ann.

If, during a voyage, the allowance of any of the provisions which any seaman is entitled to under section forty-six hundred and twelve of the Revised Statutes is reduced except for any time during which such seaman willfully and without sufficient cause refuses or neglects to perform his duty, or is lawfully under confinement for misconduct either on board or on shore; or if it shall be shown that any of such provisions are, or have been during the voyage, bad in quality or unfit for use, the seamen shall receive, by way of compensation for such reduction or bad quality, according to the time of its continuance, the following sums, to be paid to him in addition to and to be recoverable as wages:

First. If his allowance is reduced by any quantity not exceeding one-third of the quantity specified by law, a sum not exceeding fifty cents a day.

Second. If his allowance is reduced by more than one-third of such quantity, a sum not exceeding one dollar a day.

Third. In respect of bad quality, a sum not exceeding one dollar a day.

But if it is shown to the satisfaction of the court before which the case is tried that any provisions, the allowance of which has been reduced, could not be procured or supplied in sufficient quantities, or were unavoidably injured or lost, or if by reason of its innate qualities any article becomes unfit for use and that proper and equivalent substitutes were supplied in lieu thereof, the court shall take such circumstances into consideration and shall modify or refuse compensation, as the justice of the case may require. Section 4568, R. S. p. 893.

Libelants rely upon the following cases: *Schooner Thompson v. Martin* (1900) 16 App. Cas. (D. C.) 222; *The Rence* (D. C.) 46 Fed. 805; *United States v. Reed* (C. C.) 86 Fed. 308; *Petersen v. Cunningham Co.* (1896 D. C.) 77 Fed. 211; *Hill v. The Triumph*, Fed. Cas. No. 6500.

In addition to certain cases cited by libelants, respondent cites *The Ship Elizabeth v. Rickers*, 2 Paine, 291, Fed. Cas. No. 4353.

Respondent admits that for the last 21 days of the voyage no butter was served libelants. It is admitted, also, that, during, but not for the entire, 21 days, there was a shortage of sugar, potatoes, and onions.

The evidence is very conflicting and, on the part of libelants, exaggerated. There is no fair preponderance of the evidence to show a shortage for a greater length of time than 21 days. There is no evidence to bring the respondent within any of the exceptions—either excusing provisioning the ship with the required food, or furnishing the seamen with the same. Though there was, undoubtedly, complaint made by the seamen concerning the character of the food served, it is concluded that it was not of poor quality.

The language of the statute, "bad in quality or unfit for use," clearly contemplates something more than poor cooking or seasoning of good food. Food of good quality might be rendered unfit for use in many ways. Hence the use of the latter expression; but its use, coupled with the first condition described—"bad in quality"—shows the degree of badness of quality intended to have been such as to unfit for use.

The evidence shows a demand upon the master early during the voyage for the statutory scale of provisions. For the shortage, no proper substitutes were furnished.

The case of *The Ship Elizabeth v. Rickers*, 8 Fed. Cas. 470, No. 4353, relied upon by respondent, is in no way at variance with the conclusion reached. The court there had before it a different statute—the Act of July 20, 1790—which provided that, on a voyage across the Atlantic, on leaving the last port, the master should have on board 60 gallons of water; 100 pounds of salted flesh meat; 100 pounds of wholesome ship bread for each person on board; and, in case the crew of any ship not so provided was put on short allowance, the master or owner of such ship should pay to each of the crew one

day's wages beyond the wages agreed upon for each day that they should be put upon short allowance.

United States v. Reed (C. C.) 86 Fed. 308, was a cause upon indictment of the master for the recovery by the government of a penalty, under section 5347, for withholding suitable food and nourishment from the crew.

The Rence (D. C.) 46 Fed. 805, was a suit for damages resulting from the failure to comply with section 4569. The language of these statutes is dissimilar to that of the one here involved. *Petersen v. Cunningham*, 77 Fed. 211, is a case more nearly in point.

[2] The only remaining question in the case is whether an award should be made of 50 cents a day for each libellant, as provided, where the reduction does not exceed one-third of the statutory allowance, or whether \$1 a day should be allowed, as provided where the reduction does exceed one-third of such allowance.

If the statutory provision concerning one-third of the allowance contemplates the total amount of provisions to be furnished, the reduction in the present case would not exceed it. If it contemplates a shortage of the allowance of a single article of provision, for which no substitute is provided, the shortage did exceed it.

It is concluded that the separate articles of provision are contemplated, and not the total amount. That this is the meaning of the statute is not only to be gathered from the reading of section 4568, which provides, "If * * * the allowance of any of the provisions * * * is reduced * * * the seamen shall receive, by way of compensation," etc.; but the difficulty of determining the relative quantity of provisions furnished—where part of the required schedule is to be measured by weight, as meat and bread, and part by quantity, as rice, molasses, and pickles—points to the same conclusion. Further, the resultant hardship might be much greater if the total deprivation was of one article, as water or flour, though less than one-third of the total allowance, than that caused by withholding more than one-third of the allowance, if the deduction were somewhere near evenly distributed throughout the entire list.

Each of the libellants is awarded \$1 per day for the 21 days of shortage established, with costs.

ARNOLD et al. v. NESS.

(District Court, D. Oregon. March 23, 1914.)

No. 6025.

1. PROCESS (§ 149*)—EVIDENCE AS TO SERVICE—WEIGHT AND SUFFICIENCY.

In an action to cancel a sheriff's deed as a cloud on the title, evidence held sufficient to show service of summons on the defendant in the action in which the land was sold under execution.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. §§ 202–205; Dec. Dig. § 149.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. EXECUTION (§ 251*)—SALE—OPENING OR VACATING—FRAUD.

At an execution sale a tract of timber land divided into four lots and worth at least \$3,500 was sold as a whole, though L. O. L. § 238, requires real property consisting of several known lots or parcels to be sold separately or otherwise as is likely to bring the highest price. It was purchased on behalf of the execution creditor's attorney, with money furnished by him, by a person who subsequently deeded it to him, for \$142.30, the amount necessary to satisfy the judgment and another judgment, as he had previously ascertained from the sheriff by direction of the attorney. The sheriff's deed was issued 17 months after the sale and not promptly recorded, and the deed from the bidder to the attorney was not recorded. Purchasers from the execution debtor were permitted to pay the taxes for several years without any notice that the attorney claimed to be the owner. *Held*, that there was such fraud on the part of the attorney in not directing the sheriff to sell but one lot and in concealing his identity in the transaction, evincing a purpose to obtain the entire tract for a nominal sum, as justified the setting aside of the sheriff's deed.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 708-716; Dec. Dig. § 251.*]

3. EXECUTION (§ 228*)—SALE—PERSONS WHO MAY PURCHASE.

The attorney for execution creditors is not inhibited from purchasing at the sheriff's sale; but, being an officer of the court, when his acts are questioned, he must show that they were fair and bona fide.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 642-647; Dec. Dig. § 228.*]

4. EXECUTION (§ 251*)—SALE—OPENING OR VACATING—INADEQUACY OF PRICE.

While inadequacy of price alone does not justify the setting aside of a judicial sale, if it is great or such as to shock the conscience, slight circumstances impeaching the fairness of the transaction will justify setting it aside.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 708-716; Dec. Dig. § 251.*]

5. EXECUTION (§ 242*)—SALE—CONFIRMATION—CONCLUSIVENESS.

The statute of Oregon, providing that an order confirming a judicial sale shall be a conclusive determination of the regularity of the proceedings in any other action, suit, or proceeding, does not cover a case of fraud unknown and undiscovered by an execution debtor who had constructive notice only of the sale and confirmation.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 669-672; Dec. Dig. § 242.*]

6. EXECUTION (§ 242*)—STATUTORY PROVISIONS.

Laws Or. 1913, p. 752, § 2, providing that all judicial sales of land heretofore made to satisfy judgments shall be valid and sufficient to sustain the sheriff's deed if the money shall have been paid and the sale confirmed by the court, was not intended to cover a case of palpable fraud attending an execution sale.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 669-672; Dec. Dig. § 242.*]

7. EXECUTION (§ 255*)—SALE—VACATING—CONDITIONS.

The setting aside of a sheriff's deed at an execution sale as a cloud on the title would be conditioned upon the repayment of the bid and of taxes paid by the purchaser with interest.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 255.*]

In Equity. Suit by B. F. Arnold and another against S. P. Ness. Decree for complainants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

A. A. Hull, of Chehalis, Wash., H. W. Thompson and C. A. Hardy, both of Eugene, Or., and Reed & Bell, of Portland, Or., for complainants.

G. F. Skipworth and Jay L. Lewis, of Eugene, Or., and Geo. A. Pipes, of Portland, Or., for defendant.

WOLVERTON, District Judge. This is a suit to remove cloud from title to land described as the north half of the north half (being lots 1, 2, 3, and 4) of section 2, township 16 south, range 8 west, W. M.

The complainants deraign their title through John G. Curry from the United States. The defendant claims title through Curry by sheriff's deed to one Peder Ophus, and by deed from Ophus. Curry's patent bears date September 4, 1907, and was recorded in Lane county November 13, 1907; the land being situated in that county.

On May 23, 1905, the defendant, as attorney for Carrie Olson, obtained a judgment in the justice's court, in her favor and against John G. Curry and Eva Curry, his wife, for the sum of \$20.20 and costs taxed at \$3.90. A transcript of this judgment was certified, filed, and docketed, in the circuit court docket for Lane county, September 5, 1907. In the meantime, to wit, on September 24, 1906, the First National Bank of Eugene City recovered a judgment against J. G. Curry, in the county court in and for Lane county, Or., for the sum of \$66.66, with costs and disbursements, and it was further adjudged that the property attached, being the lands in controversy, be sold and the proceeds of sale applied to the payment of such judgment. A writ of execution was issued on the Olson judgment September 6, 1907, and the lands hereinbefore described were sold on October 21, 1907, in one parcel at sheriff's sale to Peder Ophus for the sum of \$142.30. An execution having also issued on the First National Bank judgment, the sheriff made return that he applied such proceeds of sale as follows:

To the Olson execution in full.....	\$ 28 15
Printer's fees.....	18 90
To the First National Bank execution.....	95 25

\$142 30

The sale was in due time confirmed by the circuit court, and the sheriff directed to execute a deed to the purchaser. This deed was executed March 23d, and recorded in Lane county records March 31, 1909.

These facts are established by record evidence introduced at the trial. Further testimony was adduced, and but two questions vital to the cause are presented for decision: First, whether the defendant J. G. Curry was served with summons in the Olson case in the justice's court; and, second, whether the sheriff's sale was accompanied with such fraud on the part of Ness as to invalidate the same.

[1] As it relates to the first question, J. G. Curry, defendant in the justice's action, testifies that no service of the summons was ever made upon him. He is unequivocal and very positive about it. On

the other hand, Ness, the defendant herein, who was the attorney for Carrie Olson, testifies that he witnessed the fact of service by the constable upon Curry, and relates that it was made in the anteroom to the Oddfellows Lodge, and that he (Ness) called Curry out of the lodgeroom, knowing the officer to be there, for the very purpose of having him make the service. The return of the constable shows that he received the summons on the 16th day of May, 1905, and on the same date served it upon John G. Curry and his wife, Eva Curry. This is practically all the testimony that was adduced material to the fact of service.

Considering the return of the officer in connection with the testimony of Ness that he saw the summons served, the weight would appear to be in favor of service. This testimony stands against the testimony of Curry denying the fact, and I am satisfied that due service was made as shown by the return of the officer.

[2] As to the sheriff's sale, the defendant Ness testifies that he was not present thereat, but that he directed Ophus to get figures from the sheriff respecting the amount to be bid for the property. This Ophus did, and the property was bid in at the sum of \$142.30. It further appears from the testimony of both Ness and Ophus that the property was in reality bid in for Ness, and with money supplied by him. The sheriff's deed was issued more than a year after the sale by five months, and was not promptly recorded. Ophus deeded the property to Ness. This deed is not in evidence, and the date thereof is uncertain; but all this was in pursuance, no doubt, of Ness's plan, first to have the property bid in in the name of Ophus, but for himself, and then to have Ophus deed to him. The Ophus deed has never been placed on file. In the meantime Ness has suffered the present owners of the land to pay the taxes thereon for the years 1908, 1909, and 1910, without notification or warning to them that he himself claimed to be the owner.

At the time the property was sold at sheriff's sale, Ness admits that it was worth \$1,500 to \$2,000. But it had a much greater value. Curry sold to the plaintiffs in this suit November 5, 1907, being not far from the time that execution was issued, for \$5,000, and the property is now worth a sum much in excess of that. I think there can be no question that at the time of the sheriff's sale it was worth from \$3,500 to \$5,000.

Now, the question arises under this state of facts whether Ness has been guilty of such fraud as that this sale should be vacated, and the deed thereunder declared to be illegal and void.

[3] An attorney is not inhibited from bidding in property at sheriff's sale where he is acting on behalf of the execution creditors; but, being an officer of the court, when his acts are questioned, it becomes incumbent upon him to show that they were fair and bona fide.

[4] It is furthermore a rule that inadequacy of price alone is not sufficient to justify the setting aside of a judicial sale; but it has been held that, where the inadequacy is great or such as to shock the conscience, the court will not be slow to seize upon other circumstances impeaching the fairness of the transaction as a cause for

vacating the sale. *Schroeder v. Young*, 161 U. S. 334, 337, 16 Sup. Ct. 512, 40 L. Ed. 721. So it was said in the case of *Roger v. Whitham*, 56 Wash. 190, 193, 105 Pac. 628, 629 (134 Am. St. Rep. 1105, 21 Ann. Cas. 272):

"While it is a primary rule that mere inadequacy of price, unless so gross as to shock the conscience, is not enough to set aside a judicial sale, it is also true that, when there is a great inadequacy, slight circumstances indicating unfairness will be sufficient to justify a decree setting the sale aside."

The statutes of Oregon require that real property, consisting of several known lots or parcels, shall be sold separately or otherwise as is likely to bring the highest price. Section 238, L. O. L.

The property here in controversy consists of timber land, and was divided into lots and described as such, four of them, each containing about the same area, all probably of about equal value, and each worth from six to nine times more than was bid for the whole at the sheriff's sale, and from 35 to 50 times more than was sufficient to satisfy the writ by virtue of which the sale was made. There is no possible excuse compatible with good conscience and fair dealing for offering the whole of these premises to satisfy so small a claim. Undoubtedly Ness knew what the sheriff was going to do, for he advised Ophus to bid the amount that the sheriff would give him, and the amount given was just sufficient to cover the two judgments with costs and accruing costs. Having control of the writ, Ness could have as readily directed the sheriff to sell but one lot to satisfy the writ, as to have allowed him to sell the whole. Furthermore, the fact that Ness covered his identity in the transaction by having Ophus bid the land in the latter's name for him, and the failure to record the Ophus deed, evinces a purpose of eventually obtaining this entire tract for the almost nominal sum bid for it. The case is of marked analogy to *Taylor Investment Co. v. Deatsman*, 64 Or. 384, 130 Pac. 740, recently decided by the Supreme Court of this state. That was a suit to set aside a decree and to annul a sheriff's deed in pursuance of such decree. The execution creditors directed the sheriff not to search for personal property, but to levy the writ in the first instance upon the realty of the judgment debtor. The method pursued was unhesitatingly declared to be a fraud, and it was held that a court of equity would interpose to set aside the sheriff's deed.

[5] It is urged, notwithstanding this condition of the record, that the confirmation of the sale by the circuit court precludes the defendant in the justice's action and those holding under him from further inquiry. The statute provides that:

"An order confirming a sale shall be a conclusive determination of the regularity of the proceedings concerning such sale, as to all persons, in any other action, suit, or proceeding whatever."

And it is under this statute that the defendant bases the contention. This statute has been many times applied in the courts of the state, but it was not intended to cover a case of fraud unknown and undiscovered by the execution debtor, and it is axiomatic that fraud will vitiate every transaction in which it enters as a material element. It is true that plaintiffs had constructive notice of the sale and con-

firmation, but they had no actual notice thereof, as is shown by the fact of their continuing to pay the taxes upon the premises, and clearly they had no notice of the fraud attending the sheriff's sale.

[6] Reliance is furthermore had upon the curative act of 1913 relating to judicial sales. 1913 Session Laws of Oregon, 752. But I cannot believe that it is the purpose or intendment of this act to cover a case of palpable fraud attending an execution sale.

I am firmly of the opinion that Ness was guilty of such fraud, taking into consideration the very small sum bid for this property, as to warrant a court of equity in setting aside the sheriff's deed under which he now claims. Such deed being a nullity, it follows that the deed of Ophus to Ness must also be set aside, and such will be the order of the court.

[7] It appears further that Ness has paid the taxes on this land for the years 1911 (\$27.93) and 1912 (\$43.23), and, having paid the sum bid therefor, it would seem to be equitable that the plaintiffs in this action should repay to Ness the amount of such taxes and the amount bid, with interest on such sums at 6 per cent. per annum from date of payment to this time. These deeds will therefore be set aside on condition that plaintiffs make such payment to the defendant, and plaintiffs will recover their costs and disbursements.

JOHNSON v. CLYDE S. S. CO. et al.

(District Court, E. D. New York. March 6, 1914.)

SEAMEN (§ 29*)—DEATH OF SEAMAN—NEGLIGENCE.

In a libel to recover compensation for the death of a seaman alleged to have been drowned by stepping into an open space between a barge and a wharf and falling into the water, as he was assisting in carrying timber from the barge to the wharf, evidence *held* insufficient to show negligence on the part of the steamship company by which decedent was employed.

[Ed. Note.—For other cases, see *Seamen*, Cent. Dig. §§ 186, 188-194; Dec. Dig. § 29.*]

In Admiralty. Libel by Olivia H. Johnson, as ancillary administratrix of Walter Johnson, deceased, against the Clyde Steamship Company and another. Dismissed.

Beals & Nicholson, of New York City (William J. Martin, of New York City, of counsel), for libellant.

Armstrong & Brown, of New York City (Pierre M. Brown, of New York City, of counsel), for respondents.

CHATFIELD, District Judge. The libellant is the mother and administratrix, etc., of one Walter Johnson, who was drowned on the morning of July 10, 1912, at pier 38, North river. Johnson lived in Baltimore with his mother, and was brought from Philadelphia, in company with other colored men, during the day of July 9th, to take the place of certain striking stevedores at the Mallory Line piers. The co-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

defendant, the Clyde Steamship Company, seems to have had nothing to do with the matter in any way, and as to this defendant the libel should be dismissed, but, under the circumstances, without costs. Johnson does not seem to have been acquainted with any of the colored men who came from Philadelphia in this party, except with a cousin, one Jones, who had been working with him in Philadelphia. Neither of these young colored men had any familiarity with boats or stevedoring, and, according to Jones' statement, were hired to work in handling freight with small trucks.

At pier 38, upon the night in question, the steamship Alamo of the Mallory Line was lying on the south side of the outer end of the pier, bow in, and with her forward discharging port or gangway near the end of the shed or covered structure upon the inner half of the pier. A second discharging gangway or cargo port toward the stern and near the outer end of the pier was also in use by the gang of stevedores, who were all taken to this pier from another pier of the Mallory Line, early in the evening of July 9th. These stevedores were carrying the cargo of the Alamo upon the open end of the pier, under the direction of two foremen, one of whom was inside the vessel, directing the work, at each end of the cargo space. A third foreman was superintending the piling of the cargo upon the dock. This cargo consisted of timbers of large lengths and sizes (dimension lumber) and of railroad ties from southern ports. The large sticks of timber required the services of several stevedores at each end of the timber, supporting it by a cross-piece, or in some instances rolling the back end of the timber when upon the dock by means of a hand truck. Each of the men in the gang was given a brass check with a number, and the record shows that the check given Johnson (No. 75) was not turned in by any of the other workmen, and Johnson is admitted to have disappeared before daybreak the following morning. A straw hat identified by the cousin, Jones, was found floating in the water upon the south side of the pier around 4 o'clock a. m., and some days afterwards the body was reported by the police, and sent by the Mallory Line to the mother in Baltimore.

The certainty of the death and the approximate time of the accident are therefore not in dispute. The manner or cause of death presents an issue of fact as to the allegation of negligence on the part of the steamship company. The witness Jones testified that one of the foremen (whom he later substantially identified as the outside foreman stevedore), finding that the gang contained more men than were necessary to bring the timbers from the hold of the vessel and pile them upon the dock, called some of the gang to one side and picked out Johnson and Jones, who were working together, and set them to work upon one of the lighters alongside the dock upon the north, carrying plank from the lighter to the dock. He describes these plank as being of considerable length, and indicates that they were some 10 or 12 inches in width and 2 or more inches thick. But he distinctly testifies that they were not railroad ties nor square timber, and that he saw no ties or large sticks of timber upon this lighter in the place where he was working. He testifies that a number of other stevedores were also taken by this foreman and put to work upon other lighters upon the north side of the pier, but further inshore. But his testimony about

what these men did and where they were working cannot be of great accuracy in any event, for Jones and Johnson, the decedent, had made but one trip to the pier and returned to the lighter, picked up another plank, and started for the pier when the accident happened. Jones states that the deck load upon the lighter was above the surface of the wharf or dock, but that the rail or deck of the lighter was below the wharf, and that he and Johnson were carrying the plank in front of them, one being at each end with his arms around the end of the plank, holding it against his body. Jones says that as they reached the edge of the deck load next to the wharf and attempted to step upon the deck or rail of the boat, his foot failed to find a resting place, but that he threw the plank in front of him, and, giving a shove with his other foot, jumped or scrambled upon the dock. He heard some slight cry or exclamation from Johnson, and when he turned around the plank was lying upon the dock, but Johnson had disappeared. He states that he found upon examination that the lighter had moved away from the dock, leaving space enough between her side and the dock, and also space enough under the face of the dock, so that Johnson had disappeared between the two.

The lighters had been moored the night before in such manner as to allow for the rise and fall of the tide. The testimony shows that the tide does not run strongly under the pier, and if the lighter had moved away from the dock, it would indicate that the tide had turned and in rising had allowed some further slack upon the lines. It further appears that the lights upon the wharf consisted of two arc lamps elevated over the open part of the dock, giving, as Jones and the other witnesses testified, sufficient light to work by upon the dock, but casting a shadow from the piles of lumber and the dock itself upon the spaces behind or below those objects.

Jones testifies that he immediately notified the foreman after his cousin disappeared, that no great effort was made to find his cousin, that his statement that Johnson was drowned was ridiculed, and that it was not until the straw hat was found about 4 o'clock in the morning that any policeman appeared, and that search under the dock was made. He testifies that the foreman in question did use a lantern from one of the boats, but thinks that this occurred at the time of the 4 o'clock search, and that he had in the meantime gone to one of the other piers, through the sheds upon the wharves, borrowed some paper, and written a letter to Mrs. Johnson, notifying her of the death of her son. This letter was received in Baltimore the next day, and the police blotter, as well as the testimony of the patrolman, indicates that the first notice to the police of which any record is shown or testimony given was not until around daylight in the morning.

Jones testified that both he and Johnson gave notice when they were employed that they knew nothing about boats, and that when they were put to work upon this pier, they received no instructions other than what to do with and how to carry the large pieces of timber. He testifies that when taken to the lighter by the foreman, he and his cousin were told only to carry the planks and pile them upon the wharf, and that no warning or instruction was given them about the danger present in the dark shadows at the side of the wharf, but, on the contrary, that

they were sent in ignorance and uninstructed across what is alleged to have been a dangerous place, to carry plank in a way directed by the foreman, and without having furnished sufficient light to enable them to use proper care for their own protection.

The company have called the three foremen who were in charge of the work, and all of them deny having set any of the colored stevedores at work upon any of the lighters along the north side of the pier. Another steamer had been inside of the Alamo unloading into the covered pier, and, so far as it was traced and as shown by the record produced upon the trial, the lighters along the north side of the pier were being loaded with railroad ties and large timber, and none of the cargo from any of these lighters was being unloaded, nor was the Alamo or any other steamer at the pier that night receiving cargo. The two foremen who were on the vessel deny any knowledge whatever of the occurrence until they heard that a man had been drowned, except that the foreman, Thumler, who was in charge of the stern gangway of the vessel, testifies that around midnight, as he came across the dock, he thought he saw a stevedore with a straw hat lying upon the stringpiece on the north side of the pier, and that at different times he had been compelled to wake up or hunt out some of the colored stevedores who were trying to sleep or loaf. On this particular occasion he said nothing to the man with the straw hat, as he was occupied with some other duty at the time, but that in a few moments he met the witness Jones sauntering around from behind a pile of lumber, and that Jones told him in a casual fashion that his cousin was drowned. This witness testifies that nothing more was seen of the stevedore who had been lying upon the stringpiece, wearing a straw hat, but that later, when the decedent's straw hat was found, this witness remembered that occurrence, and from this incident arose the defense that the decedent had fallen overboard while asleep.

The outside superintendent denies having set any of the men to work upon the lighter, or that any of the occurrences happened as described by Jones, but, on the contrary, says that when Jones gave notice, between midnight and 1 o'clock, that his cousin was drowned, a search had been made over the sides of the pier with a lantern taken from one of the barges, and that nothing could be seen. He also testifies that the police were called at that time, and denies that he ignored or disregarded the statements of Jones, and also testifies that no planks or small lumber were placed upon these lighters or taken from the Alamo that night. He states that no cargo of any sort was removed from the lighters, and the respondent has produced a sheet showing the lighter layout of the Alamo after her arrival upon the 3d of July, 1912. This sheet was produced after the policeman (who said that he was called around 5 o'clock in the morning, and who testified that the outside foreman [identified by Jones] had then been looking under the pier itself with a lantern from one of the barges) stated that Jones pointed out a lighter, next but one to the outer end of the pier, called the Charlotte, as being at that time alongside of the place where the accident occurred. There was no evidence of any sort to indicate that the boats had been shifted, and the lighter layout, Exhibit 8, contains three lots of dimension timber and ties placed on the Charlotte, all of which came

from the Alamo. No plank or small lumber, so far as the records of the cargo show went on the lighter.

It is urged by the respondent that no cargo would be removed from the lighters without the knowledge of persons who were checking up the amount of cargo being placed upon these lighters, that none of them were being used for bringing cargo to the pier; that the captains or men in charge of these lighters had stopped work for the night; and that no possible reason existed for taking stevedores upon the lighters and directing them to remove cargo. Jones' testimony as to seeing the other men at work was not definite, and if he and Johnson were set to work first, and only carried two plank, it is evident that he could not have seen much as to what the other men were doing. Jones told a credible, straightforward story, and all of the attendant circumstances as to which he differed from the witnesses for the respondent would seem to bear out his statement, while the discrepancies in the testimony are generally upon the side of the company. Thus we have on the one hand a plausible and more or less corroborated statement of events, told by a witness who would ordinarily be believed by any court or jury, and certainly the burden of proof has been sustained by the libellant as to the general narrative of events. When we consider the exact manner in which Johnson fell overboard, a slightly different situation is presented. The letter put in evidence by the attorney who first mentions the statements of Johnson is to the effect that the steamship company failed to provide reasonable and ordinary protection upon one of its boats, by which a young man was "precipitated" into the water and drowned. The attorney who received this letter in New York, and who also talked with the Baltimore attorney, in correspondence with the steamship company, referred to a "collision" of the boat with the dock. This was explained upon the trial to be a misinterpretation of the word "precipitated" above referred to; but it is difficult to see how the accident could have been so described if Jones had already told the detailed story about carrying the plank and falling through a space between the boat and the pier, as a result of a lack of warning and lack of light to enable Jones and Johnson to see where they were stepping. This in a negative way fails to corroborate Jones and does not bear out his statement upon the trial that Johnson came to his death through carrying out orders of a foreman, who put him at work in a dangerous place, without warning him as to the danger, or without providing lights to make the danger obvious to an inexperienced man. On the issue, therefore, as to whether the respondent is liable for negligence, or that negligence was shown, it is impossible, for several reasons, to hold that the libellant has sustained the burden of proof.

Jones testifies that the boat was away from the pier, and that neither he nor Johnson found this out upon the first two trips. The accident did not happen through unfamiliarity with boats, in the sense that Jones and Johnson did not know how to step from a boat to a wharf, nor from any danger involved in carrying the end of a plank over an open space. Those were obvious dangers as to which no instruction need be given. Nor would the company be negligent in not warning Jones and Johnson to avoid stepping into the water off the boat. That again would be obvious even to a person unfamiliar with

boats. The only possible ground of negligence would be in failing to call attention to the way in which the boats were moored, or to point out and make plainly visible the precise location of the rail of the lighter alongside the dock. So, assuming the men to be working as we have said, we must determine whether Jones, by failing to get his foot upon the rail, caused Johnson to lose his balance, or whether Johnson also did not know and could not see where he was stepping, and attempted to stand upon the open space between the boat and the dock, or whether Johnson may have stumbled over something upon the deck of the lighter, which in turn caused Jones to overstep and fail to put his foot upon the side of the boat, and thus in turn to precipitate Johnson in such a way that Johnson fell overboard and was drowned, or that any one of a number of different accidents might have happened. Even Jones did not see Johnson fall, but merely knew that Johnson was carrying the timber, and that Johnson with some outcry disappeared just as Jones himself had some difficulty in stepping upon the wharf. The danger of climbing from a rocking boat up to a wharf and of not stepping in the dark off the boat cannot be classed as a risk directly connected with navigation, nor would it seem that warning need be given by a foreman to workmen to be careful about such a matter. It is not in any sense instruction connected with the peculiar kind of work.

The court is unable to see that there was any negligence on the part of the company or that there was any carelessness on the part of any one except Jones and Johnson. The danger could not be considered a trap, nor, with the lights arranged as they were, throwing the side of the lighter into the shadow under the pier, would it seem to be negligence on the part of the company to expect that even inexperienced men would use care to see where they were stepping.

It is true that, if a light had been placed over the edge of the pier, the danger of falling might have been less, but these men were not compelled to undergo any unknown danger by the order of the respondent, nor were they excused from avoiding obvious danger on their own part by a general instruction to do work which might involve a danger that they should see for themselves. When we couple the failure to show responsibility on the part of the company with the improbability of the witness Jones' story upon the one matter as to which he is not corroborated, it is impossible to hold that the libellant has sustained the burden of proof, and the libel must be dismissed as to the Mallory Line.

The Clyde Line had nothing to do with the pier or work on the night in question, and is admittedly out of the case in any event.

UNIVERSAL FILM MFG. CO. v. COPPERMAN et al.

(District Court, S. D. New York. March, 1914.)

1. COPYRIGHTS (§ 29*)—PROCEEDINGS TO OBTAIN—PUBLICATION.

Under Act March 4, 1909, c. 320, § 9, 35 Stat. 1077 (U. S. Comp. St. Supp. 1911, p. 1475), providing that any person entitled thereto may secure a copyright for his work by publication thereof with the notice of copyright required by that act, publication with notice of copyright is the essence of compliance with the statute, and publication without such notice amounts to a dedication to the public sufficient to defeat all subsequent efforts at copyright protection.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 29, 30; Dec. Dig. § 29.*]

2. COPYRIGHTS (§ 29*)—PROCEEDINGS TO OBTAIN—PUBLICATION.

Under Act March 4, 1909, c. 320, § 9, 35 Stat. 1077 (U. S. Comp. St. Supp. 1911, p. 1475), relative to copyright by publication with notice of copyright, and section 11 providing that copyright may also be had of the works of an author of which copies are not reproduced for sale, by the deposit with claim of copyright, in the case of a motion picture photo play, of a title and description, with one print taken from each scene or act, etc., articles, whether enumerated in section 11 or not, can only be protected by publication with notice of copyright, and publication before the copyright is registered invalidates the copyright.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 29, 30; Dec. Dig. § 29.*]

3. COPYRIGHTS (§ 40*)—"PUBLICATION" BEFORE OBTAINING COPYRIGHT.

Where, before a photo play was copyrighted in the United States, photographic prints, films, or reels were sold in Great Britain and Europe, with knowledge that the play would be performed or the films shown, though each purchaser agreed not to use them out of his own country and not to sell for export, there was such a publication as prevented a valid copyright, since such a dissemination of a thing among the public as justifies the belief that it took place, with the intention of rendering the work common property, constitutes a "publication."

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 35; Dec. Dig. § 40.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5841-5846.]

4. COPYRIGHTS (§ 40*)—SUBJECTS OF COPYRIGHT—WORKS OF WHICH COPIES ARE NOT REPRODUCED FOR SALE.

Assuming that Act March 4, 1909, c. 320, § 11, 35 Stat. 1078 (U. S. Comp. St. Supp. 1911, p. 1475), relative to copyright of works of an author of which copies are not reproduced for sale, creates a different kind of copyright from that covered by section 9, relative to securing a copyright by publication with notice of the copyright, where photographic prints, films, or reels of a motion picture photo play were sold, there was such a reproduction of copies for sale as rendered the copyright under section 11 void.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 35; Dec. Dig. § 40.*]

In Equity. Suit by the Universal Film Manufacturing Company against S. Copperman and others on a copyright of a motion picture photo play. On final hearing. Action dismissed.

See, also, 206 Fed. 69.

Isaac B. Owens, of New York City, for complainant.

Samuel F. Frank, of New York City, for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HOUGH, District Judge. Prior to September, 1912, the Nordisk Films Company manufactured or created a motion picture photo play known as "The Great Circus Catastrophe." The photographs on the film tell a story which was originally shown by human actors who played their parts before a camera, so that the photo play (i. e., the story told by the photographs successively shown to the audience) is a pantomime drama. The Nordisk Company is a Danish corporation; this work was done in Denmark. In that and other countries of Europe it was in 1912 lawful to copyright photo plays, but no copyright was sought. Before September 7, 1912, the Nordisk Company advertised and sold this photo play "for release on September 7th." This means that they sold photographic prints, films, or reels from the original negative wherever they could, with the agreement, however, that no public exhibition should be had until September 7th. Purchasers of this photo play further agreed that it should not be exported or sold for export to any other country; that is to say, the right of presenting the drama or showing the pantomime was limited to the country wherein the sale took place. On November 14, 1912, the photo play was copyrighted in the United States, but in the preceding September one of the films was bought by one of the defendants in England without any knowledge of the restriction on its use inserted in the contract of sale between the Nordisk Company and the first purchaser. This film was brought to the United States and exhibited before copyright registration. The point for decision is whether this copyright is valid.

[1] Prior to the present copyright statute (March 4, 1909) the lawful method of obtaining copyright was laid down in Rev. Stat. § 4956 (U. S. Comp. St. 1901, p. 3407), as amended from time to time. That section prescribed what had to be done, not only in regard to copyrighting books and the like, but also such things as photographs, drawings, etc. Section 9 of the act of 1909 carries forward substantially the historic method of obtaining copyright and corresponds to Rev. Stat. § 4956, when it says:

"Any person entitled thereto by this act may secure copyright for his work by publication thereof with the notice of copyright required by this act."

Around this method of procuring copyright has grown a great body of case law, the sum of which is that publication with notice of copyright is the essence of compliance with the statute, and publication without such notice amounts to a dedication to the public sufficient to defeat all subsequent efforts at copyright protection.

[2] It is here argued that the act of 1909 disturbed this theory of copyright and introduced another and new kind of copyright. This argument rests on the existence of section 11, which as originally passed in 1909, read as follows:

"Copyright may also be had of the works of an author of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work, if it be a lecture or similar production, or a dramatic or musical composition; of a photographic print if the work be a photograph; or of a photograph or other identifying reproduction thereof if it be a work of art or a plastic work or drawing."

The argument is that this section relates only to something "of which copies are not reproduced for sale," so that lectures, dramatic compositions, photographs, works of art, plastic works, and drawings may be copyrighted in two ways, and the proper way will depend upon whether copies thereof are or are not "reproduced for sale." If copies are reproduced for sale, then section 9 applies, and, if they are not, then section 11. So far as photo plays are concerned, they are brought within the purview of copyright by the amendment of 1912 (Act Aug. 24, 1912, c. 356, 37 Stat. 488). By that amendatory act motion picture photo plays are inserted in the classification section, No. 5. If this were the only reference to photo plays, they would clearly be copyrighted in the method or manner prescribed by section 9; i. e., "by publication thereof with notice of copyright." But in section 11 was also inserted (after the provision regarding lectures and before that concerning photographs) the following words:

"Of a title and description, with one print taken from each scene or act, if the work be a motion picture photo play."

It is said that the effect of this amendment is to add to the list of things that may be copyrighted without any reference to publication, so that under section 11, as it now stands, a photo play may be copyrighted without publication, and it may also be copyrighted after publication. I am not prepared to admit that section 11 has any such meaning. It is not believed that the phrase, "works of an author, of which copies are not reproduced for sale," was intended to modify any other nouns except "lecture," "dramatic composition," and "musical composition." To speak of a photograph as the work of an author of which copies are not reproduced for sale is absurd. But, in order to maintain the argument as to two kinds of copyright, it must be asserted that a photograph or a drawing or a work of art or a motion picture or a photo play may be copyrighted at any time without reference to the use made of it, provided only that "copies are not reproduced for sale." In my opinion it is still true that all the articles enumerated in section 11 can only be protected on publication by affixing the notice of copyright required by this act, so that, no matter whether an article be enumerated in section 11 or not, the inquiry is still important, when it was published, and, if it was published before copyright registered, then the copyright sought is invalidated.

[3] What amounts to publication varies, of course, with the nature of the thing published; i. e., the publication of a book is naturally different from the publication of a picture. The statute does not undertake to describe what publication is, so that we must fall back upon the long line of decisions originally referred to. *Werckmeister v. Am. Lithographic Co.*, 134 Fed. 321, 69 C. C. A. 553, 68 L. R. A. 591, and cases there cited sufficiently guide one toward an understanding of publication in any given instance. If there be such a dissemination of the thing under consideration among the public as to justify the belief that it took place with the intention of rendering the work common property, then publication occurred. I do not see what more the Nordisk Company could have done toward disseminating its work than to sell it everywhere in Great Britain and Europe with knowl-

edge that the play would be performed or the films shown over most of the civilized world. I do not think it makes any difference that each purchaser agreed not to use out of his own country or to sell for export; it is proven that more than a month before registration in the United States there was nothing to prevent anybody in any part of Europe from buying, using, and seeing this photo play. How publication could be plainer I do not perceive. And I should be of this opinion if no copy had ever come to the United States prior to November 14, 1912. Any discussion of the restriction clause in the Nordisk Company's contract is unimportant.

Because, therefore, there was a publication in Europe before registration in the United States, this bill must be dismissed.

[4] It is, of course, true that, if there be anything in the contention that section 11 creates another and different kind of copyright from that referred to in section 9, then what took place in Europe amounted to a reproduction of copies for sale, thereby rendering the copyright void, but for a different reason. The dismissal will carry costs.

CALAUSKY v. LEHIGH VALLEY COAL CO.

(District Court, S. D. New York. March 23, 1914.)

1. MASTER AND SERVANT (§ 95½*)—LIABILITY FOR ACTS OR OMISSIONS OF PERSONS COMPULSORILY EMPLOYED.

The Pennsylvania statutes requiring mineowners to employ a mine foreman and to place the underground workings of the mine in charge of him, and such assistants as he may employ, do not prevent the owner employing the foreman to perform duties outside of and beyond his statutory duties, and for negligence in the performance of such contract duties the owner is liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 358; Dec. Dig. § 95½.*]

2. MASTER AND SERVANT (§ 247*)—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

An employé's negligence did not defeat a recovery for injuries caused by the employer's negligence, unless it contributed in some way to the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 795-800; Dec. Dig. § 247.*]

3. MASTER AND SERVANT (§ 231*)—LIABILITY FOR INJURIES—RELIANCE ON EMPLOYER'S ASSURANCES.

Where a miner called attention to the dampness of powder or dynamite and was assured by his employer that it was all right and safe, he had a right to rely on such assurance unless he knew to the contrary, and where, because of its dampness, it failed to explode when used in charging a hole in the usual manner, whereupon in the usual and customary mode of proceeding he placed another charge which in exploding failed to explode the first charge, the employer was liable for injuries caused by the first charge exploding when struck by a pick in breaking up the coal dislodged by the second charge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 675-677; Dec. Dig. § 231.*]

At Law. Action by George Calausky against the Lehigh Valley Coal Company. On motion by defendant to set aside a verdict for plaintiff, and for a new trial. Motion denied.

Alexander & Green, of New York City (C. P. Williamson, of New York City, of counsel), for the motion.

Richard W. Darling and L. B. Treadwell, both of New York City (Frank McGaffry, of Brooklyn, N. Y., of counsel), opposed.

RAY, District Judge. Having gone over the evidence and charge in this case, I am of the opinion that the motion to set aside the verdict and for an order granting a new trial should be denied.

The plaintiff was an experienced miner, of good character, employed by the defendant in its mine, and was engaged in mining coal for the defendant. He had a helper, so called. Having drilled into the walls of the chamber assigned to him by the defendant and in which he was operating and dislodged a mass of coal, he with his helper was engaged the following day in loading the coal onto a car for the purpose of removal from the mine, when, on striking a large mass or lump with a pick for the purpose of breaking it up so as to be handled, a charge of powder or dynamite or both contained in such lump or mass exploded, and the plaintiff was seriously injured. The sight of one eye was entirely destroyed and that of the other very seriously impaired. He received other injuries. The plaintiff contended that this charge of explosive material was in this mass or large lump of coal by reason of the negligence of the defendant. The defendant contended it was there by reason of the negligence of the plaintiff. The defendant contended that plaintiff drilled a hole into the side of his chamber, inserted his charge of powder and dynamite with tamping, and that when it failed to explode he dug out a part of the tamping and inserted another charge on top on the first, the unexploded one, trusting to the explosion of the last charge to explode the first one; that the explosion of the second one did blow out a large mass of coal, but failed to explode the charge first placed in the hole; and that this accounts for the presence of the charge in the mass of displaced coal which exploded when struck by the plaintiff's pick the next day and did the damage complained of.

The jury was expressly charged that, if the accident happened in this way or for such reason, plaintiff could not recover. The jury found that the accident and explosion did not happen by reason of any such cause or causes.

The plaintiff claimed and gave evidence tending to establish: That he drilled into the walls of his chamber in the usual and the approved manner, charged the hole in the usual manner, but that such charge failed to explode because of the dampness of the powder used in making up the cartridge, and that such dampness was the result of the negligence of the defendant. That thereupon, in the usual and approved manner, he drilled another hole by the side of the former one at a little distance therefrom, loaded it, using powder from another can, and exploded it, thereby blowing out and dislodging a mass of coal including the large lump containing the first charge. That this was the usual and customary mode of proceeding, and that when powder is dry, etc.,

the explosion of the charge in the second hole will explode the charge in the first hole and remove all danger of a concealed, unexploded charge in the mass of dislodged coal.

Each miner of coal has a box in which to keep his tools and his powder and dynamite. These boxes are made by the defendant company and furnished to the miners and charged up to them. The defendant also furnishes all explosives to the miners. The miners are not allowed to select the place where their tool boxes shall be kept. The construction of complainant's box was fully described, and it was apparent that, if standing in a place where water dripped on top of it, the dampness could pass into the interior of the box and dampen the contents including the powder in its keg. The box kept in a dry place was all sufficient, but kept in a damp place where water dripped upon it the powder would or might become dampened.

The plaintiff contended and gave evidence tending to show that he kept his box where he was required by the defendant company to keep it even after he discovered that water dripped on the box and had called defendant's attention to the fact; that he was assured it was all right and safe, etc. The plaintiff gave evidence tending to show, and sufficient to justify the jury in finding, that the place where his box was placed by the defendant and where the plaintiff was required to keep it, and assured it was safe to keep it, was wet or quite damp, and that water dripped from the rocks, etc., overhead, etc.; that in this way his powder became dampened, etc.; and that as a result the charge placed in the hole first drilled failed to explode and was not exploded by the charge placed in and exploded in the second hole, and only exploded by the blow of the pick the next day when the coal was being loaded.

[1] The defendant contended that the negligence, if any, was that of the mine foreman, who had certain statutory duties to perform, and that the defendant, under the laws of Pennsylvania, was not liable for injuries resulting from the nonperformance of those duties by such foreman; and that if there was any negligence it was the failure of this mine foreman to perform a statutory duty.

The defendant requested the court to charge, and the court did charge, as follows:

"The Court: No. 4. 'If the jury believe that any negligence on the part of the mine foreman—that is, this man Miller—or his assistants in the performance of their duties caused or contributed to plaintiff's injuries, the defendant is not liable.' I cannot charge that in that form. Anything within their statutory duty, duties imposed upon them by the statute, then, that would be true. They could do both. They could go beyond what their statutory duties were, having been employed by this defendant to go beyond. But work, if it was outside and beyond their statutory duties, which has been read to the jury, and I will read again, then of course defendant would be liable for their negligence if they were not acting within their statutory duty but outside and for the defendant. (Exception by defendant.)

"The Court: 5. 'The law of Pennsylvania in force and effect at and prior to the time that plaintiff received his injuries required the defendant to place the underground workings of the mine and all that related to the same under the charge and daily supervision of a competent person called a mine foreman, who was permitted to employ a sufficient number of competent persons to act as his assistants, and it is the law of Pennsylvania that the owner of the mine shall not be responsible for any act or neglect of the mine foreman or any of his assistants in the performance of their duties as such.' That is

true, gentlemen; the duties imposed by law, by the statute as to that, but that does not cover the duties imposed by their contracts, which are outside of statutory duties, and which are imposed solely by the contract relations existing between them and the defendant company.

"6. 'If the jury believe that any witness has willfully testified falsely as to any material matter, they are at liberty to disregard his entire testimony.' I so charge, gentlemen. That applies to the witnesses on both sides. If a witness comes into court and willfully, knowingly testifies falsely, then the jury may disregard all his testimony. You may. You do not have to, but may.

"7. 'That the jury is not permitted to speculate as to the causes of plaintiff's injuries, but they must, in order to find a verdict for the plaintiff, be satisfied by a preponderance of the negligence that the injuries occurred solely by reason of the negligence of the defendant or some employé or agent of the defendant, for whose acts or neglect the defendant is responsible.' That is true, gentlemen. I have already covered that. It is merely repetition.

"8. 'That unless the jury is satisfied by a preponderance of the evidence that through some negligent act or omission on the part of the defendant or some agent or employé of the defendant, for whose acts it can be held responsible under the law as before stated, plaintiff's powder became "wet, damp, and deteriorated," and as a direct and natural consequence thereof the plaintiff's injuries resulted, the verdict must be for the defendant.' Well, direct in the way I have pointed out. Yes, that is true. Of course, we do not want any confusion about direct, because it was indirect really, the way the accident occurred, and the failure to explode, so that the injury came about in an indirect way. With that qualification I charge that.

[2] "9. 'That even though the jury should find that there was some negligence on the part of the defendant, yet if they find that the plaintiff failed in any respect to exercise proper care and caution, the verdict must be for the defendant.' I charge that, provided that the failure of the defendant contributed in any way to the injury. Of course, if it was some neglect outside of that negligence that contributed to the injury, it would not defeat recovery. He may have been negligent for 50 years, and that would not defeat any recovery, gentlemen. Negligence on his part that has in any degree brought about this injury, that is the question. Have I not charged No. 10 sufficiently?"

This excluded from the consideration of the jury as a basis for finding negligence everything by way of failure to perform a statutory duty. It was a holding, following the Circuit Court of Appeals in this circuit, that defendant could employ these men to go beyond, do more than, their statutory duties, and that when acting pursuant to their employment and outside of and beyond their statutory duties the defendant was liable for their negligence in the performance of such duties.

[3] It will be noted that the negligence of defendant submitted as the sole ground of recovery was, at defendant's request, limited to defendant's allowing the powder to become wet, damp, and deteriorated, and that as a direct and natural consequence thereof the plaintiff's injuries resulted. Plaintiff called attention to the dampness, but was assured that it was all right and safe. This assurance given by the defendant, he had the right to rely upon, unless he knew to the contrary, and on this question the jury was fully instructed.

The question of contributory negligence was, I think, properly submitted, and I find no prejudicial error in the admission or rejection of evidence.

Motion denied. The motion for an extra allowance of costs is also denied.

HENNESSY et al. v. WINE GROWERS' ASS'N.

(District Court, S. D. New York. March 19, 1914.)

No. 9—325.

1. EVIDENCE (§ 590*)—UNFAIR COMPETITION—SUFFICIENCY OF EVIDENCE—DETECTIVES.

Assuming that courts should be careful in enjoining alleged unfair competition on the testimony of detectives whose motive to obtain evidence may lead them to make false or highly colored reports in favor of their employer, where the circumstances surrounding sales of liquor in bulk to be used in refilling bottles bearing plaintiffs' labels made it impossible to obtain the testimony of disinterested persons, that of interested witnesses such as detectives would be weighed by the court, especially where they were offered no reward except the per diem paid them, and where two of the witnesses were students in professional schools doing such work temporarily while pursuing their studies.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2439; Dec. Dig. § 590.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 97*)—UNFAIR COMPETITION—INJUNCTIVE RELIEF.

Where several of defendant's stores sold liquor in bulk to detectives employed by plaintiff and delivered to the purchasers empty bottles bearing plaintiff's labels, with the understanding that the liquor was to be used in refilling such bottles, plaintiff was entitled to an injunction against such unfair competition; it being enough that several sales have been made indicating that defendant was willing to make further sales, and the sales without knowledge that the purchasers were detectives disclosed the intent and purpose as if made to other purchasers.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 110, 111; Dec. Dig. § 97.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 98*) — UNFAIR COMPETITION — ACCOUNTING.

Where plaintiff's damages from sales by defendant of liquor in bulk, to be used in refilling bottles bearing plaintiff's labels, was insignificant, an accounting will be denied.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. § 98.*]

In Equity. Bill by Jacques Francis Henry Hennessy and others against the Wine Growers' Association for injunction and accounting on the ground of unfair competition. On final hearing. Decree for complainant.

Adolph L. Pincoffs, of New York City, for James Hennessy and others.

Kiernan & Moore, of New York City, for Alexander Oliver Riddell and others.

Theodore Larson, of New York City (George Gordon Battle and Adolph L. Pincoffs, both of New York City, of counsel), for the Hostetter Co.

Bandler & Haas, of New York City (Henry A. Wise and David Bandler, both of New York City, of counsel), for Wine Growers' Ass'n.

HUNT, Circuit Judge. The bill charges sales by defendant of an article resembling in color, appearance, and flavor Hennessy Three

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Star brandy, the giving therewith of empty genuine Hennessy bottles, and the advising, counseling, suggesting, and assisting purchasers to place defendant's liquor in plaintiffs' bottles and to sell the same as genuine Hennessy brandy, all with intent to defraud.

This case was tried with seven others against the same defendant brought by the proprietors of Martell brandy, Canadian Club whisky, Hostetter's bitters, Gordon gin, Gilka Kummel, King William whisky, and Usher's Scotch whisky.

In 1912 the defendant had from 32 to 36 stores in Greater New York, and in the summer of that year detectives in the employ of the plaintiffs in the several actions visited 11 of these stores representing that they desired to purchase bulk liquors that could be substituted for certain brands named, including Hennessy Three Star brandy. Defendant's employes, at the request of plaintiffs' agents, sold the bulk goods and furnished therewith empty bottles with plaintiffs' labels thereon. The record is voluminous, but from the entire testimony I find that at one of defendant's stores Weiler, the manager, believing that he was dealing with yacht clubs, fishing clubs, and stewards, sold goods in bulk and furnished therewith empty bottles from time to time. O'Hare, one of plaintiffs' detectives, says that Ramme, manager of another of defendant's stores, referred him to Weiler as making a practice of selling bulk goods for refilling. The testimony is that Weiler volunteered to furnish empty bottles, promised to send bottles with clean labels, and advised that a genuine bottle of each brand be kept on the shelf back of the bar that it might be opened in the presence of a customer in case of complaint. Weiler said, however, that he supplied the trade in the neighborhood, mentioning several names, and that he had never had a complaint on the goods he furnished. On three separate occasions Weiler received and filled orders from plaintiffs' detectives and delivered as many lots of empty bottles, each lot including a Hennessy bottle. At three other stores, 663 Sixth avenue, 92 Lenox avenue, and 21 Columbus avenue, goods were sold and empty bottles delivered under circumstances similar to those at Weiler's place; and at still another store, 2085 Amsterdam avenue, bulk goods were negotiated for and bottles promised.

While it is admitted that some of the liquors and bottles in evidence were furnished by defendant's agents, it is denied that anything was said about refilling at the time the sales were made. But the great weight of the evidence is that defendant's employes who sold the goods well understood that the bulk goods with which they furnished empty bottles were to be used for refilling. The witness Schmidt, called by defendant, said in part:

By the Court: Q. You said that something was said about refilling. Now, did you believe that he wanted wines or liquors to refill bottles? A. Well, yes; I did.

Q. Well, why did you sell them to him? Did you know that you might get into trouble over that sort of thing? A. Why, no; I had never had that experience before, and they told me they were giving these goods away and they were trying to save expenses, and I did not think anything of it.

Q. In your former experience, Mr. Schmidt, what had you been doing with your Gordon gin bottles, for instance, and Hennessy brandy bottles? A. Any bottles that had names in them we used to throw away. Other bottles,

branded bottles, Black & White bottles, Port bottles or flasks, we kept them until we got three or four crates, and then we returned them to headquarters, and they used them down there.

Q. Did you not know that you ought not to take, for instance, an Irish whisky bottle of the brand of Jameson's and to sell a whisky that looked like it for the purpose of putting it into the Irish whisky bottle? A. Well, I never thought of it.

Q. I only want you to tell me exactly your own view; I just want you to tell me what you know and what you believe, and nothing else; that is all Mr. Wise wants you to tell, and that is all Mr. Battle wants you to tell. A. I didn't even think of it anyway; they said they wanted—the way they put it to me, to save expenses. They said they were giving the stuff away, and I thought I could give them just as good goods.

Q. You believed that, did you? You believed what they said to you? A. Yes, sir.

Q. Mr. Wise has asked you to tell anything that you can recall. Wasn't that the substance of your last question?

Mr. Wise: Yes, sir. I want you to tell the court your recollection of whatever was said in this entire visit there, of Moore and this man Naughton; while those two men were in there talking with you about this first purchase, as they went over this list of goods, and as they went over this stuff, and you told them that you had such goods that were as good as several different brands; what was said during the conversation about refilling, if anything? Tell us all that you can remember. A. They asked if these goods were just as good as the standard brands, whether I thought they would pass that way, and I thought so. I thought they were just as good a quality. I didn't see why not. I don't remember just the exact words; it was so far back; and I cannot remember any more about it.

[1] Defendant says that testimony of detectives employed to gather evidence is always to be regarded with suspicion, and is not to be relied upon in this case. Let it be accepted as generally true that courts should be very careful about lending their aid to enjoin a defendant upon a showing made by witnesses whose motive to obtain evidence may lead them to make false or reckless or highly colored reports in favor of those employing them. But, on the other hand, it is the truth that is to be ascertained; and, if to get at the facts which are essential to sustain an issue upon which valuable property rights depend, circumstances make it impossible to obtain evidence of disinterested persons, it none the less becomes the solemn duty of the court to work to a correct finding, and in doing so to weigh all evidence, no matter whether given by interested or disinterested witnesses. In other words, the courts must prevent threatened future invasion of rights, whether proof of past invasion comes from men in one calling or another.

The present case is to be distinguished, too, from cases where the testimony comes solely from persons who are professional detectives working for large rewards only to be gathered in the event of success. Here there was no reward except the per diem paid to each, and further than that at least two important witnesses were, when employed, students in professional schools and working in order to gain temporary support while pursuing their studies. One such is now a lawyer, another a physician.

[2] There being no proof of sales to persons other than detectives in the employ of plaintiffs, defendant urges that no injunction should issue inasmuch as no such course of conduct has been proved as will show by a clear preponderance of the evidence that there was inten-

tional fraud. It is further contended that plaintiff has no cause of complaint against a defendant for damages resulting from an act done by defendant at the instance and solicitation of plaintiff's agents. As defendant's employes did not know at the time that the purchasers were detectives, the evidence discloses their intent and purpose exactly the same as if the sales were made to purchasers not buying in order to obtain evidence against the seller.

In *Julius Kessler & Co. v. Goldstrom*, 177 Fed. 392, 101 C. C. A. 476, the Court of Appeals for the Eighth Circuit, in reversing a decree of the lower court, commented upon the argument to the effect that a sale to emissaries of the complainant did not warrant a decree for an infringement of a trade-mark and for an accounting, and held that, notwithstanding the sale to the agent of complainant, the intent of the defendant was disclosed exactly as if the sale had been to a real purchaser; it appearing that the defendant did not know at the time that the purchasers were acting for complainant. The court was of the opinion that the motives and actions were to be judged from the viewpoint of the understanding of the facts by the defendant who sold the goods.

It is not necessary to prove a course of business in order to warrant an injunction. I do not think that it is incumbent upon the plaintiff to establish a habit by showing very many sales; it is enough that plaintiff has established several sales from which must be deduced the fact that defendant was willing to make further sales, and that in several of the stores owned by defendant its agents were ready to make sales is clearly established. *Gorham Mfg. Co. v. Schmidt* (D. C.) 196 Fed. 955; *Julius Kessler & Co. v. Goldstrom*, 177 Fed. 392, 101 C. C. A. 476; *A. B. Dick Co. v. Henry* (C. C.) 149 Fed. 424; *Badische Anilin, etc., v. Klipstein* (C. C.) 125 Fed. 543, 556; *Samuel & Co. v. Hostetter*, 118 Fed. 257, 55 C. C. A. 111; *Chicago P. T. Co. v. Phila. P. T. Co.* (C. C.) 118 Fed. 852; *Hostetter Co. v. Conron* (C. C.) 111 Fed. 737; *Hostetter Co. v. Schneider* (C. C.) 107 Fed. 705; *Hostetter Co. v. Sommers* (C. C.) 84 Fed. 333; *Hostetter Co. v. Becker* (C. C.) 73 Fed. 297; *Hostetter Co. v. Brueggeman* (C. C.) 46 Fed. 188.

[3] Injunction should therefore issue to stop defendant from continuing the practice it has indulged in. I do not find, however, that any accounting should be granted, for upon the testimony in the record the damage has been too insignificant to warrant a decree for an accounting.

Decree for plaintiff, together with costs.

In re JOHNSON.

(District Court, E. D. Oklahoma. January, 1914.)

1. SALES (§ 474*)—CONDITIONAL SALES—EFFECT OF CONDITION AS TO BUYER'S CREDITORS.

Under Comp. Laws Okl. 1909, § 7911, providing that instruments evidencing conditional sales shall be void as against the creditors of the vendee unless filed in the office of the register of deeds, a conditional sale

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

is void as against creditors who extended credit to the buyer between the time of the sale and the time the conditional agreement was filed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1391-1402; Dec. Dig. § 474.*]

2. BANKRUPTCY (§ 184*)—LIENS—UNFILED CONDITIONAL SALE.

Under Bankr. Act July 1, 1898, c. 541, § 67a, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449) providing that claims which, for want of record would not have been valid liens against the creditors of the bankrupt should not be liens against his estate, and Bankr. Act, § 47a(2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended in 1910 (Act June 25, 1910, c. 412, § 8, 36 Stat. 840 [U. S. Comp. St. Supp. 1911, p. 1501]), providing that the trustee, as to all property in the custody of the bankruptcy court, should be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, a trustee in bankruptcy, representing creditors against whom a conditional sale was void because it was not filed until after they had extended credit, was entitled to the possession of the property as against the seller.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

3. BANKRUPTCY (§ 184*)—LIENS—LIEN VALID AGAINST PART OF THE CREDITORS.

The fact that the sale was void as to only a portion of the creditors represented by the trustee did not affect his right to the possession of the property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

In Bankruptcy. Proceedings against Wesley Johnson, in which the Rock Island Implement Company asserted title to certain property in the hands of the trustee. From an order of the referee denying the right to reclaim the property, the Implement Company appeals. Order confirmed.

Shartel, Keaton & Wells, of Oklahoma City, Okl., for petitioner.
Leopold & Cochran, of Muskogee, Okl., for trustee.

CAMPBELL, District Judge. This appeal brings up for review a decree entered in the above-styled bankruptcy proceeding.

The matter under dispute is the validity under section 7911, Statutes of Okl. 1909, of an unrecorded conditional sale contract as against creditors who became such after the contract was executed prior to its being recorded, and without knowledge of it, where none of them had, prior to the adjudication in bankruptcy, secured a lien upon the property covered by the conditional sale contract, either by execution, attachment, or otherwise, prior to the recording of said conditional sale contract, and where the property subsequently came into the hands of the trustee in bankruptcy.

The Rock Island Implement Company, the conditional vendor, asserted title under its contract and sought to reclaim the property, or its proceeds, from the trustee in bankruptcy. The petition of the implement company was denied by the referee; he being of the opinion that the conditional sale contract was invalid as against the subsequent

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

creditors without notice, who had presumably extended credit to the bankrupt upon the faith that his property was unencumbered.

The Rock Island Implement Company prosecutes the present review. Section 67a of the Bankruptcy Act declares:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

And the applicable provision of the recording law of Oklahoma (section 7911, Statutes 1909) is as follows:

"Instruments evidencing conditional sale must be recorded. * * * That any and all instruments in writing, or promissory notes now in existence or hereafter executed, evidencing the conditional sale of personal property, and that retains the title to the same in the vendor until the purchase price is paid in full, shall be void as against innocent purchasers, or the creditors of the vendee, unless the original instrument, or a true copy thereof, shall have been deposited in the office of the register of deeds in and for the county wherein the property shall be kept, and when so deposited shall be subject to the law applicable to the filing of chattel mortgages; and any conditional, verbal sale of personal property reserving to the vendor any title in the property sold shall be void as to creditors and innocent purchasers for value."

A similar provision as to the effect of unfiled chattel mortgages against creditors is found in section 4422, Statutes 1909.

[1, 2] It is apparent that the effect to be given to the unrecorded conditional sale contract must be determined by the recording law of the state; and it is also apparent that the question arising under that law turns upon who are included in the term "creditors" in section 7911.

Upon that question the decisions of the several state courts have not been uniform. Although recording statutes usually provide that an unrecorded mortgage, or conditional sale contract, is void as to creditors, the prevailing doctrine seems to make such instruments void only as against those creditors who obtain a lien on the mortgaged property by attachment or levy of execution before the instrument is filed for record; that this rule only applies to creditors who became such before the mortgage was executed. See 6 Cyc. 1070. Where credit was extended to the mortgagor during the time that the mortgage was withheld for record, it has been held that the mortgage is void alike as to creditors with or without liens.

In some of the states, however, creditors who have extended credit to the mortgagee subsequent to the execution of the mortgage are required to obtain a judgment before attacking the unrecorded mortgage. This is generally held to be necessary: First, to definitely establish the legal demand; second, to extinguish the legal remedy. Such was the holding in the case of *Union National Bank v. Oium*, 3 N. D. 193, 54 N. W. 1034, 44 Am. St. Rep. 533, wherein the court in construing the identical statute which we have in Oklahoma held that the same rendered unfiled chattel mortgages void as to creditors: First, who had extended credit and fastened upon the property covered by the mortgage, either by attachment or levy, prior to the filing of the same;

second, void as to creditors who had, subsequent to the execution of the mortgage, extended credit to the mortgagor and had, subsequent to the filing of the mortgage, obtained a judgment. To the same effect, see *Ruggles v. Cannedy*, 127 Cal. 290, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371; *Noyes v. Brace*, 8 S. D. 190, 65 N. W. 1071.

The exact point we are here discussing has not been passed upon, to our knowledge, by the Supreme Court of Oklahoma. However, the Supreme Court of Oklahoma in the case of *Campbell, Hunt & Adams v. Richardson & Eicholtz*, 6 Okl. 375, 51 Pac. 659, held that the Oklahoma statute should receive the same construction as that given to it by the Supreme Court of South Dakota, and held in that case that the word "creditor" as used in the statute applied alike to that class of creditors whose claims are antecedent to the execution of the mortgage and those who extended the mortgagor credit subsequent thereto. The statute of North Dakota is identical with that of South Dakota.

In the case of *Cornelius v. Boling et al.*, 18 Okl. 469, 90 Pac. 874, the Supreme Court of Oklahoma territory held that an unfiled chattel mortgage, even though the mortgagee had taken possession of the property covered thereby prior to bankruptcy, was invalid against the mortgagor's trustee in bankruptcy. This case was cited and commented upon by us in an opinion in *Re Wall* (D. C. Okla.) 29 Am. Bankr. Rep. 901, 207 Fed. 994, a case arising prior to the amendment of 1910 to section 47a(2) of the Bankruptcy Act.

In the case of *First National Bank v. Saylor*, 4 Okl. 408, 50 Pac. 76, the court held a chattel mortgage void as to creditors for want of record to be void as against the assignee in trust for the benefit of creditors.

In *Re Wall*, supra, this court held that the Oklahoma Supreme Court, in holding that an adjudication in bankruptcy amounted to an attachment, had overlooked the qualification which the Supreme Court of the United States had placed on this doctrine in the case of *York v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, 15 Am. Bankr. Rep. 633, and we there held that the term "creditor" in the statute above quoted meant a creditor who has perfected a lien by legal process upon the specific property.

Section 47a(2) of the Bankruptcy Act, as amended, provides that the trustee, as to all the property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon. Such is the standing of the trustee in this case.

The question to be answered, therefore, is whether or not, in order to render the conditional contract of sale void as against the creditors here represented by the trustee, it was necessary for them to have fastened upon the property by attachment, levy, or otherwise prior to the filing of the conditional sale contract.

The holding in the case of *Cornelius v. Boling*, supra, if it had been based upon a correct understanding of the effect of an adjudication in bankruptcy, would be authoritative of this proposition. In our opinion, it correctly interprets the law as it now stands.

Chief Justice Corliss, in the case of *Union National Bank v. Oium*, supra, in construing the Dakota Territory statute, said:

"It is important that there should be kept in mind a distinction between the right of a general creditor to insist that an unfiled chattel mortgage is void and the ability to enforce this right. While an unfiled chattel mortgage may be void as to a general creditor, he cannot avail himself of the statute until he has armed himself with attachment or execution and levied on the property, or has in some other way secured a lien thereon. Before he has seized the property covered by the chattel mortgage, or secured some lien thereon, he is in no position to raise the question that the mortgage is void as to him. * * * The statute does not, however, require that he should be armed with process or have a lien on the property to entitle him to come within the category of 'creditors,' as to whom the unfiled instrument is a nullity. The mortgage is not void as to creditors who have seized the property, or who hold process under which they can seize it. This is not the language of the statute. The mortgage is void as to creditors, and nothing is said in the statute about the necessity of a creditor's having secured a lien on the mortgage property. The fact that the creditor cannot assail the mortgage until he has seized the property is of no moment in determining whether he belongs to the class of persons as to whom the mortgage is void. Whether he belongs to that class is one question; whether he is in a position to derive benefit from belonging to that class is another, and entirely different, question. The two inquiries are distinct, and each is independent of the other. When he arms himself with process, and seizes the mortgaged property, the court will then inquire whether he is a 'creditor,' within the meaning of the statute which declares void the mortgage as against 'creditors.' The facts which determine this point are independent of the fact of seizure, and can derive no aid therefrom. The inquiry is whether he is a 'creditor' within the spirit of the law, and not whether he is a creditor with process which he has levied on the property covered by the mortgage. If it were necessary that he should have seized the property before he can be regarded as a creditor within the statute, great wrong could be done the public by the withholding of a chattel mortgage from record, from which those wronged would have no redress. After a chattel mortgage had been given, and while it was withheld from record, a loan might be made to the mortgagor, or credit might be extended to him on the sale of property, the creditor relying upon the apparent freedom of the debtor's property from liens. All the harm that could be done the creditor has now been consummated. The subsequent filing of the chattel mortgage cannot undo it. It would be a gross perversion of the statute requiring chattel mortgages to be filed to assert that the right of this creditor successfully to attack the unfiled mortgage depends on his seizing the property under process before the mortgage is filed; that until then he cannot be considered a creditor as to whom the mortgage is void. It is true that he must seize the property before he can raise the point, but he need not seize it before the instrument is filed. Whenever he does seize it, whether before or after the filing of the mortgage, he is then in a position to urge that he was before the mortgage was filed a 'creditor,' within the meaning of the statute."

The question we are considering is not one of substantive right, but of procedure.

In the *Matter of Gerstman & Bandman* (C. C. A. 2d Cir.) 19 Am. Bankr. Rep. 145, 157 Fed. 549, 85 C. C. A. 211, Ward, Circuit Judge, said:

"This court in *Re New York Economical Printing Co.* (C. C. A. 2d Cir.) 6 Am. Bankr. Rep. 615, 110 Fed. 514, 517 [49 C. C. A. 133], held that a nonfiled mortgage was void only as to creditors who by judgment or attachment or otherwise had seized or were in a position to seize the mortgaged property. Since that decision, however, the Court of Appeals of the State of New York has held that a nonfiled mortgage is void as to general creditors al-

though it cannot be attacked until they are in a position to seize the mortgaged property by virtue of a judgment, attachment or otherwise. This, however, is a mere matter of procedure, and the mortgage is none the less void as to them."

See, also, *Simmons v. Greer* (C. C. A. 4th Cir.) 23 Am. Bankr. Rep. 443, 174 Fed. 654, 98 C. C. A. 408; *Smith v. Mishawaka Woolen Mfg. Co.* (C. C. A. 7th Cir.) 22 Am. Bankr. Rep. 616, 172 Fed. 98, 96 C. C. A. 412; *Re Mission Fixture & Mantle Co.* (D. C. Wash.) 24 Am. Bankr. Rep. 873, 180 Fed. 263; *Matter of Watts-Woodward Press, Inc.* (C. C. A. 2d Cir.) 24 Am. Bankr. Rep. 684, 181 Fed. 71, 104 C. C. A. 105.

In the case of *In re Martin* (*In re Bothe*) 23 Am. Bankr. Rep. 151, 173 Fed. 597, 97 C. C. A. 547, Judge Adams of the United States Circuit Court of Appeals for the Eighth Circuit, in reviewing a decree of the District Court of the United States for the Eastern District of Missouri, said:

"Detached expressions are found in *Harrison & Calhoun v. South Carthage Min. Co.* [95 Mo. App. 80, 68 S. W. 963], and *Landis v. McDonald*, supra [88 Mo. App. 335], to the effect that, if 'a prior creditor' fails to obtain some specific lien by attachment, execution, or otherwise on the mortgaged property before the mortgage is actually recorded, the mortgage is by the act of recording validated as to such creditor, and his right is subordinated to the rights of the mortgagee; and counsel for the mortgagee seize on expressions of this kind and claim that, because the special creditors in this case failed to take steps to fix a lien upon the mortgaged property before the mortgage was recorded, their rights were lost. We cannot give our assent to this claim. Until the mortgage was recorded it was absolutely void as to these special creditors. Their superior rights arose against the property of their debtor while the mortgage was thus void, and to hold that such rights were lost before they had an opportunity to assert them, before they even knew of the existence of the mortgage, is a palpable absurdity. We find nothing in the cases referred to to justify any such contention. The words 'prior creditors,' there referred to, clearly relate to creditors whose claims antedated the execution of the mortgage. This is apparent, not only from the opinions taken as a whole, but from other cases there cited and relied on. Such creditors, who parted with nothing on the faith of their debtor's ostensible ownership of unincumbered property, are required to take some step to fix a lien upon the mortgaged property prior to the recording of the mortgage in order to secure an equitable standing. Until then they have no equitable right or claim enforceable in a court of equity. On the contrary, creditors who extend credit to the mortgagor after the execution of the mortgage and before it is recorded have, as already seen, a clear equitable right, inhering in the transaction itself, superior to the mortgagee, and this right entitles them to relief without the necessity of fixing a lien as a prerequisite. This distinction, we think, is clearly recognized in the Missouri cases relied upon by counsel, and was distinctly recognized and applied by us in *First Nat. Bank of Buchanan County v. Connett* [142 Fed. 33, 73 C. C. A. 219, 5 L. R. A. (N. S.) 148] where we said: 'Such a mortgage is also utterly void as to simple contract creditors who extended credit after it was given, and who have secured no title or lien by purchase, execution, attachment, or otherwise. As to them the subsequent recording of the instrument is of no effect. It cannot be asserted against the enforcement of their demands.'"

The Eighth Circuit Court of Appeals also passed on this question in the case of *Post v. Berry*, 23 Am. Bankr. Rep. 699, 175 Fed. 564, 99 C. C. A. 186, being an appeal from the United States Court for the Southern District of Iowa. In this case the court says:

"Henry Heartfield was in the general mercantile business at Moulton, Appanoose county, Iowa, having a general merchandise stock of \$5,000 in 1905, which was subsequently increased by purchases to about \$13,000. In March, 1908, he made an assignment under the State law for the benefit of his creditors. In April, 1908, he was duly adjudicated a bankrupt. In November, 1905, he borrowed of W. F. Berry the sum of \$2,200, and secured the same by a chattel mortgage upon his stock of general merchandise and in January, 1906, he borrowed of Berry an additional sum of \$536, which was secured by a second mortgage upon his stock of merchandise. Neither of the mortgages were recorded until February 28, 1908. All the creditors of the bankrupt extended their credit subsequently to the date of the giving of the mortgages and prior to their having been filed for record. Two questions are presented at this hearing for consideration: First. Are the mortgages void as against the creditors? Second. If such mortgages are void, is the defendant Berry entitled to prove his claim for the moneys thus loaned and share in the assets of the bankrupt estate with the other creditors?"

"The first question was fully discussed and decided by this court in *Re George Bothe* (C. C. A. 8th Cir.) 23 Am. Bankr. Rep. 151, 173 Fed. 597 [97 C. C. A. 547]. That case controls and rules this. Any and all creditors of the bankrupt who extend credit to him between the dates of the giving of the mortgages and their filing for record have an equity superior to the mortgagee whose conduct invited them to trust the mortgagor. All persons so extending credit between these dates will be presumed to have done so on the faith of an unincumbered title as disclosed by the record."

Taking into consideration the object of the Oklahoma statute, the rule that such statutes are to be construed liberally, with a view of obtaining their object, in view of the holding of the court in the case of *Cornelius v. Boling*, the holding of the Supreme Court of North Dakota, the holdings by the Eighth Circuit Court of Appeals, and the declaration in *Cyc.*, we conclude that an unfiled conditional sale contract is, since the amendment to section 47a(2) of the act, absolutely void as against a trustee in bankruptcy representing creditors who have, subsequent to the execution of the contract and prior to its filing, extended credit to the bankrupt.

[3] That only a portion of the creditors represented by the trustee extended credit subsequent to execution and prior to filing of the contracts involved does not affect the trustee's right as against petitioner. In *re Farmers' Co-operative Co.* (U. S. D. C. N. D.) 202 Fed. 1008.

The order of the referee in this case will be confirmed. It is unnecessary to pass upon the other phases of the case considered by the referee.

In re H. B. HOLLINS & CO.

(District Court, S. D. New York. March, 1914.)

1. BANKRUPTCY (§ 140*)—STOCKBROKERS—RATABLE DISTRIBUTION OF STOCK.

Where stockbrokers, who had purchased stock for several customers and who had charged themselves with the stock as "long" on their books and had notified the customers, became bankrupt, each customer was entitled as against the general creditors to such proportion of the stock in the possession of the brokers at the time of the bankruptcy as the shares which the brokers should have held for his account bore to the total amount of the shares which should have been in their possession, in case

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the amount of shares on hand was less than the number of shares required to satisfy all the customers in full.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

2. BANKRUPTCY (§ 154*)—STOCKBROKERS—RATABLE DISTRIBUTION OF STOCK—SET-OFF.

Where the shares on hand were less than the amount required to satisfy the demands of the customers, any customer indebted to the brokers could set off his indebtedness against the shares not recoverable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 451-455; Dec. Dig. § 154.*]

In Bankruptcy. Proceeding against H. B. Hollins & Co., bankrupts. On petition of Arthur B. Duel for the distribution and apportionment to himself and others entitled to 100 shares of the stock of the Amalgamated Copper Company in the possession of the receiver of the bankrupts. Relief granted.

See, also, 210 Fed. 965.

Hollins & Co. (hereinafter called Hollins) were stockbrokers, and went into bankruptcy November 13, 1913. On October 13, 1912, the petitioner Duel employed them to purchase for him 100 shares of the stock of the Amalgamated Copper Company (hereinafter referred to as "Copper"). They did so and actually received certificates for that amount. These certificates Hollins disposed of before bankruptcy; how or to whom is not known. On October 25, 1912, one Bamberger likewise employed Hollins to purchase 30 shares. They did so, received the stock, and shortly thereafter pledged the same with the consent of Bamberger, but for their own benefit, with the National Bank of Commerce. On the 25th of February, 1913, Wiener, Levy & Co. (hereinafter called Wieners) employed Hollins to purchase 50 shares of Copper. The customers were notified that purchase had been made, and Hollins charged themselves with the stock as "long" on their books. It is alleged, and not denied, that on or about June 13, 1913, the 50 shares so bought passed out of the control of Hollins "for and in behalf of another customer."

At a date not shown, but prior to November 1, 1913, Hollins by their books appear to have purchased 100 shares of Copper for one Hugo Landau, and also by their books they asserted themselves to be in possession of this stock as "long" for Landau's account. At the close of business November 7, 1913, the books of Hollins show them as responsible for 280 shares of Copper, in the following proportions, viz.: Bamberger, 30; Duel, 100; Wiener, Levy & Co., 50; Landau, 100. But they had in possession only 100 shares. Bamberger's 30 shares were, as above noted, pledged to the National Bank of Commerce; but for which particular customer the 100 shares were held does not appear and cannot be ascertained. It follows that Hollins had apparently already converted 150 shares (100 Shs "in box," 30 Shs with National Bank of Commerce by Bamberger's consent, leaving 150 Shs missing).

On November 8, 1913 (a Saturday), one Schatzkin ordered Hollins to sell for his account 200 shares of Copper "short," and this was done. On the next business day, November 10th, it was obligatory to make a delivery pursuant to the short sale, and delivery was made by Hollins surrendering the 100 shares held as above for "account of their long customers," together with another 100 shares borrowed by Hollins for that purpose. On the same November 10th Schatzkin ordered his brokers to "cover" the short sale, which was done by buying 200 shares "on the market." This necessitated a stock exchange clearing house operation, as the result of which the borrowed shares were returned to the lender, and the 100 shares previously delivered were replaced by another 100 shares in different certificates which Hollins received from another brokerage house on November 11th. It is thus proven that 100 shares which on November 7th Hollins & Co. had for account of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

their "long" customers were used to make deliveries under "short" orders. On the day of failure the bankrupts continued to be liable as above noted for 280 shares of the stock in question, but they had in possession no more than the 100 shares now in the receiver's hands, the certificates for which had come to them two days before as the result of the Schatzkin speculation.

Transactions in "Copper" were not the only pieces of business transacted between the bankrupts and the persons heretofore enumerated. On November 13th Landau's account showed him indebted in the sum of \$10,175.92, with certain securities, including the Copper stock in question, held as security therefor. This account has been liquidated by the receiver, so far as appears, with Landau's consent, i. e., he has been credited with the values on the day of failure of the stocks held, so that on the papers before me they are gone, and Landau is still indebted to the bankrupt estate in the sum of \$375.92. Bamberger was in the same condition, and the receiver has credited him with the values of his stocks on the day of failure, including the 30 shares of Copper known to be in the possession of the National Bank of Commerce. By the account submitted Bamberger's interest in that stock has been wiped out by consent, and he has become a creditor of the bankrupt estate for \$221.55. Wieners were in the same position on the date of failure, i. e., they were heavily indebted, and numerous stocks (including the Copper) were held by Hollins as security. The receiver in like manner has offered to liquidate this account. If the same principles were applied there would result a balance in favor of Wieners of \$3,227.78, and the receiver is willing that they should be considered creditors for that sum. Wieners, however, in their answer, in effect decline to assent to liquidation; they accept it only as far as necessary to wipe out their debit balance, so that their account, as stated in the answer, shows the appropriation of all collateral except the fifty shares of Copper, with the result that as of November 13, 1913, Wieners are indebted to the estate in only \$290.97, while the estate is still responsible for the 50 shares of Copper. From the papers before me it does not appear that any effort has been made to liquidate the account of Duel. In the account rendered him by the bankrupt as of November 1, 1913, he is shown to be in debt to Hollins in the sum of \$3,326.01, as against which the aforesaid 100 shares of Copper is held as security. "Copper" was quoted on November 13, 1912, at 70½, on which basis the liquidations referred to were made. Under these circumstances Duel petitioned for an allotment to him of 100-280 of the Copper stock the receiver has in hand. Notice was given to all the other persons interested in Copper stock on "long" transactions, and Wieners appeared and claim 50-280 thereof. Landau has not appeared, though duly notified. Bamberger submitted his rights, claiming whatever relief was accorded Wieners.

Hawkins, Delafield & Longfellow, of New York City (Frederick W. Longfellow, of New York City, of counsel), for petitioner.

Cravath & Henderson, of New York City (Stuart McNamara, of New York City, of counsel), for Wiener, Levy & Co.

Stroock & Stroock (Henry L. Moses, of New York City, of counsel), for L. M. Bamberger.

Lexow, Mackellar & Wells, of New York City (T. Tileston Wells, of New York City, of counsel), for receiver.

Beekman, Menken & Griscom, of New York City (William C. Armstrong, of counsel), for bankrupts.

HOUGH, District Judge (after stating the facts as above). [1] This claim is the legitimate aftermath of *Gorman v. Littlefield*, 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047, if that decision logically follows *Richardson v. Shaw*, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981, and *Sexton v. Kessler*, 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995. That there is such logical sequence Justice Day's opin-

ion asserts, and it seems to me plain enough. All these controlling cases fully accept the "grain elevator" doctrine respecting stocks, so that a customer who finds any stock of the kind he bought on his broker's premises can claim what he finds, for it is "unnecessary * * * to put his finger on the identical certificates purchased for him." This right is helped out by that "presumption in favor of fair dealing" so much dwelt on in the higher courts, though said presumption is productive of cynic smiles even in counsel advancing the same in courts nearer real life—as it is seen in stockbrokers' shops.

Putting together these controlling fictions, it is difficult to see what exclusive right any customer can have in any given certificate until he gets it in possession; but that claim still awaits decision. If there were 280 (or more) shares of Copper in the receiver's hands, the Gorman Case would be plainly applicable; but there are only a hundred, and that fact is said to entail both a difference and distinction. It is true that Day, J., twice refers to the presence of shares sufficient to satisfy the demand of the petitioner Gorman—as if that fact were significant. It was significant, after the fictional presumption had been made, that what the brokers had on hand was acquired because they intended to replace the misappropriated shares of Gorman. If they were going to replace any shares, acquiring the exact amount taken is quite significant of intent to make good the wrong done. But if by dwelling upon number of shares on hand anything more than this was meant, the logical symmetry of the fictions on which the decisions rest is seriously impaired, to say the least. If stock purchasers dealing in a given stock at a given broker's are entitled to regard his aggregate purchases as so much grain in a bin (at least until he allots the stock in specie, if there is such a thing), and if they are entitled to presume that when he wrongfully takes from the bin, any subsequent acquisition of "stock-grain" is intended to fill up the bin again, what difference can it make that, when the broker is surprised by bankruptcy the bin is full, or half full, or as here, 10-28 full?

Again it was urged that Gorman's Case did no more than relax the rules of identification. Gorman was refused any stock in this court, because he could not identify as his the stock on hand, but the very ground of decision in the Supreme Court is that no identification is necessary—the presumption of restitution plus the physical presence of some stock, supplies the lack—"in the absence of countervailing proof." To call what occurred in Gorman's Case identification is playing with words. Nor is there here any countervailing proof. Indeed, this record is more favorable to Hollins' customers in Copper than was the evidence in Gorman's Case. It is uncontradicted that on November 7th Hollins had on hand 100 shares "for account of their long customers." They were used to "carry" Schatzkin. That they emerged from that transaction in different certificates, but unchanged in their relation to Hollins, needs no exposition in a community much too familiar with transactions such as have here been outlined.

In short, if one deals with facts instead of fictions, it is true that any customer who had applied for his Copper before bankruptcy would have gotten these 100 shares, or the proper part thereof. The effect

of bankruptcy is that all apply together, and so all must share pro rata. Landau's account has been liquidated and he is still in debt, therefore he has no claim. Bamberger's situation is interesting but microscopic. It is known exactly what became of the paper called a certificate which Hollins purchased for him. The pledge was lawful and consented to. Bamberger never paid for that stock, unless the receiver's liquidation is payment. Unless he somehow pays he can get nothing. The receiver's liquidation does not suit counsel, even partially; perhaps because it may deprive Bamberger of rights against any surplus in the Bank of Commerce loan. As Bamberger will not come upon this fund on the only basis admissible, he is relegated to his rights elsewhere.

[2] Duel may recover 35.714 shares and Wiener 17.857 shares. Their several indebtedness may be set off against the shares not recoverable. The fractional shares must be adjusted in cash at 70 $\frac{1}{8}$.

In re QUALITY SHOE SHOP, Inc.

(District Court, E. D. Pennsylvania. April 6, 1914.)

No. 4905.

1. BANKRUPTCY (§ 350*)—CLAIMS—PRIORITY—RENT.

A provision in a lease that, if the lessee was sold out at sheriff's sale or in bankruptcy, etc., the rent for the balance of the term should at once become due and payable, as if made payable in advance, and should be first paid out of the proceeds of the sale, gave the lessor priority upon the lessee's bankruptcy, under the Pennsylvania law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. § 350.*]

2. CORPORATIONS (§ 448*)—LIABILITY ON CONTRACTS OF PROMOTERS.

C., doing business as the Q. Shoe Shop, executed a lease in that name and his own. The incorporation of the business under that name was then contemplated and was thereafter accomplished. The three stockholders, who were also directors, were C.'s wife, son, and son-in-law, and they, after employing C. as general manager, held no further meetings. C. continued the business, having full charge as before; no change being apparent or announced. The first month's rent was paid by Mrs. C., who was repaid by the corporation, and it thereafter paid the monthly installments until bankruptcy became imminent. *Held* that, though the lease was never formally assigned to or accepted by the corporation, it was bound thereon, as C. was acting as its promoter and agent, and it could, and by its conduct did, ratify his unauthorized act.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1709, 1789-1792; Dec. Dig. § 448.*]

In Bankruptcy. In the matter of the Quality Shoe Shop, Incorporated, bankrupt. On report of the referee disallowing a claim for rent. Order reversed, with instructions.

Julius C. Levi, of Philadelphia, Pa., for landlord.

Porter, Foulkrod & McCullagh and Abram Peterzell, all of Philadelphia, Pa., for trustee.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 212 F.—21

J. B. McPHERSON, Circuit Judge. The decision of this case has awaited the determination of the appeal taken from a recent ruling in this district. *Re Keith-Gara Co.* (D. C.) 203 Fed. 585. That ruling having been affirmed a few days ago (sub nom. *Ludlow, Trustee, v. Pugh*, 213 Fed. 450, 130 C. C. A. 96), the pending controversy will now be disposed of. The facts are as follows:

On August 26, 1913, an involuntary petition was filed against the Quality Shoe Shop, and on September 22 the adjudication was entered. The assets of the bankrupt were sold by a receiver, and upon a distribution of the fund Bacharach & Co., the landlords of the place of business occupied by the Shop, presented a claim for one year's rent. The lease had about 16 months to run, and the landlords asserted priority under the Pennsylvania law, basing their claim upon the following clause in the lease:

"It is agreed and understood that, should the lessee make an assignment for the benefit of creditors, or be sold out at sheriff's sale, or in bankruptcy or insolvency, or under any other compulsory procedure or order of court, then the rent for the balance of the term shall at once become due and payable, as if by the terms of the lease it were all payable in advance, and shall be first paid out of proceeds of such assignment or sale, any law, usage, or custom to the contrary notwithstanding."

[1, 2] Undoubtedly this position was sound (*Ludlow v. Pugh*, supra), if the bankrupt was bound by the lease, and this, therefore, is the only question for decision. The referee rejected the claim, holding that the lease did not bind the corporation; but in my opinion the facts point to a different conclusion.

What happened was this: In January, 1913, Samuel Cohen was occupying the premises in question, and was doing business as an individual under the name of the Quality Shoe Shop. On January 16 he executed the lease now under consideration. The contract recites the parties as the Ledger Building Realty Company, agents for Bacharach & Co., lessors, and "Samuel Cohen, trading as Quality Shoe Shop," lessee; and the lessee signed as "Quality Shoe Shop, Samuel Cohen." At this date, the incorporation of the business under the same name was in contemplation and a charter had either been already applied for or was applied for within a few days thereafter. This is evident, for the charter was granted on February 19, and in Pennsylvania previous advertising for three weeks is necessary before an application can be laid before the Governor. Three persons were named as incorporators and subscribers for all the stock, two of them—Cohen's wife and son—signing the application, and subscribing for 64 shares out of 100. The third corporator and subscriber (although not a signer) was Cohen's son-in-law. The three subscribers were also the directors of the company, but the testimony shows that there "was not any occasion to have a meeting after February 22, when Cohen was employed as general manager at a salary of \$3,600 per year." He continued the business and had full charge in the same manner as before, no change being either visible or announced. The first month's rent was paid by a check in Mrs. Cohen's name, but the corporation repaid the money afterwards, and thereafter paid the monthly installments regularly until bankruptcy became imminent.

The situation is shown so clearly in the frank testimony of Samuel Cohen that I quote a part of his examination:

"Q. You expected to incorporate when you signed the lease, didn't you?

"A. That is right.

"Q. And the corporation got the store immediately upon its incorporation?

"A. That is right.

"Q. You took possession under the lease on February 1, 1913?

"A. February 1, was it?

"Q. Yes?

"A. I want to be careful what I say.

"Q. What is your answer?

"A. Yes.

* * * * *

"Q. And your corporation paid the rent, \$375, during its occupancy of the premises?

"A. That is right.

"Q. And they paid the rent stipulated under the lease executed by you January 16, 1913? Read it and you can tell, you are so careful.

"A. That is right.

"Q. And they availed themselves of all the rights, benefits, and privileges which you had?

"A. Under the lease.

* * * * *

"Q. How much rent did the Quality Shoe Shop pay a month for use and occupation of its premises?

"A. \$375 a month.

"Q. That is the same rent that you were to pay under the terms of the lease for the same floor?

"A. That is right.

"Q. Under the lease dated January 16, 1913, for a term of 23 months, the 1st day of February, 1913?

"A. Yes.

* * * * *

"Q. Under the minutes of the Quality Shoe Shop at its meeting held February 22, 1913, you were elected manager?

"A. Yes, sir.

"Q. For a term of one year at salary of \$3,600?

"A. Yes, sir.

"Q. And you had full charge of the conduct and management of the business of the Quality Shoe Shop?

"A. That is right.

"Q. So there was no change so far as the occupancy of the premises was concerned after the lease was executed, was there?

"A. No change.

"Q. You were the only one in charge before and after the incorporation of the company?

"A. Yes, sir.

"Q. It was always known as Quality Shoe Shop, was it not?

"A. Yes, sir.

"Q. And the signs at your place of business all read Quality Shoe Shop?

"A. Yes, sir.

"Q. You traded, when you signed the lease, as Quality Shoe Shop?

"A. That is right.

"Q. And when you incorporated you traded as Quality Shoe Shop?

"A. That is right.

"Q. Were notices of these facts given to the landlords, Bacharach & Co., or to the Ledger Building Realty Company, that a corporation was occupying the property?

"A. Not to my knowledge.

"Q. You never communicated it to the landlord, or their recognized agents Ledger Building Realty Company?

"A. Never.

"Q. But you continued to occupy the premises, and paid the rent stipulated and provided for under the terms of the lease? That is right, is it not?

"A. That is right.

"Q. And secured and obtained as manager of the corporation all the benefits and advantages which you were entitled to as an individual, trading as Quality Shoe Shop?

"A. That is right.

"Q. The board of directors of the stockholders of the Quality Shoe Shop never held any meetings after February 22, 1913, did they?

"A. I do not think they did. No; they did not.

"Q. In other words, they incorporated, went through the formalities of a corporation, and you ran the business?

"A. That is right.

"Q. Until it met with disaster?

"A. That is right.

"Q. That is the whole story?

"A. That is the whole story."

This testimony speaks for itself, and does not seem to need discussion. The lease was never formally assigned to the corporation, and the corporation never accepted it by any formal official action. But neither of these steps was essential. The substance and reality of this family transaction appear to be plain enough. When Cohen signed the lease, he was acting as promoter and agent of a corporation then on the point of being formed, and (while he may have bound himself also by the execution of the lease) I have no doubt that he intended to bind the corporation, and I find as a fact that he was acting in its behalf. That the corporation could ratify this previously unauthorized act done for its benefit is a proposition that needs no citation of authority to support it; and that such ratification might be proved by the company's conduct as completely as by a formal corporate act is I think equally plain. For both propositions, however, I may refer to the notes in 26 L. R. A. 548, 549. The learned referee inadvertently overlooked or minimized the decisive importance of these questions of agency and ratification.

The order of December 29, 1913, is reversed, with instructions to allow the claim.

J. H. HAMLEN & SONS CO. v. ILLINOIS CENT. R. CO.

(District Court, E. D. Arkansas, W. D. April 14, 1914.)

No. 5691.

1. CARRIERS (§ 35*)—CONTRACTS FOR TRANSPORTATION—VALIDITY.

A carrier, which had never published or filed with the Interstate Commerce Commission a through rate to a foreign port, was neither required nor could it make a through rate to such port without violating Hepburn Act June 29, 1906, § 2, c. 3591, 34 Stat. 586 (U. S. Comp. St. Supp. 1911, p. 1289), amending Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 (U. S. Comp. St. 1901, p. 3156), requiring carriers to file schedules of all rates between points on their own routes and points on the route of any other carrier by railroad, pipe line, or water.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 94; Dec. Dig. § 35.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CARRIERS (§ 177*)—TRANSPORTATION OF GOODS—LIABILITY FOR CONNECTING CARRIER'S DEFAULT.

A carrier, issuing bills of lading expressly providing that it issued them on its own behalf over its own lines only, and as agent for connecting lines without a joint, but several, liability, was not liable thereunder for the failure of a connecting ocean carrier to accept the shipment for transportation to a foreign country; the Carmack amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 593 [U. S. Comp. St. Supp. 1911, p. 1307]) not applying to foreign commerce.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 775-789, 791-803; Dec. Dig. § 177.*]

3. CARRIERS (§ 35*)—CONTRACTS—ULTRA VIRES CONTRACT.

A railroad company, not authorized expressly or impliedly by its charter to guarantee the performance of duties by another carrier, had no power to guarantee the transportation of a shipment by a connecting steamship company at a specified rate, and hence was not liable for the steamship company's failure because of bankruptcy to receive the shipment necessitating its shipment over another line at a higher rate.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 94; Dec. Dig. § 35.*]

4. CARRIERS (§ 35*)—TRANSPORTATION CONTRACTS—VALIDITY—"DISCRIMINATION."

A guaranty by a carrier that a shipment would be transported by a connecting steamship company, over whose line no through rate had been made for a specified rate, was void under the prohibition of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) against "discrimination," since the difference in the rates, if any, would have to be paid out of the earnings of its own line, resulting in a lower rate over its line than that published and charged; any assumption of a more burdensome liability than that specified in the public schedules constituting a "discrimination."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 94; Dec. Dig. § 35.*]

For other definitions, see Words and Phrases, vol. 3, p. 2099.]

5. CARRIERS (§ 30*)—CONTRACTS FOR TRANSPORTATION—AUTHORITY OF AGENTS.

A shipper is conclusively presumed to know the published rates of an interstate carrier, and may not rely on the representations of the carrier's agent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 81; Dec. Dig. § 30.*]

6. CARRIERS (§ 30*)—CONTRACTS FOR TRANSPORTATION—LIABILITY FOR QUOTING LONG RATE.

A carrier is not liable for the damages resulting from its mistake in quoting a rate less than the full published rate.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 81; Dec. Dig. § 30.*]

At Law. Action by the J. H. Hamlen & Sons Company against the Illinois Central Railroad Company. Judgment for plaintiff for a part only of the amount sued for.

The plaintiff seeks to recover damages sustained by it by reason of a contract entered into between the plaintiff and the defendant, whereby it was agreed that if the plaintiff would make certain shipments from Little Rock, Ark., and Monessen, Pa., over the line of the defendant to New Orleans, La., that road connecting with other roads which have terminals at the initial points of shipments, it would secure and guarantee an ocean rate on freight from New Orleans to Buenos Aires, A. R., at \$9.60 per long ton;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that in consideration of this promise the plaintiff had its freight routed over defendant's line to New Orleans, instead of sending it to the port of New York and shipping it to Buenos Aires from that point; that when the freight arrived in New Orleans, there was no steamship line to carry it to Buenos Aires, by reason whereof the plaintiff was obliged to have the freight reshipped to Mobile, Ala., and there engage ocean freight at a higher rate than that guaranteed by the defendant, which sum it seeks to recover by this action.

The answer denied most of the allegations in the complaint, and also pleaded that the railroad company had never filed a schedule of through rates to Buenos Aires with the Interstate Commerce Commission, that its terminal was at New Orleans, and that no tariff rates had been published by it farther than New Orleans. It also denied that it had guaranteed any rate, and alleged that its agent had merely acted as agent for the plaintiff for the purpose of obtaining a rate for it; that it arranged with the Pan-American Steamship Line, which, at that time, ran a line of steamships between the ports of New Orleans and Buenos Aires, to carry plaintiff's freight at the rate alleged, to wit, \$9.60 per long ton, and authorized the Chicago, Rock Island & Pacific Railway Company, the initial carrier of the freight shipped from Little Rock, to specify in its bill of lading that rate, and in its own bill of lading which it had issued for the car of freight shipped from Pennsylvania it also inserted the rate of \$9.60 per long ton as the ocean rate, but that all bills of lading, those issued by the Chicago, Rock Island & Pacific Railway Company, as well as its own, were what is known as export bills of lading, and in which it was expressly stipulated that in issuing the bill of lading the company only acted as agent for the steamship line or connecting line, and that each line would be liable for any loss or damage caused by it on its own line, and that the responsibility should be several, but not joint.

The case was submitted on an agreed statement of facts, which shows that the agent of the Illinois Central Railroad Company approached the plaintiff and asked for the shipments over its line to New Orleans, and agreed that the railroad company would undertake to get a rate for the ocean freight; that it arranged with the Pan-American Steamship Line, which at that time had steamers plying between the ports of New Orleans and Buenos Aires, to carry the freight at \$9.60 per long ton, and so informed the plaintiff; that but for this fact the plaintiff would not have routed its freight over the defendant's line, but would have sent it by way of New York; that the goods were safely carried to New Orleans, and there delivered at the place designated in the bill of lading, the pier of the Pan-American Steamship Line, but when it arrived there the steamship line had become bankrupt and ceased to run its ships; that the defendant immediately notified the plaintiff of that fact, and thereupon the freight was taken to the port of Mobile and there reshipped at a higher rate than had been contracted for with the Pan-American Steamship Line; that for one of the shipments the plaintiff had prepaid to the defendant the ocean freight, amounting to \$247.67. It was also agreed that the defendant had never published or filed with the Interstate Commerce Commission a through rate to Buenos Aires.

Rose, Hemingway, Cantrell & Loughborough, of Little Rock, Ark., for plaintiff.

Thos. S. Buzbee, of Little Rock, Ark., for defendant.

TRIEBER, District Judge (after stating the facts as above). [1, 2] As the defendant had never published or filed with the Interstate Commerce Commission a through rate to Buenos Aires, it was neither required nor could it make a through rate without violating the Interstate Commerce Law. *Southern Railroad Co. v. Reid*, 222 U. S. 424, 441, 32 Sup. Ct. 140, 56 L. Ed. 257. The bills of lading expressly provide that the carrier issuing the same only issued them on its own behalf

over its own lines, and as agent for the connecting lines, without a joint, but several, liability, and as the Carmack amendment applies only to transportation between the states, and not to foreign countries, the defendant is clearly not liable under the bill of lading, even if it had been the initial carrier which had issued the bill of lading, which it was not, except for the car from Pennsylvania.

[3, 4] Is it liable on the contract made before the freight was delivered and the bills of lading issued? Ordinarily the written contract is held to merge all negotiations previously had, but the plaintiff claims that it is entitled to recover on the agreement and guaranty of the defendant, as without it the shipments would not have been made over its lines.

There are two reasons why this contention is untenable:

First. A railroad company has no power, unless expressly, or by necessary implication, authorized by its charter, to guarantee the performance of duties by another carrier, and there is no evidence that the defendant is so authorized. It is true that a carrier may, at common law, lawfully enter into a contract for the carriage of freight over connecting lines by issuing a bill of lading whereby it undertakes absolutely to carry and deliver a shipment to a destination on another line, but there was no such contract here. All that can be claimed is that it is liable on its guaranty to secure the rate of \$9.60 per long ton from New Orleans to Buenos Aires. But it had no right to make such a guaranty. That it arranged for the transportation at that rate is admitted, and that is the most it could lawfully agree to do.

The cases relied on by counsel for the plaintiff (Northern Pacific R. R. Co. v. American Trading Co., 195 U. S. 439, 25 Sup. Ct. 84, 49 L. Ed. 269, and Southern Pacific Co. v. Interstate Commerce Com., 200 U. S. 536, 26 Sup. Ct. 330, 50 L. Ed. 585), may be distinguished on the facts, but that is unnecessary, as both of these cases arose and were determined by the court prior to the enactment of Hepburn Act June 29, 1906, c. 3591, 34 Stat. 584, 586. Section 2 of that act amends section 6 of the former act so as to read as follows:

"That every common carrier subject to the provisions of this act shall file with the Commission created by this act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation."

It then proceeds to prescribe how the schedules shall be prepared and filed.

As it is not contended that any through rate to Buenos Aires was ever filed by the defendant, it could not indirectly assume a liability which the law prohibits it from assuming directly. The ocean rates were not required to be published, and, for reasons stated in *Re Export and Domestic Rates*, 8 Interst. Com. Com'n R. 214, 276, *Re Tariffs and Export and Import Traffic*, 10 Interst. Com. Com'n R.

68, and *Armour Packing Co. v. United States*, 209 U. S. 78, 28 Sup. Ct. 428, 52 L. Ed. 681, could not properly be made.

Second. If such contracts were permitted, their effect would be to nullify the provisions of the Interstate Commerce Act prohibiting discrimination, for by guaranteeing a lower rate on the foreign line, the difference, if any, would have to be paid out of the earnings of its own line, resulting in a lower rate than that published and charged to other shippers for the carriage of freight over the lines of the railroads, and a lower rate than that specified in its schedules filed with the Commission. *Armour Packing Co. v. United States*, 209 U. S. 56, 78, 28 Sup. Ct. 428, 52 L. Ed. 681.

Any contract by which a carrier of interstate freight assumes a more burdensome liability than is specified in the published schedules is a violation of the Interstate Commerce Act and void. *C. & A. R. R. Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033; *Clegg v. St. L. & S. F. R. R. Co.*, 203 Fed. 971, 122 C. C. A. 273; *C., C. & St. L. R. R. Co. v. Hirsch*, 204 Fed. 849, 123 C. C. A. 145. In the *Kirby* Case it was held that a carrier cannot legally contract with a particular shipper for an unusual service, unless it makes and publishes a rate for such service equally open to all. To guarantee a certain rate from New Orleans to Buenos Aires to one shipper was certainly an unusual service, and not equally open to all, for it had never been published.

[5, 6] Nor is it an excuse that the plaintiff did not know what rates had been published by the railroad company, and that it relied upon the representations of the agent of the company. It has been authoritatively determined that a shipper is conclusively presumed to have that knowledge. *K. C. S. Ry. Co. v. Carl*, 227 U. S. 639, 653, 33 Sup. Ct. 391, 57 L. Ed. 683. Nor is the carrier liable for damages resulting from a mistake in quoting a rate less than the full published rate. *Illinois Cent. R. R. Co. v. Henderson Elevator Co.*, 226 U. S. 441, 33 Sup. Ct. 176, 57 L. Ed. 290.

There can be no recovery for damages, but the plaintiff is entitled to a judgment for the money prepaid for the ocean freight, amounting to \$247.67, with 6 per cent. interest from the time of payment.

JENKINS BROS. v. KELLY & JONES CO.

(District Court, W. D. Pennsylvania. February 21, 1914.)

No. 97.

1. TRADE-MARKS AND TRADE-NAMES (§ 11*)—PATENTED ARTICLE.

Where patented valves were manufactured and sold under the name "Jenkins valves" and the name became so associated with the patented article that it was the generic designation of the particular class of valves, plaintiff, as successor of the patentee, could not prevent the use of such name to designate similar valves manufactured by others after the patent had expired.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 15; Dec. Dig. § 11.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. TRADE-MARKS AND TRADE-NAMES (§ 71*)—DESIGNATION OF PATENTED ARTICLE—EXPIRATION OF PATENT.

Where, after the expiration of a patent on "Jenkins valves" defendant began to manufacture and sell similar valves under the same name, it was bound to disclose, in connection with the name, the source of manufacture in such way as to prevent the public from believing that defendant's valves were those of the successor of the patentee.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 82; Dec. Dig. § 71.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 86*)—UNLAWFUL COMPETITION—SCOPE OF RELIEF.

Plaintiff succeeded to the rights of the patentee in the manufacture and sale of "Jenkins valves." After the expiration of the patent, defendant began to manufacture and sell similar valves, which were put out under the name "Jenkins valve" or "Standard Jenkins valve," and having on the opposite side of the globe of the valve the initials of defendant company. In 1901 plaintiff objected to defendant's use of the word "Jenkins" in connection with its valve, and defendant offered to mark its valves with the further words, "Made by Kelly-Jones Co.," but not on the same side of the valve with the words "Jenkins valve." Plaintiff did not accede to this, but did not institute suit for unlawful competition until 10 years thereafter. *Held*, that while plaintiff was entitled to an injunction restraining defendant's use of the word "Jenkins" as the name of the valve, except in conjunction on the same side with the words, "Made by Kelly-Jones Co.," plaintiff's laches barred its right to recover damages and costs.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 95; Dec. Dig. § 86.*]

In Equity. Bill by Jenkins Bros. against the Kelly & Jones Company. Decree for complainants for an injunction without damages.

Macleod, Calver, Copeland & Dike, of Boston, Mass., for complainants.

Kay & Totten, of Pittsburgh, Pa., for defendant.

ORR, District Judge. The bill in this case charges the defendant with infringement of the trade-name of the complainant and with unfair competition in business by selling valves which are so marked as to cause the public to believe that they are the complainant's valves.

About 1865 Edward Jenkins engaged in the business of selling valves and manufacturing packing for valves. In 1868 he obtained a patent for a globe valve. He had other patents for valves and for the disc or packing to be used inside valves. He gave special attention to the manufacture of the discs or packing to be used in the valves protected by his patents. The valves he caused and permitted others to manufacture for him. He continued in this business alone for a short time, when he took into partnership one of his sons. He died in 1872, after which his surviving partner associated with him another son of the inventor, and they carried on the business in the firm name and style of Jenkins Bros. until about the year 1906, when the business was incorporated under the name of Jenkins Bros. This corporation has continued the business to date, and is the plaintiff in this suit.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

That the valves covered by the Jenkins patent of 1868 were manufactured by others for the owners of the patent appears throughout the testimony, but especially in a circular to the trade issued by the partnership in 1877. That circular names 12 different firms or corporations which were manufacturing the Jenkins patent valve. The valve became known generally during the life of the patent as the Jenkins valve. This is a fact not seriously controverted by the plaintiff.

Without reference to the original patent of 1868, the nature of the Jenkins valve is shown by the following quotation from the specification of United States patent No. 362,630, issued May 10, 1887, to Charles Jenkins, one of the firm of Jenkins Bros.:

"The invention relates to the class of valves known as the Jenkins valve, or that class employing a removable disc or ring of packing or other material as a valve seat."

It does not appear that the valves during the life of the patent were marked in any way to indicate their origin. After the expiration of the patent on the valve, other manufacturers than those theretofore recognized by Jenkins Bros., began to manufacture the valve and advertised it for sale as the Jenkins valve. The predecessors of the plaintiff and the plaintiff have endeavored to protect the business which had grown up during the life of the patent, not only by advertising their successorship to the original patentee, but by the adoption of one or more trade-marks, which, however, need not be specially considered in this case. Their business has grown steadily in spite of competition.

Among those who began the manufacture and sale of the valve originally covered by the patent to Jenkins is the defendant and its predecessor, the partnership of Kelly & Jones. The defendant is a large manufacturer of fittings of various kinds, including valves. Defendant and its predecessors, for 12 years past at least, have been manufacturing the valve originally protected by the patent, and have advertised it in their catalogues and sold it to the trade throughout the United States as the Jenkins valve. Some of such valves made by the defendant have upon them no indication that they are the Jenkins valve. In other words, the word "Jenkins" does not appear, but there is upon one side of the globe of the valve the monogram, "K-J," and on the other side of the globe "Standard Valve." The defendant, however, has made many of the Jenkins valves, and is now making and selling them, having on one side of the globe of such valve, "Standard Jenkins Valve" in circular lettering around the monogram, "K-J," and on the other side of the globe of the valve in circular lettering the words, "Made by Kelly-Jones Co." surrounding the monogram, "K-J."

The business of the defendant in the selling of the valves so marked has been quite large, and is increasing. The plaintiff avers and has offered testimony tending to prove that the valves made by the defendant and marked by it as last described have not only a tendency to confuse the trade with respect to the source from which the valves come, but have actually deceived the trade to an extent which has

been the cause of great pecuniary loss to the plaintiff. The court is not satisfied from the evidence that there was any actual deception intended by the defendant or by the jobbers in the specific instances which are the subject of the testimony. The request made of a jobber for a Jenkins valve might be complied with by the delivery of a valve of the Jenkins type. The person who made the request might have supposed, and probably did suppose, in many of the cases, that the term "Jenkins" indicated the manufacturer and not the special type of valve. It is natural that persons should be inattentive to the source from which the article they desire comes. There are people who believe that the Corliss engine is made by only one manufacturer, and there are people who would believe that Babbitt's metal was still under the control of the discoverer or his family. The proof of actual deception is not sufficient in this case to lead the court to the belief that the plaintiff has been substantially injured by any deception of the public. So far as the defendant has advertised or catalogued the valves, the source of their production is made plain, yet the court must find as a fact that some people are liable to be deceived in the purchase of the valves of the defendant because the lettering indicating the source of manufacture is on the opposite side of the globe of the valve, and therefore separated from the description of the valve itself.

In 1901 correspondence took place between the plaintiff and the defendant through their solicitors, in which the plaintiff complained of the marking of the valves specially with the word Jenkins thereon. The defendant in that correspondence asserted the right of the defendant to use the word "Jenkins" on the valve, and on January 28, 1901, stated that the defendant was—

"ready to mark the Jenkins valves hereafter made by them as follows: Placing the mark on one or both sides of the valve, 'Jenkins valve made by the Kelly & Jones Co.'"

To this proposition the plaintiff never agreed and in the letter to the defendant's counsel of April 26, 1901, they said:

"The change in the stamping of the Kelly & Jones valve which you suggested in your letter of January 28th your clients were willing to make has been considered by my clients and by me. While we appreciate your and their efforts to meet our wishes, we are obliged to say that the trade would still mistake the Kelly & Jones valve for the Jenkins. This belief has been strengthened by actual cases of such error on the part of Jenkins Brothers' customers, the Kelly & Jones valve with the Jenkins mark having been sold to them and received by them as genuine Jenkins valves."

There is no sufficient excuse offered by the plaintiff for its delay in filing the present bill. From the date of the above correspondence, and the ascertainment of the facts stated in the last sentence quoted from the letter, 10 years were allowed to elapse before the bill was filed.

Evidence was offered on the part of the plaintiff to show that the valves manufactured by the defendant were inferior to those of the plaintiff. We cannot find that fact from the evidence. There is no substantial difference in the qualities of the valves. Each will answer

equally well the purposes for which they are intended, and that is specially to resist a maximum of pressure.

From the foregoing facts, the following conclusions must be reached.

[1] The defendant, after the expiration of the patent, had a right to manufacture valves such as had been protected by the patent, and to call them Jenkins valves, because during the existence of the monopoly secured by the patent the name had become so associated with the patented article that it became the generic designation of the particular class of valve. See *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118. No other authority is necessary on this point.

[2] The defendant having acquired the right to manufacture and sell valves as Jenkins valves was required in equity and good conscience to indicate the source from which they came. No other authority is necessary than the case of *Singer Mfg. Co. v. June Mfg. Co.*, *supra*.

The defendant, however, must not only indicate the source from which they came, but must indicate it in such a way as to prevent the public from being imposed upon. While equity should not lend its aid to the extension of the monopoly granted to the inventor under the patent laws by preventing the use, after the expiration of the patent, of the generic term by which the patented article was designated, equity should not, on the other hand, permit a manufacturer to manufacture such article, after the expiration of the patent, to the detriment of the persons carrying on business in proper succession to the one originally possessed of the monopoly. We believe that it is the duty of a manufacturer, availing himself of the privilege of manufacturing a patented article after the expiration of the patent to declare thereon in no unmistakable terms the source from which it comes. In the case at bar, the defendant has placed upon the valves a statement as to their source, but it cannot be said that such statement is in unmistakable terms, because the language of that statement is not immediately connected with the language in which the valve is described. The description, being on one side of the valve, might be seen by one who did not turn it over in order to see the statement of its source. The valve, if set in position in connection with a system of steam or water distribution, would be so placed that it could not be turned by one observing it, and the description might be seen by reason of the valve's location, when the source from which it came could not be learned. The defendant, therefore, was guilty of unfair competition in the respect only that the source from which the valve came was not immediately coupled with the description of it. The defendant should be restrained, not from the use of the term "Jenkins valve," or the "Standard Jenkins Valve," but from the use of such terms except in immediate connection with language indicating the source from which the valves come.

[3] That the defendant was willing to mark the Jenkins valves made by it in a proper way was a fact of which the plaintiff had knowledge in January, 1901. The plaintiff was not satisfied with that, although, as we have seen, that was all that could be required of the defendant. The plaintiff insisted that the word "Jenkins" should not

be used, which, as we have seen, the defendant was entitled to use in a proper way. The plaintiff, therefore, in 1901, could have had all the relief to which it is now entitled, without litigation. No complaint appears to have been made that the defendant did not immediately couple the words of description with words indicating the origin of the valve. The absence of complaint of this fact during the period of years from that date down to the filing of the bill should operate to relieve the defendant from liability for damages resulting from an act of which the plaintiff did not complain, while complaining of another act. The plaintiff in equity and good conscience should have spoken of the wrong done to it, if any, by the marking of the valves in such way that the source of origin and the description of the valves were not immediately connected. The defendant could well believe that the name "Jenkins" only was unacceptable to the plaintiff. It would not be right, therefore, that the plaintiff should be awarded damages for the act of the defendant in the past in marking the valves as they have been marked.

The laches and delay of the plaintiff can operate against it no further than this. For improper marking in the future, or for the sale of goods already improperly marked, the plaintiff may be damaged, and if such acts are done or permitted by the defendant, the plaintiff may have its remedy in the future for any breach of the injunction which will follow this opinion.

Inasmuch as the plaintiff in 1901 declined to accept from the defendant the proposition to mark defendant's valves on one or both sides, "Jenkins Valve, made by the Kelly & Jones Co.," which under the law the defendant was entitled to place upon its valves, and inasmuch as the plaintiff has no other or further relief by this extended litigation, other than such as it refused to accept in 1901, the court is of the opinion that it is not entitled to recover full costs in this case; and, inasmuch as it appears from the correspondence that while defendant proposed to mark its valves in a proper way, thereby indicating that that way was more in accord with good conscience than the way in which it had been marking them and continued to mark them, that is, by separating the words of description from the words of source, the defendant should not be relieved of all liability in this case, and should therefore pay a part of the costs. The court is of the opinion that each party should pay its own costs in this behalf expended.

A writ of injunction shall issue restraining the defendant, its officers, agents, and employes, from manufacturing any Jenkins valves (and from selling such valves so manufactured by them) upon which appears a description of the manufactured article in that name, without words of equal prominence, immediately connected with such description, indicating that they have been manufactured by the defendant; each party to pay its own costs.

THE FLORIDA.

(District Court, S. D. New York. March 24, 1910.)

1. SHIPPING (§ 207*)—LAWS AFFECTING RIGHTS—STATUTES LIMITING LIABILITY OF SHIPOWNERS.

The statutes limiting the liability of shipowners (Rev. St. § 4283 [U. S. Comp. St. 1901, p. 2943], and Act June 26, 1884, c. 121, § 18, 23 Stat. 57 [U. S. Comp. St. 1901, p. 2945]) were enacted for the public benefit, to encourage shipbuilding and the employment of ships in commerce, and are binding upon the United States government when as a shipper it sustains a loss.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 555, 643, 644; Dec. Dig. § 207.*]

2. UNITED STATES (§ 76*)—GOVERNMENT AS SUITOR—PROCEEDINGS FOR LIMITATION OF LIABILITY.

Where, in proceedings by a shipowner for limitation of liability, the United States appears and files a claim for damages, it has a lien on the property or fund surrendered differing in no respect from that of other damage claimants and is entitled to no preference over them in the distribution of the fund.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 59; Dec. Dig. § 76.*]

In Admiralty. In the matter of petition of the Lloyd Italiano Società di Navigazione, as owner of the steamship Florida, for limitation of liability. On motion by the United States for an order giving preference to its claim for cargo lost in collision. Motion denied.

As the result of collision on the high seas between the Italian steamship Florida and the British steamship Republic, the latter vessel became a total loss.

The Florida, though much injured, came into this port and began the above-entitled proceeding for limitation of liability pursuant to U. S. Revised Statutes, § 4283 et seq. (U. S. Comp. St. 1901, p. 2943).

The United States had shipped on the Republic about \$60,000 worth of cargo. So far as shown by the record, this shipment was made in exactly the same way and by exactly the same methods as in the case of a private shipper.

In this proceeding the United States has filed a claim setting forth its loss in the usual way, and now moves for an order that it be decreed "to receive payment in full for the amount of its loss before the fund paid into court as the result of the sale of the Florida in these proceedings shall be prorated among the other claimants." It is admitted that the fund is wholly insufficient to pay in full all the parties justly entitled.

Addison S. Pratt, Asst. U. S. Atty., of New York City, for the motion.

Samuel Park, Frederick M. Brown, William S. Montgomery, and James Forrester, all of New York City, opposed.

HOUGH, District Judge (after stating the facts as above). There are at least two reasons in my judgment for denying this motion. The first arises from a very broad and universally acknowledged proposition of law which in its application to this case is new. The second is based upon the peculiar nature of this proceeding, and the effect thereof upon any person or corporation, including the sovereign, who chooses to come into it.

[1] That "nullum tempus occurrit regi" is a maxim neither disputed nor disputable in its application either to a monarch or to the sovereignty of the people as embodied in any form of government. But when the ground of the doctrine is investigated it has been declared by the Supreme Court in *Fink v. O'Neil*, 106 U. S. at page 281, 1 Sup. Ct. at page 332, 27 L. Ed. 196, that it rests, "not upon any notion of prerogative, * * * the real ground is a great principle of public policy, which belongs alike to all governments, that the public interest should not be prejudiced by the negligence of public officers to whose care they are confided." It was accordingly there held that the United States was bound by the general language of a statute protecting homesteads from seizure and sale by virtue of execution, and the ground of decision was that the court was satisfied that the "statute which proposed only to regulate the mode of proceeding in suits did not divest the public of any right and did not violate any principle of public policy."

It therefore becomes necessary under the guidance of the highest court to examine any statute of limitations, whether the limitation be a contraction of time or a restriction of rights, to ascertain whether that statute is obnoxious not to the prerogative or power of republican governments either state or national, but whether the restriction of the statute is for the public good when applied to that sovereignty which is the embodiment of the people's power.

If this test be applied to the statute for limiting the liability of shipowners, the act has survived the test in the judgment of the same court. In *Butler v. Boston & S. S. S. Co.*, 130 U. S. at page 549, 9 Sup. Ct. at page 616, 32 L. Ed. 1017, Bradley, J., said:

"If we look at the ground of the law of limited responsibility of shipowners, * * * that ground is that, for the encouragement of shipbuilding and the employment of ships in commerce, the owners shall not be liable beyond their interest in the ship and freight for the acts of the master or crew done without their privity or knowledge. It extends to liability for every kind of loss, damage, and injury. This is the language of the maritime law, and it is the language of our statute which virtually adopts that law."

It seems to me that no plainer statement of the view that this act being for the benefit of commerce is for the public benefit could be made.

In this litigation it is neither shown nor suggested that the government in accepting its pro rata share of the proceeds of the Florida is suffering from the negligence or default of any of its officers or employes. The claim made (viewed from the standpoint of declaring the act inapplicable to the government) clearly rests upon prerogative only, and that ground for such a position has in my judgment never been adopted by any American court. It is not thought necessary to elaborate this view, which as the first application of a wide principle to a particular case is not important when stated by a court of first instance; but if correct, as I believe it to be, it entirely disposes of the proposition advanced.

[2] Taking up the second reason, it is admitted that the United States, among others, became entitled, as soon as it lost its goods by

the collision referred to, to a maritime lien or privilege. It acquired *jus in re*, or proprietary interest in the Florida, which when enforced by admiralty process in rem relates back to the time of the collision. The John G. Stevens, 170 U. S. at page 122, 18 Sup. Ct. 544, 42 L. Ed. 969. The United States, therefore, is in the position of a lienor whose lien (unless protected by its sovereignty) has been divested by judicial sale and transferred to the fund now in court and against which this claim is made.

It may be admitted that the United States need not have come into this proceeding, that it might have proceeded at common law against the owners of the Florida, and even that its lien would have survived (also by reason of sovereignty) the judicial sale that produced this fund. (These admissions are made wholly for the sake of argument.) None, however, of the courses indicated has been taken; the government has filed its claim, which necessarily rests upon and represents the *jus in re* that arose by virtue of and *eo instanti* the collision.

Unless therefore in this proceeding it can be shown that when the United States has a lien not different in kind from those of other shippers and other claimants against the same fund, its lien is to be preferred in payment to other similar liens; it must prorate with other claimants similarly situated and take its rank in the order of maritime priorities.

It seems to me that this proposition cannot be maintained under *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 7 L. Ed. 189, and is wholly inconsistent with numerous cases holding that a judgment obtained by the sovereign will rank in lien and order of payment just as if it had been obtained by a private citizen. *Cottrell v. Pierson* (C. C.) 12 Fed. 805; *Prince v. Bartlett*, 8 Cranch. 431, 3 L. Ed. 614, and cases there cited.

Upon the reason of the matter, if this be the rule as to judgments, much more is it the rule as to maritime liens, for a judgment creditor, as pointed out by Story, J., in the *Conard Case*, never has *jus in re*; he can rise no higher than *jus ad rem*. Persons possessing *jura in re* have a species of proprietary interest in common, and I can imagine no more inequitable doctrine, nor one more opposed to public interests, than to hold that, when by a statute of the United States a large number of maritime lienors are compelled to prorate their liens in the interests of commerce, the United States alone shall not be called upon to make this concession to the general weal.

The motion is denied, and an order may be entered denying the prior claim of the government.

KNAUTH, NACHOD & KUHNE v. LOVELL et al.

(District Court, N. D. Alabama. January 10, 1914.)

1. BANKRUPTCY (§ 302*)—RECOVERY OF PROPERTY FROM TRUSTEE—BILL.

Complainants sued a bankrupt's trustee to recover the proceeds of certain cotton, alleging that complainants had parted with their money in New York for certain foreign bills of exchange with forged bills of lading attached; that the bankrupts had deposited the bills of exchange in their local bank; that, on delivery thereof to the local bank, drafts were drawn by the bankrupts on their foreign broker and deposited with such local bank or other depositaries, and by it or them placed to the credit of the bankrupts; that these banks held ample collateral to insure redemption of the approximate drafts in case of dishonor by nonacceptance or nonpayment; that on receiving the money from complainants for the foreign bills the broker took up the approximate drafts with complainants' funds; that the foreign bills were accounted for and the proceeds thereof returned to the bankrupts and deposited by them with other money of their own in the local bank; and that such bank credit or trust fund was expended for certain cotton, etc. *Held*, that such allegations were consistent with the idea that the drafts were deposited for collection and the proceeds credited to the bankrupts in advance of actual collection, but with the right to charge back, if uncollected, and did not allege that the drafts were discounted by the local banks.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 456, 457; Dec. Dig. § 302.*]

2. BANKRUPTCY (§ 140*)—OWNERSHIP OF PROPERTY—TRUST FUND.

In order that complainants may follow a trust fund into the hands of a bankrupt's trustee and recover same, it is insufficient to show that the money of which complainants were defrauded by the bankrupts went in a general way to swell the bankrupts' entire estate which came into the hands of the trustee, but complainants are bound to actually trace their money to the trustee's possession or show that it went into or to pay for property of which the trustee acquired possession from the bankrupts, either by proof that it went into and remained in the fund which came to the trustee, and that the fund was never in amount below that claimed from the time it became a part thereof until bankruptcy, or by showing that the money was wholly or partially used to purchase property susceptible of identification as having been purchased with complainants' money and which came into the hands of the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

In Equity. Suit by Knauth, Nachod & Kuhne against one Lovell, as trustee in bankruptcy of Knight, Yancey & Co. On defendant's motion to dismiss the bill. Motion treated as for more specific statement, and as so treated allowed.

Suit in equity to follow money obtained by false pretenses into assets acquired or claimed by a trustee in bankruptcy of Knight, Yancey & Co. Motion by the defendant trustee to dismiss the bill of complaint on objections in point of law contained in the answer. The bill of complaint sets forth that the complainants parted with their money in New York for certain foreign bills of exchange in foreign money with forged bills of lading attached; that the bankrupts had deposited said foreign bills of exchange in their local bank; that, "on the delivery" thereof to said local bank, drafts "were drawn by the said Knight, Yancey & Co. upon said F. Van Gerpen, their agent or broker, or upon other drawees, for the approximate amount thereof in money of the United States, and deposited with said bank or other

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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depositories and by it or them placed to the credit of the said firm, the said bank or other depositories holding collateral security ample to insure the redemption of said approximate drafts in case of dishonor by nonacceptance or nonpayment"; that, on receiving the money of the complainants, for said foreign bills of exchange with forged bills of lading attached, said broker took up said approximate drafts with said money of complainants; that said foreign bills of exchange "were all accounted for and the proceeds thereof remitted to Knight, Yancey & Co. and deposited by them with other money of their own" in said local bank; and that said "bank credit or trust fund was expended * * * for certain cotton."

Percy, Benners & Burr, of Birmingham, Ala., for the motion.
Cabaniss & Bowie, of Birmingham, Ala., opposed.

GRUBB, District Judge (after stating the facts as above). Two grounds of the motion only were insisted upon by the trustee:

[1] 1. That the money, of which plaintiffs were defrauded, did not pass into the hands of the bankrupt, but went to reimburse a bank or banks at Decatur, which had discounted the drafts of the bankrupts on one Van Gerpen. I do not think that the averments of the bill show that the drafts were discounted by the Decatur banks. The averments are consistent with the idea that they were deposited for collection and the proceeds credited to the bankrupts in advance of actual collection, but with the right to charge back, if uncollected. *Richardson v. Louisville Banking Co.*, 94 Fed. 442, 36 C. C. A. 307. For this reason the grounds of the motion, predicated on this idea, are overruled.

2. The other ground insisted on is that the averments do not show at all or with the requisite certainty into what, if any, assets of the bankrupts that came into the hands of the trustee, the money of which plaintiff was defrauded went. I think this ground is well taken.

[2] I do not think the plaintiffs can fasten a charge upon all the assets of the bankrupts that came into the hands of the trustee, upon the ground that money of theirs, of which they were defrauded by the bankrupts, went, in a general way, to swell the entire estate of the bankrupts which came to the trustee, without actually tracing their money to the trustee's possession, or showing that it went into or to pay for property of which the trustee acquired possession from the bankrupts. *Board of Commissioners v. Strawn*, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. (N. S.) 1100; *In re Brown*, 193 Fed. 24, 30, 113 C. C. A. 348, affirmed *First National Bank v. Littlefield*, 226 U. S. 110, 33 Sup. Ct. 78, 57 L. Ed. 145.

This may be done either by showing that it went into and remained in a fund, which came to the trustee and that the fund was never, in amount, below the amount claimed from the time it became a part thereof until bankruptcy; or by showing that the money, sought to be fastened with the trust, was wholly or partly used to purchase property, which is susceptible of identification, as having been purchased with plaintiffs' money and which came into the hands of the trustee.

It is not sufficient for the plaintiffs to show that such property was purchased from a fund, which once contained plaintiffs' money, without showing also that plaintiffs' money wholly or partly was used in paying for it. The burden is on the plaintiffs to point out the specific prop-

erty and trace the plaintiffs' money into the purchase money of it. It does not suffice to show that it went into some of the bankrupts' property that came into the possession of the trustee without pointing out what it is. It is not sufficient to aver that it went into the assets generally or, what amounts to the same thing, specify separately the entire assets, in the possession of the trustee, as those into which it is claimed to have gone. The bill, it seems to me, may aver more than one item of property in the alternative, to allow for a possible failure of proof, if one alone were relied upon; but it must point the specific property into which the money is to be traced, and the proof must show that it went to purchase that property.

The case of *Gorman v. Littlefield*, 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047, is distinguished from this case. In that case, the stock was the property of the claimant, in the possession of the bankrupt as bailee. The court held that the bankrupt was only required to have in his possession at all times stock of like kind and amount, that it was his duty to do this much, and if at any time he had no stock of like kind and amount it was his duty and he could replace stock that he had disposed of, which had not belonged to him, but to his customer, with like stock in kind and amount, and that the substituted stock then became his customer's in lieu of that used or converted by him.

In this case, the plaintiffs' moneys became the bankrupts' on receipt of them, subject to divestiture, upon rescission of the fraudulent transaction by the plaintiffs. Upon rescission the money again became plaintiffs', which they could reclaim only if they could then trace it into the bankrupts' possession or into that of their trustee. This could be done, according to the authorities cited, only in one or the other of the two ways specified. That the case of *Gorman v. Littlefield* does not conflict with the cases of *Board of Commissioners v. Strawn* and *In re Brown* appears from the fact that the latter case was affirmed by the Supreme Court in *First National Bank v. Littlefield*, 226 U. S. 110, 33 Sup. Ct. 78, 57 L. Ed. 145.

It seems to me that the defendant is entitled to have the plaintiffs state their case with more certainty in the respects mentioned, rather than that the bill should be dismissed.

The third prayer of the bill seems to me to plainly show its insufficiency in the respects mentioned.

Treating the defendant's motion as a motion to require a fuller and more certain statement of plaintiffs' case, I will grant it, and enter an appropriate order for this relief when presented to me, after being agreed upon by counsel.

In re HARVEY.

BAXTER v. BEVILL, PHILLIPS & CO. et al.

(District Court, S. D. Alabama. January 31, 1914.)

No. 11.

1. PLEDGES (§ 11*)—ELEMENTS OF PLEDGE—DELIVERY OF POSSESSION.

Delivery of possession of property pledged to the pledgee is essential to give rise to a lien in his favor, which possession must be complete, unequivocal, and exclusive.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 28-35; Dec. Dig. § 11.*]

2. BANKRUPTCY (§ 188*)—PLEDGES—VALIDITY.

An agreement to give and deliver a pledge, made in good faith, to secure a present loan or consideration protected by state law, is valid under Bankr. Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3450), providing that liens given or accepted in good faith and not in contemplation of or fraud of the act, for a present consideration, which have been recorded according to law, if record is necessary in order to impart notice, shall not be affected by the act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286-289, 291-295; Dec. Dig. § 188.*]

3. BANKRUPTCY (§ 188*)—PLEDGES—LIEN.

The lien of a pledge remains undisturbed when good against both the bankrupt and his creditors immediately preceding the adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286-289, 291-295; Dec. Dig. § 188.*]

4. BANKRUPTCY (§ 188*)—PLEDGES—VALIDITY.

The title of a pledgee under an ordinary contract of pledge, in the absence of fraud, is good against all the world except creditors who have acquired enforceable liens while the property was in the possession of the pledgor, and on his bankruptcy the property passes to his trustee, subject to the superior title of the pledgee or lienor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286-289, 291-295; Dec. Dig. § 188.*]

5. PLEDGES (§ 2*)—VALIDITY—WHAT LAW GOVERNS.

The validity of a contract of pledge must be determined by the law of the state where made.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 2; Dec. Dig. § 2.*]

6. PLEDGES (§ 11*)—VALIDITY—DELIVERY—TIME.

Where a contract of pledge is invalid because of a failure to deliver the property to the pledgee, possession given the pledgee at any subsequent time will validate the pledge without a new consideration; the delivery being regarded as relating back to the original agreement except as against the rights of intervening creditors who have acquired liens on the property in the meantime.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 28-35; Dec. Dig. § 11.*]

7. BANKRUPTCY (§ 163*)—PLEDGES—VOIDABLE PREFERENCE.

Where state court decisions have held valid agreements to pledge personal property when delivery was not made until after the agreement to give the lien, except as against intervening lien creditors, the delivery of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the property by the debtor subsequent to the agreement to give the lien will not constitute a voidable preference under the bankruptcy law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248; Dec. Dig. § 163.*]

In Equity. Action by H. E. Baxter, as trustee in bankruptcy, of J. A. Harvey, against Bevill, Phillips & Co. and others. Judgment for defendants.

H. H. McClelland, of Mobile, Ala., for complainants.

R. P. Roach, of Mobile, Ala., for respondent.

TOULMIN, District Judge. [1] There must be a delivery of the possession of the property pledged to the pledgee, to give rise to the lien in his favor. *Security Warehousing Co. v. Hand*, 143 Fed. 32, 74 C. C. A. 186; 22 Am. & Eng. Encyc. of Law (2d Ed.) 853; *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779; *Christian v. Atlantic & N. C. Railroad*, 133 U. S. 241, 10 Sup. Ct. 260, 33 L. Ed. 589.

Possession is of the essence of a pledge, and without it no privilege can exist against third persons. Authorities, *supra*. Such possession, to give validity at law to the pledge, must be complete, unequivocal and exclusive by the pledgee.

[2] An agreement to give and deliver a pledge made in good faith, to secure a present loan or consideration, as an advance of money, protected under the law of the state, is valid, and is also within the protection of clause "d," § 67, of the Bankrupt Act. *Collier's Bankcy.* (9th Ed.) 948, 950.

[3] The lien of a pledge remains undisturbed when good against both the bankrupt and his creditors immediately preceding the adjudication. *Hewit v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; *Chesapeake Shoe Co. v. Seldner*, 122 Fed. 593, 58 C. C. A. 261.

[4] The title of the pledgee under the ordinary contract of pledge is, in the absence of fraud, good against all the world, except creditors who have acquired enforceable liens against the property while it was in the possession of the pledgor, and upon his bankruptcy passes to his trustee, subject to the superior title of the pledgee or lienor. *Collier on Bankcy.*, 1004, 1005.

[5] The validity of a contract of pledge must be decided by the law of the state where made. *Security Warehousing Co. v. Hand*, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117, 11 Ann. Cas. 789, 19 Am. Bankr. Rep. 291; *Hartford Insurance Co. v. Railroad*, 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84; *In re Pittsburgh Industrial Iron Works Co. (D. C.)* 179 Fed. 151; *Collier on Bkcy.* (9th Ed.) 948; *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; *Humphrey v. Tatman*, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956; *Hurley v. Atchison, Topeka & S. F. Ry. Co.*, 213 U. S. 126, 29 Sup. Ct. 466, 53 L. Ed. 729.

[6] "Where the contract of pledge is invalid, because of failure to deliver the property to the pledgee, possession given to the pledgee at any subsequent

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

time will validate the pledge." 22 Am. & Eng. Encyc. of Law (2d Ed.) 855; Remington on Bkcy. § 1370; Nobles v. Christian & Craft Grocery Co., 113 Ala. 220, 20 South. 961; American Pig Iron Storage Warrant Co. v. German, 126 Ala. 238, 239, 28 South. 603, 85 Am. St. Rep. 21.

The agreement to pledge the policy of insurance involved in this cause was not accompanied by its delivery to the pledgees, and was invalid as a pledge for that reason in its inception. There is no question, however, as to the good faith of the parties at the time the agreement was made. Subsequently (2 or 3 days after the fire occurred) delivery of the policy was made and duly assigned to Bevill, Phillips & Co., pledgees. This was done 17 or 18 days before involuntary bankruptcy proceedings were instituted, but within four months thereof, and while the bankrupt was insolvent. In the absence of the prior agreement to give the pledge, the subsequent surrender of the policy would have constituted a voidable preference. If possession had accompanied the agreement to give the pledge, it would have been valid, though given within four months of the bankruptcy proceedings, because of contemporaneous consideration moving to the bankrupt for the agreement to make the pledge. The main question here is: Does the subsequent delivery of possession of the policy to the pledgees, though without a new consideration, relate back to the original agreement and have the effect to validate the pledge? The Supreme Court of Alabama has held that subsequent delivery of property agreed to be pledged renders the pledge valid, except as against intervening liens which have attached in the interim. Nobles v. Christian & Craft Grocery Co., 113 Ala. 220, 20 South. 961; American Pig Iron Storage Warrant Co. v. German, 126 Ala. 239, 28 South. 603, 85 Am. St. Rep. 21; In re Automobile Livery Service Co. (D. C.) 176 Fed. 795.

[7] "If the decisions of the state court held valid transactions to create liens in cases in which delivery is made subsequent to the agreement to give the lien, but before the right of intervening creditors has been fastened upon the property, the delivery of the property, under such circumstances, will not constitute an illegal and voidable preference under the bankruptcy law." In re Automobile Livery Service Co. (D. C.) 176 Fed. 795; Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956.

I have quoted from, and to a considerable extent used, the language of Judge Grubb in his opinion in the case cited from In re Automobile Livery Service Co. (D. C.) 176 Fed. 795, which is a case analogous to the case under consideration. Although they are different as to some of their facts, the rules of law in regard to pledges are involved in both cases.

UNITED STATES v. SHEVLIN et al.

(District Court, D. Massachusetts. June 12, 1913.)

No. 655.

1. CONSPIRACY (§ 43*)—INDICTMENT—OVERT ACT.

An indictment for conspiracy need not allege that the overt acts charged were effective, nor in what manner they would tend to effect the object of the conspiracy; it being sufficient if the act is so described as to apprise the defendant of the act intended to be given in evidence.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84-99; Dec. Dig. § 43.*]

2. CONSPIRACY (§ 43*)—INDICTMENT—MANNER OR MEANS OF ACCOMPLISHMENT.

Where an indictment for conspiring to defraud the United States of customs duties and to commit the crime of smuggling merchandise into the United States clearly described the general purpose and scope of the conspiracy, it was not necessary to allege the exact manner or means by which the merchandise was to be passed through the customs lines.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84-99; Dec. Dig. § 43.*]

3. CONSPIRACY (§ 43*)—CRIMINAL PROSECUTIONS—INDICTMENT.

An indictment for conspiracy to smuggle merchandise and defraud the United States of customs duties need not allege that defendants intended that such merchandise should not be invoiced.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84-99; Dec. Dig. § 43.*]

4. CONSPIRACY (§ 37*)—CONSPIRACY TO COMMIT CRIME NECESSARILY INVOLVING UNLAWFUL CRIME.

Though Rev. St. § 2865 (U. S. Comp. St. 1901, p. 1905), relative to smuggling, provides for the punishment of persons aiding and abetting smuggling, and though if an offense necessarily involves an unlawful agreement between two or more persons the parties thereto cannot be charged with conspiracy for making such agreement, but must be prosecuted for the principal offense, the parties to a conspiracy to smuggle foreign merchandise and defraud the United States of customs duties may be indicted for conspiracy, as neither smuggling nor defrauding the United States necessarily involves an agreement between two or more persons, and either offense may be committed by a single individual.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 68-70; Dec. Dig. § 37.*]

5. CONSPIRACY (§ 43*)—INDICTMENT—MERGER IN OFFENSE COMMITTED.

In a prosecution for conspiracy to commit a felony, the merger of the conspiracy in the completed felony is an affirmative defense, and the indictment need not negative the commission of the completed felony.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84-99; Dec. Dig. § 43.*]

Terrence L. Shevlin and others were indicted for conspiracy. On demurrer to the indictment. Demurrer overruled, and motion to quash denied.

William H. Garland, Asst. U. S. Atty., of Boston, Mass.

John P. Feeney, of Boston, Mass., for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

MORTON, District Judge. Each of the three counts of this indictment charges a conspiracy between the same three defendants. In the first two counts the purpose of the conspiracy is alleged to have been to defraud the United States of customs duties, and in the third, to commit the crime of smuggling foreign merchandise subject to duty into the United States. The overt acts alleged to have been done in furtherance of the conspiracy are the same in each count.

The defendants have demurred to the indictment. The first eight grounds of demurrer present objections to the sufficiency of the indictment of general or minor character and were argued together. Without discussing each separately, I am of the opinion that no one of them is well founded and that the indictment is not uncertain or insufficient on these points.

[1] The ninth, twelfth, and thirteenth grounds of demurrer relate to the overt acts charged to have been done in pursuance of the conspiracy. It is not necessary to allege that such acts were effective, nor "in what manner the act described would tend to effect the object of the conspiracy. It is sufficient if the act be so described as to apprise the defendant what act is intended to be given in evidence as tending to show that the unlawful agreement was put in operation. * * * The object of requiring proof of some act in furtherance of the unlawful agreement is to show that the unlawful combination became a living, active combination." *Bennedict, J., U. S. v. Donau*, 11 Blatch. 168, Fed. Cas. No. 14,983. By this test the allegations in the indictment are sufficient.

[2] The tenth ground of demurrer questions the sufficiency of the description of the manner or means by which the defendants intended or caused the foreign merchandise to be passed through the United States customs lines; the eleventh, that it does not sufficiently allege any criminal intent on the part of the defendants. The general purpose and scope of the conspiracy are clearly described in the indictment. It is not necessary to allege the exact manner or means by which it was to be carried out. An inspection of the indictment shows that it sufficiently alleges criminal knowledge and intent by the defendants.

[3] The fourteenth ground of demurrer is that the indictment does not allege that the defendants intended that the foreign merchandise should not be invoiced. Such an allegation is, in my opinion, unnecessary for the reasons stated in my memorandum in case 656 against these defendants.

[4] The fifteenth relates especially to the third count, and is, in substance, that, as section 2865 of the Revised Statutes expressly provides for the punishment of persons who aid and abet smuggling, such persons cannot be indicted for conspiracy to smuggle. When an offense necessarily involves an unlawful agreement between two or more persons, the parties thereto cannot be charged with conspiracy for having made such an agreement, but must be prosecuted for the principal offense. *U. S. v. N. Y. C. & H. R. R. (C. C.)* 146 Fed. 298. But this principle does not apply to the case at bar, because neither smuggling nor defrauding the customs necessarily involves an agree-

ment between two or more persons. Either offense may be committed by a single individual. It is at least doubtful whether the provisions of said section relating to aiders and abettors add anything to the general law. See Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [U. S. Comp. St. Supp. 1911, p. 1686]) § 332.

As to the sixteenth and seventeenth grounds of demurrer, each of the counts charges a criminal conspiracy. The scope and purpose of the alleged conspiracy are somewhat differently stated in the different counts, but the substantive crime is the same in all, and is a felony.

The eighteenth is:

"That by section 335 of the federal Penal Code of 1910 the offense denounced by section 2865 of the Revised Statutes of the United States is made a felony; that a conspiracy to commit a felony is merged in the felony when actually consummated; that the said indictment alleges the commission of a felony, and therefore the alleged conspiracy is not indictable."

As I construe the language of the indictment, it does not allege that the crime to which the conspiracy was directed was ever actually committed.

[5] Under the nineteenth ground of demurrer the defendants contend that an indictment for conspiracy to commit a felony must allege that the felony was not committed. Their argument is, in substance, that assuming all facts alleged in the indictment to be true, as it fails to allege that the felony contemplated by the conspiracy was not actually committed, it is insufficient, because there is still the possibility that the alleged conspiracy may have become merged in the completed crime. It seems to me, however, that such a merger is an affirmative defense, like a prior conviction or acquittal, which need not be expressly negated by the indictment. See *Berkowitz v. U. S.*, 93 Fed. 452, 35 C. C. A. 379; 12 Cyc. 282.

The motion to quash involves substantially the same questions as the demurrer, and for the reasons above indicated must be denied.

Demurrer overruled.

Motion to quash denied.

WILLIAMS v. McCARTAN et al.

(District Court, W. D. New York. March 17, 1914.)

1. CONSTITUTIONAL LAW (§ 206*) — LICENSES (§ 7*) — CONSTITUTIONALITY OF STATUTES—DISCRIMINATION AGAINST NONRESIDENTS.

Buffalo City Charter, tit. 2, § 17, subd. 7, prohibiting the granting of a license to run a stationary engine unless the applicant has been a resident of the city for three years, even though licensed as a marine engineer, and an ordinance carrying this provision into effect, are unjust, discriminatory, and void under Const. U. S. Amend. 14, since while the state might require applicants to submit to an examination, and if found qualified give them a stationary engineer's license of the same relative grade as the United States license, it could not, because of residence, deny an examination as to the applicant's qualifications; it not appearing that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

this provision was necessary to protect the public health, safety, or welfare.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 625-648; Dec. Dig. § 206;* Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.*]

2. COURTS (§ 282*)—UNITED STATES COURTS—JURISDICTION—CONSTITUTIONAL QUESTIONS.

A suit in which a city charter and an ordinance pursuant thereto denying licenses as stationary engineer to nonresidents of the city were attacked as violative of Const. U. S. Amend. 14, might be maintained in the United States District Court, though there was no diversity of citizenship.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820-824; Dec. Dig. § 282.*]

In Equity. Suit by Frank R. Williams against Robert T. McCartan, City Examiner of Stationary Engineers of Buffalo, and others. Decree for complainant.

Frank R. Williams, of Syracuse, N. Y., in pro. per.

William S. Rann, of Buffalo, N. Y. (Frank C. Westphal, of Buffalo, N. Y., of counsel), for defendants.

HAZEL, District Judge. The bill alleged a conspiracy on the part of the defendants, Robert T. McCartan, the city of Buffalo, the National Association of Stationary Engineers, and the International Union of Stationary Engineers, to carry into operation provisions of the charter and ordinances of the city of Buffalo prohibiting granting to a nonresident a license to run a stationary engine within the limits of said city. The evidence adduced at the hearing did not show the existence of a conspiracy, and hence the bill was dismissed as to the National Association of Stationary Engineers and the International Union of Stationary Engineers, and the action continued against the city of Buffalo and the individual defendant, McCartan, the regularly appointed examiner of stationary steam engineers, empowered to enforce the provisions of the charter and ordinances under discussion.

The averments contained in the bill, exclusive of the conspiracy charge, are sufficient to disclose the intention of the pleader, a layman who appears in person and who resides in the city of Syracuse in this state, to charge an invasion of his constitutional rights because of the enactment and enforcement of an unjust and discriminatory ordinance by the city of Buffalo. The bill is crudely drawn, and in its present form is perhaps not wholly free from technical objection, but no point has been made of this, and therefore the question of the validity of the charter and ordinances in question is deemed properly presented for decision.

[1, 2] The complainant testified that he came to the city of Buffalo in 1912 in search of employment as stationary engineer, his regular trade or occupation, and made application to the defendant McCartan for a license to run a stationary engine within said city. He also testified that he applied for a renewal of a license to run a stationary engine previously granted him, which had expired, and was informed by the defendant McCartan that a license could not be granted him unless he was a resident of the city of Buffalo, and on that ground a license

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was refused him. There was testimony for the defendants that the complainant would have received a license from the examiner of steam engineers if he had conformed to the rules of the office in making an affidavit to the effect that he was the same person mentioned in the expired license held by him, but such testimony is immaterial, in view of the question raised at the trial as to the constitutionality of a provision of the charter of the city of Buffalo whereby the granting of a license to run a stationary engine to any applicant (even though he has a license as a marine engineer) is prohibited unless such applicant shall have been a resident of the city of Buffalo for three years previous to the time of applying therefor. There is an inconsistency between the charter provision, which requires three years' residence, and section 20 of the ordinances, which forbids granting an engineer's license to any applicant unless he be an actual resident of the city of Buffalo, but which specifies no period of time for such residence. See title 2, § 17, subd. 7, of the charter, and compare with chapter 19, § 20, of the municipal ordinances.

I am of the opinion that the provisions of the charter and ordinances with regard to licensing stationary engineers are unjust, discriminatory, and void in that they impair the complainant's legal rights by operating to prevent him from following his trade or occupation in the city of Buffalo. There certainly is discrimination in favor of the residents of the city of Buffalo as against nonresidents, and such discrimination is fatal because it violates the fourteenth amendment of the Constitution of the United States. The state Legislature no doubt had the power to authorize the municipality to enact an ordinance requiring applicants for licenses to run stationary engines within the city of Buffalo to submit to an examination as to their qualifications, and to give them, if found qualified, a stationary engineer's license of the same relative grade as the United States license held by them, as specified in the charter; but the Legislature cannot restrict the issuance of such licenses or of licenses, without grade classification, to engineers living in the city of Buffalo to the exclusion of nonresidents. Such a restriction is arbitrary, unreasonable, and discriminatory as to nonresidents and interferes with their pursuit of their trades and callings. The complainant, it is true, had no positive right to a license to run a stationary engine, but he had a right, without respect to his residence, to an examination as to his qualifications.

A federal court is naturally reluctant to override a state statute and an ordinance enacted in pursuance thereof, and I should have preferred that a correction had first been decreed by a state tribunal, but the asserted discrimination in favor of persons living in the city of Buffalo is so clearly shown that the complainant should not be denied relief from the burdensome conditions, and upon application to the defendants should be given an examination as to his qualifications. It was not shown that the restrictive residential feature was a necessary expedient to protect the public health, safety, or welfare, and discussion of that phase of the subject is therefore unnecessary. The right of the complainant, although a citizen of this state and not of another, to institute this action in this court is well settled by the Supreme Court

of the United States in *Presser v. Illinois*, 116 U. S. 258, 6 Sup. Ct. 580, 29 L. Ed. 615.

A question similar in principle was presented in *Williams v. Molther*, 198 Fed. 460, 117 C. C. A. 220, an action brought by the complainant in the case at bar against the United States local inspectors of steamboats to compel them to give him an examination for pilot's license, which they refused to do on the ground that he had not had the requisite number of years' experience. The Circuit Court of Appeals for the Second Circuit held that the rule of the Board of Supervising Inspectors of the Department of Commerce and Labor refusing to the complainant the right of examination without such period of experience was illegal and void as it deprived him of a right given him by the laws of the United States by imposing an arbitrary condition precedent to the exercise thereof. The principle of that case is thought to apply to the present case.

Complainant may have a decree in accordance with this decision, with costs.

ROUILLER v. A. & B. SCHUSTER CO.

(District Court, D. Arizona. March 31, 1914.)

No. 82.

1. ATTORNEY AND CLIENT (§ 10*)—APPEARANCE BY ATTORNEY NOT ADMITTED.

While the court may refuse to permit one not a member of its own bar to appear before it, it may in its discretion allow attorneys of other courts to appear and conduct cases.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 14; Dec. Dig. § 10.*]

2. ATTORNEY AND CLIENT (§ 10*)—APPEARANCE BY ATTORNEY NOT ADMITTED.

A complaint would not be stricken, though complainant's attorney was not a member of the bar of the District Court, where he was a member of the bar of the United States Supreme Court and of the state Supreme Court, his certificate of qualifications, in which the defendant's attorney joined, showed that his admission would follow his application as a matter of course, and he had been authorized by the then judge of the District Court to file and prosecute the case.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 14; Dec. Dig. § 10.*]

3. ATTORNEY AND CLIENT (§ 71*)—AUTHORITY—TIME FOR QUESTIONING.

It was too late after answer and plea for defendant to question the authority of plaintiff's attorney to represent him.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 97-101; Dec. Dig. § 71.*]

4. ABATEMENT AND REVIVAL (§ 12*)—PENDENCY OF ACTION IN STATE COURT.

The pendency of an action in a state court does not bar the prosecution of the same cause of action in the federal courts.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 87-91, 94, 95, 98; Dec. Dig. § 12.*]

5. TROVER AND CONVERSION (§ 29*)—ACTIONS—PARTIES.

In an action for converting property received by defendant from D. with knowledge of plaintiff's ownership, D. was not a necessary party, as nothing in the case could affect his rights.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 189; Dec. Dig. § 29.*]

At Law. Action by A. E. Rouiller against the A. & B. Schuster Company. On motion to strike, demurrers by complainant to defendant's pleas in abatement, and demurrers by defendant to the complaint. Motion denied. Demurrers to the pleas sustained, and demurrers to the complaint overruled.

Isaac Barth, of Albuquerque, N. M., for complainant.

E. S. Clark, of Prescott, Ariz., and Fred W. Nelson, of St. Johns, Ariz., for defendant.

Motion to Strike.

SAWTELLE, District Judge. Defendant has filed its motion to strike the complaint from the files upon the ground that the attorney for plaintiff had not been admitted to practice in this court at the time he signed the complaint in the case at bar.

[1-3] It is admitted that plaintiff's attorney is a member of the bar of the Supreme Court of the United States and the Supreme Court of this state, and that the defendant's attorney has signed the certificate of the qualifications of plaintiff's attorney, and there is no pretense that he is not a proper party. It was asserted by plaintiff's attorney, and not denied by attorney for defendant, that prior to filing the complaint plaintiff's attorney obtained permission from the then judge of the court, Hon. Richard E. Sloan, to file and prosecute this case. It also appears from the record that, prior to making the motion to strike the complaint, the defendant's attorney had filed his answer to the same. While it is within the power of the court not to permit one not a member of its own bar to appear before it, it is also a matter resting in the discretion of the court, and it may, if it sees fit, allow the attorneys of other courts to appear and conduct cases before it. It is a matter of common custom that attorneys of the Supreme Court bar are frequently permitted to appear in other courts of the United States without formal admission to the bar of those courts. The attorney for plaintiff being a member of the bar of the highest courts, both federal and state, and purporting to act as attorney for plaintiff in the cause, cannot be held to be simply an agent of the plaintiff, and the certificate of qualifications in which the defendant's attorney joined shows that his admission would follow his application as a matter of course. The permission given him by Judge Sloan armed him with a clear right to appear in this case. It is too late after answer and plea to raise the question of the authority of plaintiff's attorney to represent him. Whatever may be the rights or the powers of the court in the matter, there are no rights of defendant which are injuriously affected by the permission given by Judge Sloan, and consequently he is not entitled to have the complaint stricken.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

See *Rader v. Snyder*, 3 W. Va. 414, in which it is held that, where the suit is brought by an attorney not authorized to appear, the remedy is by punishing such attorney and not by dismissing the case.

The motion to strike is denied.

Pleas in Abatement.

[4] Four distinct causes of action are alleged in the complaint. The first is for the alleged conversion in the year 1911 of a certain quantity of wool which the defendant received from one Duran, knowing it to be the property of plaintiff, and the second cause of action is for a similar conversion in the year 1912. The third cause of action is for the conversion of 500 sheep the property of plaintiff, which the defendant, with a knowledge of plaintiff's ownership, received from the said Duran. The fourth cause of action is for an alleged oppressive and unfounded levy of an attachment by the defendant on the property of the plaintiff under a claim of indebtedness to defendant by the plaintiff and said Duran. It is alleged that the plaintiff was in no wise indebted to defendant and that the attachment was levied on the sheep which the defendant here knew were the property of the plaintiff, and special damages are alleged to have been sustained by the plaintiff by reason of the levy.

The defendant filed pleas in abatement against each of the causes of action, which pleas are founded on the pendency of an action brought by defendant here in the courts of Apache county, Ariz., against the plaintiff here and one Duran jointly.

It is alleged in these pleas that there is another action pending between the parties hereto involving the same matters and things in controversy in this action and describes the action as one pending in the superior court of Apache county, state of Arizona, wherein the defendant herein is plaintiff and Rouiller, the plaintiff here, and one Duran, mentioned in the complaint, are defendants. The plaintiff has demurred to these pleas as showing no defense to the action.

It has been repeatedly held that the pendency of an action in the state courts was no bar to the prosecution of the same cause of action in the federal courts, and authorities appear to be so numerous as to render the question beyond the pale of argument.

The Supreme Court of the United States has held this doctrine in a long line of cases beginning in *Wallace v. McConnell*, 13 Pet. 136, 10 L. Ed. 95, and extending to *Hunt v. N. Y. Exchange*, 205 U. S. 322, 27 Sup. Ct. 529, 51 L. Ed. 821. These decisions are conclusive of the question, and the demurrers to the pleas in abatement are sustained.

Demurrers.

[5] Demurrers are filed to the first three causes of action on the ground that Duran has not been made a party to this suit.

In answer to this contention it is sufficient to say that by the allegations of the complaint they have no interest or title in the property alleged to be converted, but such conversion is charged to have been done with full knowledge of plaintiff's ownership. Nothing in this case can affect any right of the Durans, and they are not necessary parties, and the demurrers are overruled.

DAVIS v. ATLANTIC DREDGING CO.

(District Court, E. D. Pennsylvania. February 25, 1914.)

No. 69 of 1913.

TOWAGE (§ 12*)—STRANDING OF TOW—LIABILITY OF TUG.

The stranding of a scow in tow alongside a tug, on a bar which was out of the tug's proper course, *held* due in part to the fault of the tug and in part to the fault of the scowman who was employed by her owner, and not by the tug, and who as soon as the scow struck opened one or more of her pockets and allowed the mud to slip to the bar around the scow which prevented the tug from releasing her.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 24-26, 29; Dec. Dig. § 12.*]

In Admiralty. Suit by Samuel S. Davis, agent of the tug Harry Shaubel, Jr., against the Atlantic Dredging Company, with cross-libel. Decree for libellant.

Willard M. Harris, of Philadelphia, Pa., for Samuel S. Davis, agent.

Howard M. Long, of Philadelphia, Pa., for Atlantic Dredging Co.

JOHN B. McPHERSON, Circuit Judge. This libel was brought by Samuel S. Davis, representing the tug Harry Shaubel, Jr., to recover the contract price for towing services rendered to the Atlantic Dredging Company during the month of June, 1911. At the trial the tug's claim of \$587 was proved to be correct, and the only controversy related to the setoff claimed by the company. It was averred in the cross-libel that in the performance of her contract the tug negligently stranded a scow belonging to the dredging company, thereby doing such injury as to put the scow out of commission for two months. If the tug was at fault, the remaining question is: How much shall the company be allowed?

The first inquiry therefore is whether the tug was negligent. The stranding occurred under the following circumstances:

On June 29 about the end of the day the tug with the scow lashed alongside was about to enter the back channel at League Island. The course she was taking was marked by one buoy at least, and was well known, and had been used, both by herself and by other tows. Some dredging had been done along the course, and there was sufficient water, even at the stage of the tide then prevailing, which was between flood and low water. The course could be safely used when the tide was at two-thirds flood. The scow was 125 feet long, 25 or 30 feet beam, with sides of 12 feet and four pockets to hold mud or sand. Three of the pockets were partly filled with mud, and she was drawing at least 4½ feet. Once in a while other tows had gone aground in that neighborhood; but such incidents caused little inconvenience, as the boats were always floated easily at high water. On this occasion, however, the tug by some miscalculation got out of the course a considerable distance, and put the scow on a bar near the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

entrance to the back channel at a place where stranding had not happened before. The tug remained afloat and tried to get the scow off, but she did not succeed; the reason being that the scowman—who was in the employ of the dredging company, and not of the tug—on his own motion and without orders from the tug released the doors of one or more of the pockets, with the result of letting the mud slip down a short distance to the bottom of the river, thus holding the scow firmly in place on an ebbing tide. After some effort the tug desisted for the day, and was discharged from the job on June 30 or July 1. After the dredging company itself had made ineffectual attempts to release the scow, the libelant was notified on July 11 or 12 to take her off, whereupon the tug was sent down, and on this occasion was successful. The scow was then removed a short distance and was overhauled at a convenient place on the shore. She had been leaking somewhat before the stranding, but no doubt the strain of the pulling under such conditions had done additional damage, and she was found to need repair. No survey was held, and the repairs were made by the dredging company's own men, but with so small a force and in so leisurely a manner that it was 62 days from the stranding before she was able to resume work.

In my opinion the liability for the injury must be divided between the parties. The tug should have known and should have been mindful of the course, and she was at fault for putting the scow on the bar. Indeed, her negligence is scarcely denied; the master of the tug was not called as a witness, and no one else attempted to explain or excuse the stranding. But the scowman, who was the dredging company's representative, was also at fault. He certainly contributed directly to the injury by releasing the pockets and anchoring the scow so firmly as to make her removal much more difficult, thus increasing the strain on the boat. The evidence seems to put these facts beyond doubt, and I shall not discuss them further.

The only question remaining is the allowance that should be made to the company. The total claim is \$782.99, of which \$240.49 is the cost of pumping and repairs, and \$542.50 is for demurrage. The accuracy of the first item is not seriously in dispute, but the claim for demurrage is resisted. I agree that it is too large, and in my opinion the testimony does not warrant an allowance for more than 30 days. This includes the days when the scow was on the bar—to which no objection can be made—and also what I regard as a reasonable time for doing the subsequent work with proper speed. For its own convenience the time was prolonged by the company, and (while the cost of the repairs seems to be correct) the slowness with which the work was done should not operate against the libelant. Demurrage at \$8.75 per day would amount to \$262.50, or a total of \$502.99. For half this sum the dredging company is entitled to credit, and a decree may therefore be entered in favor of the libelant for \$337.50, with interest from, say, August 1, 1911, and costs.

CITY OF IRONTON, OHIO, v. HARRISON CONST. CO.

(Circuit Court of Appeals, Sixth Circuit. April 7, 1914.)

No. 2419.

1. ABATEMENT AND REVIVAL (§ 12*)—OTHER ACTION PENDING—DIFFERENT JURISDICTIONS.

Where a city sued plaintiff construction company for breach of contract in a state court, but the action had not passed to final judgment before the construction company sued the city in the federal court for the city's alleged breach of the same contract, the pendency of the state court action was not ground for abatement of the federal suit.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 87-91, 94, 95, 98; Dec. Dig. § 12.*]

Pendency of action in state or federal court as ground for abatement of action in the other, see notes to Bunker Hill & Sullivan Mining & Contracting Co. v. Shoshone Mining Co., 47 C. C. A. 205; Barnsdall v. Waltemeyer, 73 C. C. A. 521.]

2. ACTION (§ 69*)—PENDENCY OF OTHER ACTION—STAY OF PROCEEDINGS—DISCRETION OF COURT.

Where a suit had been instituted in a state court between the same parties prior to the institution of another suit in the federal court, a request that the latter suit be stayed until the termination of the suit in the state court was at most an appeal to the discretion of the federal court.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 744-751; Dec. Dig. § 69.*]

3. MUNICIPAL CORPORATIONS (§ 1034*)—ACTION—DEFENSES—PLEADING.

In an action for breach of a city's contract for construction of a waterworks system, a defense that the city was forbidden to install the works until the State Board of Health had approved the plan, and for lack of such approval the contract was invalid, could not (in Ohio) be taken advantage of unless pleaded.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2203-2205; Dec. Dig. § 1034.*]

4. MUNICIPAL CORPORATIONS (§ 352*)—CONSTRUCTION OF CONTRACT—PERSONALITY OF ENGINEER.

Where a city's contract for the construction of waterworks gave to the city engineer in charge of the works broad powers, authorizing him to supervise the work of construction generally, to order additional work, fix the price therefor, and determine controversies, etc., a provision that the word "engineer," as used in the contract and specifications, referred to P., chief engineer, in charge of the work, or in case of his death or disability, such other person as might be appointed by the city or the engineer entitled the contractor to the services of P. as engineer in charge of the work, except in case of his death or disability.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 883; Dec. Dig. § 352.*]

5. ESTOPPEL (§ 78*)—CONTRACTS—DEFENSES.

Where a city had unquestioned power to employ a certain person as engineer to supervise the construction of a waterworks improvement, and provided in a contract with plaintiff that such person had been employed and should have charge of the work, except in case of his death or disability, when another might be appointed, the city would be thereafter estopped to plead that such person had never been employed to supervise the work.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 204-210; Dec. Dig. § 78.*]

6. ESTOPPEL (§ 78*)—CONTRACTS—TRUTH OF RECITALS.

Where a municipal corporation has power to contract and do preliminary acts on which the contract rests, and which are recited in the contract as having been done, it is estopped to deny the truth of the recitals.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 204-210; Dec. Dig. § 78.*]

7. ESTOPPEL (§ 107*)—CAUSE OF ACTION—PLEADING.

Where plaintiff's pleading fully stated the facts on which an estoppel was predicated, plaintiff was entitled to the benefit thereof, though the claim of estoppel was not alleged in terms.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 297; Dec. Dig. § 107.*]

8. DAMAGES (§ 124*)—BREACH OF CONTRACT—LOSS OF PROFITS.

In an action for breach of a city's contract for plaintiff's construction of a waterworks system, plaintiff's right to recover lost profits was not affected by the fact that if, during the time fixed for performance, there had been high water in a river, the profits would have been greatly lessened, it appearing that, at the time suit was brought, the contract period had passed and the physical conditions had become matters of history.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 326-338; Dec. Dig. § 124.*]

9. APPEAL AND ERROR (§ 1078*)—WAIVER OF ERROR—FAILURE TO ARGUE.

Errors not argued in the brief of plaintiff in error will be regarded as waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Action by the Harrison Construction Company against the City of Ironton, Ohio. Judgment for plaintiff, and defendant brings error. Affirmed.

In March, 1907, the city of Ironton and the Harrison Construction Company entered into a written contract by which the latter agreed to construct for the former a waterworks plant consisting of a battery of wells and a pipe line, all for a stated price. The contract provided that the work should be done under the supervision of the engineer, and left very broad discretionary powers to the engineer. Section 10 reads thus:

"Whenever the word 'engineer' is used in this contract and specifications, it refers to Alexander Potter, chief engineer in charge of the work, or in the case of the death or disability of the said Alexander Potter, such other person as may be appointed by the city or the engineer, as the case may be."

Before work under the contract was begun, the city appointed Mr. Oliver as engineer. He directed the Construction Company to proceed with the work; it refused so to do because it was entitled to the supervision of Mr. Potter, who was neither dead nor disabled; the city declared the contract forfeited, and relet the work at a higher price, and in October, 1907, brought suit in a common pleas court of Ohio against the company to recover the excess price which the city had been compelled to pay on the reletting. The company denied that it had broken the contract, but did not set up by way of counterclaim or offset its own claim for damages. This suit resulted in judgment for the city, rendered May 10, 1910, but this judgment never became final; the appellate courts eventually reversed and remanded for a new trial. In June, 1909, the company brought this action in the District (then Circuit) Court against the city. Its amended petition set up the making of the contract and its breach by the city's refusal to permit the company to proceed under Mr. Potter's direction and insistence that it proceed under the plans of the new engineer. The petition claimed damages for the com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pany's lost expenses and values attending its furnishing of apparatus and materials in preparation for the contract, and for the loss of the profits which it would have made by performance. The amended answer set up, for a first defense, the proceedings in the state court, and claimed that, by reason thereof, the District Court was without jurisdiction, and the action should abate, or, at least, that the action should be stayed until the final disposition of the case in the state court. For a second defense, it "denies that Alexander Potter was employed as engineer on behalf of said city of Ironton to supervise and construct said waterworks and improvements; denies that said city wrongfully or otherwise refused to allow said Potter to act as engineer in the construction of said waterworks improvement, but on the contrary avers that said Potter never was at any time employed for the purpose of supervising or constructing said waterworks improvement." By cross-petition, the city then set up practically the same claim made in its suit in the state court, and asked damages accordingly.

Upon these issues, the case came on for trial, and resulted in a verdict and judgment for the construction company. The city brings this writ of error.

A. J. Layne, City Solicitor, of Ironton, Ohio (A. R. Johnson, of Ironton, Ohio, of counsel), for plaintiff in error.

Paxton, Warrington & Seasongood, of Cincinnati, Ohio, and Lum, Tambllyn & Colyer, of Newark, N. J. (Murray Seasongood, of Cincinnati, Ohio, of counsel), for defendant in error.

Before KNAPPEN and DENISON, Circuit Judges, and COCHRAN, District Judge.

DENISON, Circuit Judge (after stating the facts as above). [1, 2]

1. The city complains that this suit was not abated, or, at least, stayed, because of the prior suit in the state court. Of this claim it is sufficient to say that there had been no final judgment in the state court; that the plea was therefore, in effect, not one of prior adjudication, but one of prior suit pending, and that a prior suit pending in a state court will not abate a later suit in a federal court, even if between the same parties upon the same issue, and even if the two courts are in the same district of the same state. *City v. Clark* (C. C. A. 6) 62 Fed. 694, 10 C. C. A. 591; *Bank v. Stone* (C. C.) 88 Fed. 383, 398. The request that this suit be stayed until the termination of the other case was, at most, an appeal to the discretion of the trial court, and the inability of the company to recover its damages under the existing issues in the state court would properly influence that discretion; but it is not easy to see why the company did not have an absolute right that its case in the federal court should proceed to judgment. *McClellan v. Carland*, 217 U. S. 268, 282, 30 Sup. Ct. 501, 54 L. Ed. 762.

[3] 2. It is urged that the laws of Ohio forbid a city to install waterworks until the State Board of Health has approved the plan, and that, for lack of this approval, the contract was invalid. It is by no means clear that the State Board of Health did not give to this plan all the approval which the statutes contemplate; however that may be, the rules of pleading in Ohio clearly require that if a matter of this nature is to be urged in defense, it should be pleaded, and neither the answer nor the amended answer presents any such issue. It was therefore properly disregarded.

[4] 3. This brings us to the real question in the case,—which party broke the contract? The provisions for engineering supervision do not amount to that delegation of power which is forbidden to a municipal corporation; they are fairly incidental to the making of such a contract; but they are very broad; they make it clear that the personality of the engineer was a material element in inducing the contract, and sharply distinguish this case from those where the engineer had only to see that the specifications were satisfied. *City of Brooklyn v. Brooklyn Ry. Co.*, 47 N. Y. 475, 7 Am. Rep. 469; *Burke v. Kansas City*, 34 Mo. App. 570. Under this contract, the engineer had broad power to construe every provision, and final power to arbitrate all the technical disputes that might arise (see *Memphis Co. v. Brown* [C. C. A. 6] 166 Fed. 398, 403, 93 C. C. A. 162); he could direct work to be omitted, or added, and could fix the price of each; he could determine how fast the work should be pushed, and how many men should be employed; he could make “changes in the line, grade, form, plan, position, dimensions or material.” It is not too much to say that under this contract, the manner in which the engineer exercised his powers would determine whether there would be profit or loss, and it is clear to us that the contractor was entitled to have the supervision of that engineer who was named, or of his successor, appointed in the manner agreed.

If, after the making of the contract, the city had discharged Mr. Potter and appointed Mr. Oliver, troublesome questions would arise. The rightfulness of Mr. Potter's discharge might have to be litigated, as best it could, in a suit to which he was not a party, and whether such discharge was a “disability,” and who would then have the power to appoint a successor, would have to be determined. The present case does not present these embarrassments. The city, by its pleading, deliberately, and doubtless for what seemed to it good reasons, adopted the position that Mr. Potter never had been employed and was not employed at the date of the contract. It never has relied upon the position that he was rightfully discharged, and that his successor was appointed pursuant to the contract. It never has tendered that issue. It “avers that said Potter never was at any time employed for the purpose of supervising or constructing said waterworks improvement”; therefore, we have only this defense to consider.

[5, 6] The city cannot be heard to make this defense. Section 10 of the contract is, in effect, a recital and representation that Mr. Potter has been employed. The city had unquestioned power to employ him. It is to be presumed that the company entered into the contract in reliance upon this representation; and for the city now to deny its truth is an act of bad faith which cannot be permitted. Where a municipal corporation has power to make a contract, and has power to do the preliminary acts upon which the contract rests, and which are recited in the contract, it is estopped to deny the truth of the recitals; and that a sufficiently thorough examination of the corporate records would have shown the recital to be inaccurate is no defense. This court has frequently so held. *Cadillac v. Woonsocket*, 58 Fed. 935, 940, 7 C. C. A. 574; *Defiance v. Schmidt*, 123 Fed. 1, and cases cited on

page 7, 59 C. C. A. 159; *Bradford v. Cameron*, 145 Fed. 21, 23, 76 C. C. A. 21.

[7] 4. It is urged that this is giving the company the benefit of an estoppel against the city, though an estoppel is not pleaded, and that this benefit cannot otherwise be claimed. The company's pleading here does fully state the facts out of which the estoppel arises, and that is enough; to claim the estoppel in so many words is merely to state a conclusion of law. This is not required.

[8] 5. It is insisted that the company was not entitled to recover lost profits, and that the charge was erroneous on this subject. Further and more specific instructions on this subject might well have been given, and doubtless would have been given upon request; but the city made no request or exception, except to raise the point that no lost profits could be awarded. We find no sufficient reason for this position. True, the profits were unusually contingent in their character. If there had been high water in the river during all the period provided for the work, performance would have been impossible; abnormally high water or storms would have increased the expense and lessened the profits; but difficulties of this class are attendant on most construction work, and they do not make the profits so speculative as to be no proper basis for damages. When the suit was brought, the contract period had passed, and the physical conditions had become matters of history instead of conjecture. The recovery permitted was not beyond the rule. *Philadelphia Co. v. Howard*, 54 U. S. (13 How.) 307, 344, 345, 14 L. Ed. 157; *U. S. v. Behan*, 110 U. S. 338, 346, 4 Sup. Ct. 81, 28 L. Ed. 168; *Anvil Co. v. Humble*, 153 U. S. 540, 549, 14 Sup. Ct. 876, 38 L. Ed. 814; *Farmers' Co. v. Eaton* (C. C. A. 8) 114 Fed. 14, 17, 51 C. C. A. 640.

[9] 6. Errors are assigned on the admission and rejection of evidence. We find no prejudicial error. The most plausible objections urged upon the oral argument were not mentioned in the city's brief; and it is not clear enough that in view of the whole record there was any error, or, if there was, that it materially affects the result, to justify us in disregarding our practice to consider as waived errors not argued in the brief, which by our rule 20 is required to specify the questions involved. *Ireton v. Pennsylvania Co.* (C. C. A. 6) 185 Fed. 84, 86, 107 C. C. A. 304.

The judgment is affirmed, with costs.

In re FECHHEIMER FISHEL CO.

(Circuit Court of Appeals, Second Circuit. February 26, 1914.)

No. 195.

1. CORPORATIONS (§ 470*)—CAPITAL STOCK—"PREFERRED STOCK"—"BOND."

So-called debenture bonds issued by a corporation to its organizers, providing that they should be subordinate to the claims of general business creditors, that upon liquidation or dissolution or final distribution of the assets such creditors should be entitled to priority of payment in full

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

over the bonds, that the bonds should bear interest payable out of the earnings before any dividends should be set apart or paid on the stock and which should be cumulative, and that upon liquidation or dissolution or final distribution of the assets the bonds after payment of debts should be entitled to the whole residue of the company's assets, were in effect preferred stock, since the distinguishing feature of a bond is an obligation to pay a fixed sum of money with stated interest while the distinguishing feature of stock is a part ownership of the assets and a right to participate in the management and share in the surplus profits and in the surplus assets upon dissolution.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 470.*

For other definitions, see Words and Phrases, vol. 6, p. 5500; vol. 1, pp. 830-834; vol. 8, p. 7592.]

2. CORPORATIONS (§ 565*)—CAPITAL STOCK—REDUCTION—PURCHASE OF OWN STOCK.

Under Penal Law N. Y. (Consol. Laws, c. 40) § 664, subd. 5, providing that a director of a corporation concurring in any vote or act by which it is intended to apply any portion of the funds of the corporation except surplus profits to the purchase of its own stock is guilty of a misdemeanor, a note given in New York by a New York corporation engaged in business in that state in payment of its own stock, though given in good faith and at a time when the company was solvent, was unenforceable as against creditors where the corporation was insolvent at maturity; the note being in effect a promise to pay out of surplus profits if payment could be made without prejudice to creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2281, 2282; Dec. Dig. § 565.*

Right of corporation to retire or reduce its own stock, see note to *Allen v. Francisco Sugar Co.*, 114 C. C. A. 469.]

3. CORPORATIONS (§ 544*)—INSOLVENCY—ASSETS AS TRUST FUND.

The assets of an insolvent corporation are subject to a trust for the benefit of its creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2162-2169; Dec. Dig. § 544.*]

4. CORPORATIONS (§ 566*)—CAPITAL STOCK—REDUCTION—PURCHASE OF OWN STOCK.

Where a so-called debenture bond issued by a corporation to one of its organizers and officers, which had the characteristic features of preferred stock, but which had a definite due date, was surrendered to the corporation in exchange for a note afterwards renewed, but was never canceled, and its surrender was apparently to evade the provision thereof making it subordinate to the claims of general business creditors, the rights of creditors to priority upon the subsequent insolvency of the corporation did not depend upon whether they became creditors before or after the maturity of the bond or of the original note; no part of the capital stock having been withdrawn, and the creditors having given credit on the strength of the unreduced capital.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2283-2286; Dec. Dig. § 566.*]

5. PARTNERSHIP (§ 42*)—ORGANIZERS OF CORPORATION—EFFECT OF AGREEMENT.

An agreement between the organizers of a corporation, limiting their right to sell their stock and bonds to a sale to the other members, and providing that if the other members did not wish to purchase the corporation should be dissolved and liquidated, did not destroy its character as a corporation or make it a partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 57; Dec. Dig. § 42.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Southern District of New York.

In the matter of the Fechheimer Fishel Company, bankrupt. From an order confirming an order of the referee postponing the payment of any dividend upon the claim of the estate of Bernard Rothenberg, deceased, until after the claims of general creditors had been paid in full, Albert Dellevie, as sole surviving executor, appeals. Affirmed.

The Fechheimer Fishel Company is a corporation organized under the laws of the state of New York and doing business in the city of New York. Its capital stock was fixed at \$550,000, divided into 5,500 shares of the par value of \$100 per share, and of this amount all but \$20,000 was issued. In addition debenture bonds aggregating \$550,000 were authorized, all of which were issued except \$20,000 retained in the treasury of the corporation for future use. The bonds and stocks were issued to the organizers of the corporation, each of whom held, dollar for dollar, equal amounts of bonds and of stock.

By agreement, made part of the bonds, it was provided that "bonds" and stock should be inseparable and that on any sale of "bonds" an equal amount of stock should go with them. The right to sell or dispose of the bonds and stock held by any member of the corporation was limited to a sale to the other members in the manner provided by the agreement, and it was required that on the retirement of any member, for any reason, his bonds and stock should be sold to the other members at the book value of the bonds or else that the corporation should be dissolved and liquidated.

On November 1, 1909, Bernard Rothenberg was the holder of a "bond" of the Fechheimer Fishel Company for \$50,000 and a like amount of its stock and was also treasurer of the company. On that date he indorsed in blank and delivered to the company the "bond" and the certificate for the stock and received from the company a note for \$50,000, dated November 1, 1909, payable two years after date, with interest at 6 per cent. per annum, payable semiannually. He also received an agreement by the company to pay him an additional 2 per cent. per annum so as to make the interest on the note equal to the interest on the bond. This agreement was not actually dated or delivered until January, 1910, but was apparently part of the same transaction in which the note was given. This note was entered by Rothenberg himself in the company's bills payable book, but on the last page, and not where such an entry would naturally appear. The bond and stock were put, in an envelope marked with Rothenberg's name, in the company's safe. The bond was never canceled in the manner customary when bonds were surrendered. On August 9, 1911, this note was renewed by a new note for the same amount, payable November 1, 1912, accompanied by a similar agreement for the payment of additional interest. This is the note on which the claim is made. The Fechheimer Fishel Company was adjudicated bankrupt.

It was contended by the trustees in bankruptcy and held by the referee and by the court below:

First, that the so-called "bonds" were in reality merely a form of preferred stock and as such subject to the general rules of law applicable to a corporation's purchase of its own stock.

Second, that the corporation had no right to buy its own stock unless it was possessed of net profits sufficient to pay therefor without diminishing the fund upon which creditors had a right to rely.

Third, that the claimant was bound by the terms of the "bond" or stock and could not receive any payment in advance of general creditors.

Colby & Goldbeck, of New York City (Edward D. Brown, of New York City, of counsel), for appellant.

Louis F. Doyle and Joseph M. Proskauer, both of New York City, for trustees in bankruptcy.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1] It is necessary in the first place to determine the real nature of the so-called "debenture bonds" which this corporation issued. The courts have determined that the fact that an instrument is called a "bond" is not conclusive as to its character. It is necessary to disregard nomenclature and look to the substance of the thing itself. The distinguishing feature of a bond is that it is an obligation to pay a fixed sum of money with stated interest. The distinguishing feature of stock is that it confers upon its holder a part ownership of the assets of the corporation and gives him a right to participate in the management of the corporation and to share in the surplus profits and on dissolution to share in the assets which remain after the debts are paid.

The "debenture bonds" involved in this case provide on their face as follows:

"This bond is issued subject to and with the benefit of the terms and conditions endorsed thereon, which are deemed part of it."

Among the conditions so indorsed on the bonds was the following:

"All the bonds of said series A are to be subordinate to the claims of the general business creditors of said company, and upon liquidation or dissolution of said company or upon the final distribution of its assets, such creditors shall be entitled to priority of payment in full over said bonds."

Another condition indorsed on the bonds provides that the said debenture bond shall be entitled to receive out of the earnings interest at the rate of 8 per cent. per annum before any dividend shall be set apart or paid on the stock of the company, and that such interest shall be cumulative. It is also provided that, upon the liquidation or dissolution of the company's business or the final distribution of its assets, the said debenture bonds shall after payment of the debts of the company be entitled to the whole residue of the company's assets. All these features are quite characteristic of stock. They are not at all characteristic of bonds. And we are satisfied that no error was committed by the court below in holding that these so-called "bonds" were in effect preferred stock. *Burt v. Rattle*, 31 Ohio St. 116; *Hilson Co. v. State Board of Assessors*, 82 N. J. Law, 2, 80 Atl. 929; *Cass v. Realty Securities Co.*, 148 App. Div. 96, 132 N. Y. Supp. 1074, affirmed 206 N. Y. 649, 99 N. E. 1105.

The bond for \$50,000 which Rothenberg surrendered to the company on November 1, 1909, being in effect preferred stock of the company, the transaction was therefore a purchase by the company of its own stock and payment therefor by the issue of its own note, which, after renewal, matured when the company was insolvent. We are thus led to inquire whether the company had the right to purchase the stock and, if so, under what conditions.

The courts are not at all agreed concerning the right of a corporation to purchase its own stock.

The view that a corporation cannot buy its own stock without an express grant is based on the following grounds:

1. That corporations cannot increase or diminish their capital stock without the sanction of the Legislature.
2. That such a transaction is a fraud upon creditors.

3. That it is foreign to the purposes for which the corporation was created.

In England the courts, in a long and unbroken line of decisions, have held that a corporation, unless expressly authorized to do so, cannot purchase its own stock. The leading case in that country upon the subject was decided in the House of Lords in 1887, *Trevor v. Whitworth*, L. R. 12 App. Cas. 409.

In the United States the courts of some of the states have followed the English rule. But the clear weight of authority upholds the right of a corporation to buy its own stock if the purchase is made in good faith and does not prejudice the rights of creditors. *Cook on Corporations*, vol. 1 (7th Ed.) § 311.

The text-writers have arrayed themselves generally on the side of the English rule. *Thompson on Corporations* says, in volume 2, § 2054:

"The rule which forbids a corporation thus to employ its funds rises to the grade of a rule of public policy; and is so strong that although power is conferred upon the company to deal in the shares of joint-stock companies generally, this does not authorize it to deal in its own shares."

Machen on Modern Law of Corporations says, in volume 1, § 628:

"In America, many courts uphold the same sound and wholesome doctrine as the English cases. But it must be conceded that a somewhat larger number of the American courts have taken the view that a corporation may without express statutory authority purchase its own shares, provided the purchase is entered into bona fide and does not endanger the claims of creditors. It should be observed that the American cases which agree with the English doctrine are often well considered and fully reasoned, whereas those which uphold the contrary view generally lack any extended examination of the subject."

Mr. Morawetz, in his work, says in volume 1, § 112:

"No verbiage can disguise the fact that a purchase by a corporation of shares in itself really amounts to a reduction of the company's assets, and that the shares purchased do in fact remain extinguished, at least until the reissue has taken place. The fact that such a transaction may not necessarily be injurious to any person is not a sufficient reason for supporting it. It is contrary to the fundamental agreement of the shareholders, and is condemned by the plainest dictates of sound policy. To allow the directors to exercise such a power would be a frightful source of unfairness, mismanagement, and corruption. It is for these reasons that a shareholder cannot be allowed to withdraw from a corporation with his proportionate amount of capital, either by a release and cancellation before the shares have been paid up, or by a purchase of the shares with the company's funds."

We have referred to the opinions of these writers because we think that, in recognizing the right of a corporation to buy its own stock, they indicate the necessity of confining the right to purchase within strict limits. Indeed, the dangers incident to the recognition of the right has led the Legislatures in a number of the states to prohibit the right altogether. And Congress in enacting the law relating to national banks has denied to such banks any right to purchase their own stock.

[2] The corporation which purchased its stock in the case at bar was organized under the laws of New York, was engaged in business in New York, and entered into the purchase of the stock in New

York. And under the law of New York a corporation has the right to purchase its own stock. *City Bank of Columbus v. Bruce*, 17 N. Y. 507 (1858); *Vail v. Hamilton*, 85 N. Y. 453, 457 (1881); *Joseph v. Raff*, 82 App. Div. 47, 54, 81 N. Y. Supp. 546, affirmed 176 N. Y. 611, 68 N. E. 1118. But the purchase must be made out of surplus profits and cannot be made from the capital. The Penal Law of the state provides, in section 664, that:

"A director of a stock corporation, who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended: * * * (5) To apply any portion of the funds of such corporation, except surplus profits, directly or indirectly, to the purchase of shares of its own stock—is guilty of a misdemeanor."

In *Richards v. Wiener Co.*, 207 N. Y. 59, 65, 100 N. E. 592, 593 (1912), the Court of Appeals, in speaking of an agreement by the corporation to purchase its own stock, said:

"The contract itself, therefore, was perfectly legal subject to certain limitations upon its enforceability. If when the time came defendant had a sufficient surplus, the contract would be enforced. If it had not, the contract could not be enforced."

But the contract in that case involved an agreement by the corporation to purchase its stock on a certain contingency. The agreement was made with one who had bought his stock on the corporation's promise to employ him in its business, with the right reserved to discontinue his employment at its option, and, in case of a discontinuance, the corporation bound itself to repurchase his stock if he so desired. What the court held was that the agreement was not invalid, but that its enforceability depended upon whether "when the time came" it had a sufficient surplus. In that case the time for the payment for the stock would be concurrent with the seller's exercise of his option to sell. But this is not decisive of the case at bar. In the case before us the time for the payment of the stock was not concurrent with the purchase but was postponed for two years and then again postponed for an additional year. Assuming that the corporation was solvent when the stock was purchased and that the contract was therefore valid at that time, the question we have to decide is as to the effect of the subsequent insolvency of the corporation upon this obligation of the company to pay for the stock. We are not aware that the New York courts have dealt with that question, and we must decide it upon principle with the aid of such light as the decided cases throw upon it.

The courts have decided in numerous cases that a corporation cannot buy its own stock if at the time it is insolvent. *Tiger Bros. v. Rogers, etc., Co.*, 96 Ark. 1, 130 S. W. 585, 30 L. R. A. (N. S.) 694, Ann. Cas. 1912B, 488 (1910); *Currier v. Lebanon Slate Co.*, 56 N. H. 262 (1875); *Alexander v. Relfe*, 74 Mo. 495 (1881); *Hall & Farley v. Alabama, etc., Co.*, 173 Ala. 398, 56 South. 235 (1911).

There is no evidence in this case that, at the time the agreement was made to buy Rothenberg's stock, the company was insolvent. But we are not by any means to understand that a corporation has a right to buy its own stock simply because it is solvent at the time, because

if it becomes insolvent thereafter and before payment has been made, or if it is made insolvent by the transaction, the payment cannot be made, for the Penal Law of the state makes it a crime to apply anything but "surplus profits" to the purchase of the stock, and there are no such profits which can be applied.

In *Fitzpatrick v. McGregor* (1909) 133 Ga. 332, 340, 65 S. E. 859, 862 (25 L. R. A. [N. S.] 50), the court declares that the creditors of the corporation can question the purchase "when the circumstances are such as to show that the transaction was fraudulent in fact, or that the corporation was insolvent, or in process or contemplation of dissolution at the time the purchase or exchange was made, and also that the transaction diminished their (the creditors') security for the debts due them."

The courts also recognize the right of a corporation to take its own stock in payment of a security for antecedent debts when it is necessary to do so. *Cook on Corporations* (7th Ed.) § 892.

But there is no evidence in this case that Rothenberg was indebted to the company at the time this purchase of the stock took place, or that he was insolvent at that time or at any other time, or that the stock was taken in payment of an antecedent debt. On the contrary, in the case at bar the corporation bought the stock outright and gave its note in payment therefor.

The note for \$50,000 due November 1, 1912, which is the basis of the claim involved in this case is a renewal of a note for the same amount given by the bankrupt on November 1, 1909. Whatever infirmity inhered in the original note attached to the renewal note. *Hamor v. Taylor-Rice Engineering Co.* (C. C.) 84 Fed. 392, 398 (1897). As the note was given by the corporation for its own stock, the right to enforce payment out of the assets of the corporation depends upon the existence of surplus profits.

If at the time the stockholder receives payment for his stock the payment prejudices the creditors, payment cannot be enforced. If a stockholder sells his stock to a corporation which issued it, he sells at his peril and assumes the risk of the consummation of the transaction without encroachment upon the funds which belong to the corporation in trust for the payment of its creditors.

The right of the creditors of the corporation cannot be defeated by the fact that at the time the transaction was entered into the seller of the stock and the officers of the company who purchased it were acting in good faith and supposed that the company was solvent.

The Supreme Court of Illinois in *Commercial National Bank v. Burch*, 141 Ill. 519, 31 N. E. 420, 33 Am. St. Rep. 331, said:

"Purchase of its own stock by a corporation by the exchange of its property of equal value, though made in good faith and without any element of fraud," or "anything in the apparent condition of the" corporation "to interfere with the making of the exchange, will not be allowed where it injuriously affects a creditor of the" corporation, "even though the fact of the indebtedness was not at the time established or known to the stockholders. * * * The capital stock of" a corporation "is a fund set apart for the payment of its debts, and the directors * * * hold it in trust for that purpose. * * * The shareholders of the corporation are conclusively charged with notice of the trust character which attaches to its capital stock."

As to it they cannot occupy the status of innocent purchasers," and, when "they have in their hands any of the trust fund, they hold it cum onere, subject to all equities which attach to it."

In *Clapp v. Peterson*, 104 Ill. 26 (1882), the same court, after stating that the shareholders of a corporation are conclusively charged with notice of the trust character which attaches to its capital stock and that when they have any of this trust fund in their hands they hold it cum onere, subject to all the equities which attach to it, went on to say:

"It is objected, against the principles above stated, that the cases in which they were declared were where there was actual or constructive fraud or unfairness, where the corporations were insolvent, or in process of being wound up. The question naturally would arise mostly in such circumstances, but the principles enunciated are general in scope, following from the nature of the capital stock of corporations, and the relation of a stockholder to the corporation, and we know of no limitation of their application as above suggested."

In this statement we fully concur. There can be no such limitation of the principle.

The Supreme Court of Connecticut, in *Crandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 560 (1884) said:

"If the view we have taken of the character and nature of this stock is sound," that it is a trust fund for the security of creditors, "and we have no doubt that it is, the conclusion inevitably follows that under no circumstances can a stockholder sell his stock to the company and take therefor his portion of the capital stock to the prejudice of creditors. The illegality of the transaction does not at all depend upon the actual knowledge or mala fides of the seller; if he in fact sells to the company and receives in return a part of the capital, the policy of the law requires him to know it, and conclusively charges him with knowledge. Thus selling, he sells at his peril. In no other way can the rights of creditors be protected. The seller can protect himself by selling to other parties, or he may hold his stock, taking, as he is bound to, the risk of his investment. The creditor is not bound to assume any part of the stockholder's risk, and he has no way of protecting himself. The law is his only protection."

The above cases were not based on any local statute, but upon general principles.

[3] In saying that the assets of a corporation constitute a trust fund, we are to be understood as referring to the assets of an insolvent corporation. A solvent corporation, of course, holds its property as any individual holds his. But when a corporation becomes insolvent, a trust arises in respect to the administration of its assets for the benefit of its creditors. *Hollins v. Brierfield, etc., Co.*, 150 U. S. 371, 381, 383, 14 Sup. Ct. 127, 37 L. Ed. 1113 (1893); *McDonald v. Williams*, 174 U. S. 397, 401, 19 Sup. Ct. 743, 43 L. Ed. 1022 (1899). Hence when a corporation buys its own stock payment cannot be made with funds which upon insolvency belong to its creditors instead of to its stockholders. *Cook on Corporations* (7th Ed.) vol. 1, § 9, pp. 42, 43.

In *Clark v. E. C. Clark Machine Co.*, 151 Mich. 416, 115 N. W. 416 (1908), a corporation purchased some of its own stock for which it gave three promissory notes in payment secured by a chattel mortgage. The corporation at the time it made the purchase owed somewhere within \$300. The assets of the corporation were worth about

\$9,000. The stockholders had all agreed to the purchase and, if there were any creditors existing at the time of the purchase, none of them complained. All the creditors who did complain were subsequent creditors who gave credit with the mortgage on file in the proper office, but who insisted that it was not notice to them that the assets of the company had been used to purchase some of the capital stock. The court said that the assets of a corporation constituted a trust fund not only for the benefit of existing but also for future creditors, and that they could not be used in the purchase of outstanding stock to the exclusion of subsequent creditors. It added:

"It is apparent under the record as it now stands that the assets will be more than sufficient to pay the debts. Should this prove to be the case Mr. Wells (whose stock the company purchased) will be entitled to receive out of the surplus sufficient to pay this amount. The decree will be modified in accordance with this opinion."

In other words, the right of the vendor of the stock to receive payment on the notes given him by the corporation for his stock was not conclusively established by the fact that the corporation was solvent when the purchase was made. His right turned on the condition of the assets at the time payment was to be made and he could only be paid out of the surplus if any there should be.

The Supreme Court of Michigan, in 1906, in *McIntyre v. Bement's Sons*, 146 Mich. 74, 109 N. W. 45, 10 Ann. Cas. 143, held that an agreement by a corporation to take back its stock at cost at the expiration of two years if the purchaser so wished became void on the corporation's becoming insolvent at or before the purchaser sought to exercise his option. It was claimed in that case that, if the promise when given was valid, subsequent insolvency of the maker would not make it invalid. The court admitted that this would be true as respects the usual and ordinary contracts of corporations and individuals, but held that this principle did not apply to contracts made by a corporation for the purchase of its stock.

The stock of a corporation is its only basis of credit, and it is of vital importance that it be rigidly guarded and protected. Courts have conceived it to be their duty to detect and defeat any scheme or device calculated in any way to place this fund beyond the reach of the creditors. *Buck, Trustee, v. Ross*, 68 Conn. 29, 31, 35 Atl. 763, 57 Am. St. Rep. 60 (1896). As the illegality of a purchase by a corporation of its stock rests upon the fact that it withdraws assets upon which the creditors have a superior right or lien, it seems to us that even though the company may have been solvent when the contract to purchase was made, if it becomes insolvent later or is made insolvent by the transaction and is in that condition at the time when payment is to be made, the vendor cannot as against creditors be permitted to take the assets for that purpose in a state in which the statutes make it a criminal offense to apply directly or indirectly anything but surplus profits to the purchase by a corporation of its own stock. If the stockholder postpones the time of payment, he runs the risk of the corporation becoming insolvent in the meantime and must be held to a knowledge of the fact that he cannot enforce payment if in doing so

he deprives the creditors of assets upon which they have a lien superior to any claim of his. In the case at bar, when the corporation bought the stock and gave its note to Rothenberg, it in effect promised to pay him \$50,000 out of surplus profits and if payment could be made without prejudice to creditors. To be sure the note did not so state on its face, but that was a condition which the law attached to it and which was binding on both Rothenberg and the company. The fact that the corporation had a surplus when the note was given is not decisive of the case if it was insolvent when the time for payment arrived. What the rule may be in the absence of such a statutory provision as exists in New York we need not now determine.

[4] The bond was a promise to pay Rothenberg "and any subsequent registered holder" \$50,000 on November 1, 1904. Payment was thereafter extended to November 1, 1910. Before that time arrived and on November 1, 1909, Rothenberg surrendered the bond and accepted a note for \$50,000, and it was agreed that he should have the same interest on the note that he was to receive on the bond. That note was payable in two years, but before the time for payment came a new note was given, dated August 25, 1911, payable November 1, 1912, which was similar in amount to the bond both as to principal and interest. Assuming that the bond was nothing more than preferred stock, it is necessary to consider whether the fact that it had a definite due date affords any sufficient reason for distinguishing it from stock not so limited in time, and making it necessary to hold that all who became creditors after the due date, or after the date of the first note or the date of the renewal note should be held to have no claim superior to Rothenberg's upon the assets of the corporation. We do not think that under the facts of this case we can make any such distinction. The manner in which this corporation sought to conduct its business was extraordinary and altogether unusual. The trustees charge that the arrangement by which the bond was surrendered and the note issued in lieu thereof was devised and executed for the purpose of evading and defeating the provision of the bond which recited that it was to be "subordinate to the claims of the general business creditors of said company, and upon liquidation or dissolution of said company, or upon the final distribution of its assets, such creditors shall be entitled to priority of payment in full over said bonds." Whatever may have been the reasons which influenced Rothenberg and the company in their dealings with each other, we are satisfied that, if we should construe the note as counsel for Rothenberg ask us to construe it, the effect certainly would be to prejudice the rights of the creditors, in disregard of the New York statute. The surrender of the bond which the company seems never to have canceled and the giving of the note did not in itself work any reduction in the amount of the capital for neither were ever paid, and the \$50,000 remained in the business being at no time withdrawn. The due date of the bond and the due date of the note are alike immaterial under the circumstances of the case. At the best they only indicated a time when a reduction of the capital stock might have been made under the agreement, but, as the reduction was not made, it may be disregarded. There is a well-established

lished principle to the effect that if an individual, even without any intention to defraud creditors, disposes of his property without consideration, those who subsequently become creditors cannot complain or ask to have the transfer set aside, so that they can reach the property and apply it to the payment of their debts. The reason is they have not been injured or prejudiced in their rights as they gave credit to the debtor in the condition he was in after the transfer was made. The courts have applied the same principle to the creditors of corporations. *Graham v. La Crosse & Milwaukee R. Co.*, 102 U. S. 148, 26 L. Ed. 106. In the case at bar no part of the capital had been withdrawn and paid over to Rothenberg and the creditors gave credit to the corporation on the strength of its un-reduced capital. And if, at any time after any one of these creditors gave credit on the strength of its capital, any part of that capital as distinguished from its surplus had been paid over to Rothenberg, such creditor might have maintained a suit in equity against him to recover from him and subject to the payment of his claim any part of the capital which Rothenberg so received. *Guinness v. Land Corporation of Ireland*, 22 Ch. Div. 349, 375 (1882); *Wood v. Dummer*, 3 Mason, 308, Fed. Cas. No. 17,944 (1824); *Buck v. Ross*, 68 Conn. 29, 35 Atl. 763, 57 Am. St. Rep. 60 (1896); *Bartlett v. Drew*, 57 N. Y. 587 (1874); *Singer v. Hutchinson*, 183 Ill. 606, 56 N. E. 388, 75 Am. St. Rep. 133 (1900).

The court below in its decision stated that "the bankrupt corporation was really a copartnership masquerading as a corporation." The court added:

"Reduced to its lowest terms, what Rothenberg did was to convert his partnership interest into a debt of the concern, without liquidation. If he can do this, all other bondholders could have done the same thing. So that, if this claim is good, every debenture might have been converted into a note; the consideration being in each case forbearance from enforced liquidation. This seems to me *reductio ad absurdum*."

[5] In confirming the order which the court below made, we disclaim any intention of treating this corporation as a partnership. The provision by which the incorporators agreed that their right to sell their stocks and bonds should be limited to a sale to the other members of the corporation and that, if they did not wish to purchase, then the corporation should be dissolved and liquidated, did not destroy its character as a corporation.

If this corporation is not a corporation in law but is to be regarded as a partnership, there can be no reason, of course, why the other partners could not have bought out Rothenberg's interest. In that event the purchase of his interest would work a dissolution and a winding up of the partnership; in which case the creditors would be paid before the partners.

But it was as we have said, not a partnership, and it is not to be treated as one. There is no real analogy between a partnership and a corporation, as is clearly pointed out in a case decided in the House of Lords. *Birch v. Cropper*, L. R. 14 App. Cas. 525.

The order of the referee was confirmed by the court below, and it postponed the payment of dividends out of the bankrupt's estate on

the claim of Rothenberg's executor for the sum of \$50,925 until after the claims of general creditors of the bankrupt have been paid in full. The order of the court below is affirmed.

BEDFORD v. J. HENRY MILLER, Inc.

(Circuit Court of Appeals, Fourth Circuit. March 4, 1914.)

No. 1214.

1. PLEADING (§ 236*)—AMENDMENT—DISCRETION OF COURT—PLEA OF SET-OFF.

Where a plea of set-off was defective in that it was not supported by the affidavit required by law and was not in the form prescribed by the rules of court, the court was authorized by Rev. St. § 954 (U. S. Comp. St. 1901, p. 696), to deny a motion to reject the set-off on that ground and to permit defendant to amend its plea so as to conform to legal requirements.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.*]

2. DAMAGES (§ 78*)—LIQUIDATED DAMAGES OR PENALTY.

A builder, having contracted to reconstruct a federal building, contracted with plaintiff to construct the stone work, the contract providing that time, being the essence of the contract between the builder and the United States, was also the essence of the contract in question, and therefore in the event of the contractor's failure to furnish material and labor provided for by the contract, and in case of delay to the builder under his contract with the United States beyond the period of 12 months, the contractor should pay the builder for each and every calendar day of the delay \$50, which forfeit was to be paid as and for liquidated damages and not as a penalty, and was to be taken from any money due thereunder; it being understood and agreed that the liquidated damages were in lieu of actual damages arising from such breach of contract. *Held*, that the provision was for liquidated damages and not a penalty.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 157-163; Dec. Dig. § 78.*]

4. DAMAGES (§ 85*)—LIQUIDATED DAMAGES—CONTRACT PROVISION.

Defendant, having contracted to reconstruct a federal building and being bound by his contract to pay \$50 a day for delay, let the stone work to plaintiff under a contract providing that time was the essence thereof; that in the event of the contractor's default or delay, causing delay in the completion of the work to be performed by the builder under his contract with the United States beyond the period of 12 months, then the contractor should pay the builder for each calendar day's delay \$50; and that the forfeit was to be paid as liquidated damages and not as a penalty, and was to be taken from any money due under the contract, it being agreed that the liquidated damages were in lieu of actual damages arising from breach of the contract. *Held*, that such provision was not only intended to indemnify the builder for loss sustained by delay under his own contract by being required to pay damages to the United States, but also to indemnify against other damages which might be sustained by the builder; and hence he, having been relieved by the government from liability under the daily damage clause of his own contract, was only entitled to recover under such clause in plaintiff's contract such actual damages as could be proved.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 179-181, 183-187; Dec. Dig. § 85.*]

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Action by A. C. Bedford, suing for the use and benefit of the American National Bank, his assignee, against J. Henry Miller, Incorporated. From a judgment for plaintiff, but for less than the relief demanded, resulting from an allowance of a set-off, plaintiff brings error. Reversed and remanded.

C. V. Meredith and Emmett Seaton, both of Richmond, Va. (Meredith & Cocke, of Richmond, Va., on the brief), for plaintiff in error.

L. L. Lewis and Hill Carter, both of Richmond, Va., for defendant in error.

Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

WOODS, Circuit Judge. The defendant, J. Henry Miller, incorporated under the laws of Maryland, contracted with the United States on March 26, 1910, for the reconstruction of the federal building in the city of Richmond, the work to be completed by December 1, 1911. On May 11, 1910, the plaintiff, A. C. Bedford, agreed as subcontractor with the defendant to do the stone work by May 11, 1911, for the sum of \$190,000, payable in installments as the work progressed. On December 21, 1912, the plaintiff brought this action in the law and equity court of the city of Richmond, alleging full performance of his contract, and indebtedness of the defendant to him in the sum of \$23,406.29, after allowing all credits. The cause having been removed on the ground of diversity of citizenship to the District Court of the United States for the Eastern District of Virginia, the defendant pleaded nonassumpsit, and with this plea gave notice that on the trial it would seek to recoup or set off damages for 392 days' delay in the completion of the work, at \$50 a day; that being the per diem measure of damages fixed in the contract. The defendant also set up as a separate item a claim for \$5,000 damages for delay in the completion of the approach work within the time required by the contract, and several charges for labor and material furnished to plaintiff, amounting to \$1,403.18. The District Judge overruled a motion to reject the set-off, made on the ground that it was not supported by the affidavit required by law, and was not in the form prescribed by the rules of court, and allowed the defendant to amend so as to conform his pleading to the legal requirements. At the trial the claim for the separate item of \$5,000 damages was withdrawn; the separate account of \$1,403.18 was submitted to the jury; and the peremptory instruction was given to the jury that the defendant's claim for liquidated damages of \$50 a day for 392 days must be allowed as a set-off. The verdict and judgment was in favor of the plaintiff for \$3,516.30, with interest from December 7, 1912.

[1] The error assigned in the refusal to reject defendant's pleas because of absence of the affidavit required by law was abandoned at the argument. There is no ground for assignment of error in allowing the defendant to amend rather than in rejecting its plea because of a defect in form only. The discretion of the court to allow amend-

ments is so clearly conferred by section 954 of the Revised Statutes (U. S. Comp. St. 1901, p. 696) that it is unnecessary to cite any of the numerous cases on the subject. When a party gets his cause of action, or his defense, or his appeal, before a court of competent jurisdiction, he should not be turned out before trial of the merits of the controversy, except in obedience to a clear statutory mandate, or on a showing of gross carelessness or bad faith. The absolute dismissal of a plea or an appeal, for error in a matter of mere procedure, is in reality the infliction of the severest penalty for a minor fault, and is suggestive of the excessive punishments formerly inflicted for minor offenses in the administration of the criminal law. Conformity to rules of procedure is important, but usually it may be secured by imposing as a condition of amendment the payment of costs or other penalty, short of dismissal, on the party or his counsel, as circumstances may require, for negligence or inadvertence.

The vital question in the cause is whether the plaintiff was bound at all events to pay as liquidated damages the sum of \$50 a day for the time he was in default in the performance of his contract. The agreement on this subject was as follows:

"It is further covenanted and agreed by and between the parties hereto that, the time being the essence of the said contract between the builder and the United States of America, it is also the essence of this contract, and therefore in the event of the failure on the part of the contractor to furnish the materials and labor provided for by this contract to be furnished by him (when and as required as aforesaid), within a reasonable time after such request, not to exceed five (5) days, or in the event of the failure of the contractor to furnish and set all the stone work required for the building proper (not including the approach work, pointing up or cleaning down) within twelve months after the date of this contract, or in event of the contractor furnishing materials which shall be condemned or rejected, thereby causing delay in the erection, construction or completion of the work to be performed by the builder under his contract with the United States of America, beyond said period of twelve months, then and in either event the contractor shall pay to the builder for each and every calendar day of such delay the sum of fifty dollars (\$50.00). The completion of the approach work, pointing up and cleaning down to be done in such time as the builder shall direct to be not less than fifteen (15) months after the date of this contract, or as will permit the building to be finished in contract time as hereinbefore provided for, to wit, on December 1, 1911. The above forfeit is to be paid as and for liquidated damages and not as a penalty and is to be taken from any money due hereunder. The said measure of such liquidated damages being fixed and agreed upon as the sum specified as the damages which will be suffered by the builder by reason of such default are difficult to estimate with exactness, and it is understood and agreed by the parties hereto that said liquidated damages are in lieu of the actual damages arising from such breach of this contract."

The builder, Henry Miller, did not perform his contract by completing the entire work by December 1, 1911. But, under authority conferred by statute, the secretary of the treasury, for reasons appearing to him sufficient, remitted the claim of the government against him for \$50 a day liquidated damages, and paid Henry Miller, the builder, the entire contract price. Thus it appears that the defendant suffered no loss on account of its liability to the government by reason of the delay of the plaintiff in the completion of his work.

[2] Whatever may have been the conflict of authority as to the

rules to be applied in determining whether a contract like that here under consideration provided for a penalty or liquidated damages, certainly there can be no doubt now in this jurisdiction that this was a contract to pay \$50 a day as liquidated damages and not as a penalty. In *Sun, etc., Association v. Moore*, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366, the Supreme Court thus lays down the rule:

"The decisions of this court on the doctrine of liquidated damages and penalties lend no support to the contention that parties may not bona fide, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement. On the contrary, this court has consistently maintained the principle that the intention of the parties is to be arrived at by a proper construction of the agreement made between them, and that whether a particular stipulation to pay a sum of money is to be treated as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract, fairly construed; it being the duty of the court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract."

This rule is restated and emphasized in *United States v. Bethlehem Steel Co.*, 205 U. S. 105, 27 Sup. Ct. 450, 51 L. Ed. 731; *Schmulbach v. Caldwell*, 196 Fed. 16, 115 C. C. A. 650; *Crawford v. Heathwole*, 110 Va. 358, 66 S. E. 46, 34 L. R. A. (N. S.) 587. In these cases, however, the courts were careful to recognize the paramount principle that the intent of the parties, the limit which they intended to place on the liability, is to be ascertained from consideration of the entire instrument.

[3] Treating the contract, then, as one for liquidated damages, the difficult question remains whether the provision to pay the sum stipulated was for the general loss in gross to be anticipated from delay, or for two factors of loss, namely: First, the general damages usually incident to delay in such work; and, second, the damages of \$50 a day which the defendant had contracted to pay to the United States for delay in completion of the entire work. If both these factors of loss entered into the undertaking, if it was for these separate elements of damage in combination that the plaintiff promised to pay \$50 a day, and one of the elements of damage afterwards was eliminated, then it would seem to follow that the defendant could not recover the entire amount for the one element of damage which remained.

The fact that the obligatory words are general does not determine this point; the recitals of the contract, its purpose, the relation of the parties to each other, and even obligations to others appearing from the contract to be in the view of both parties must be weighed in arriving at the scope of the undertaking. Viewing the instrument in this way, it will hardly be doubted that the words we have italicized in the portion of the contract above set out clearly import that the provision for liquidated damages in this undertaking was meant primarily to protect the Miller Company against its obligation to the United States for damages for delay in the completion of the entire work. This is rendered still more obvious by the following recital of the contract between the plaintiff and defendant making defendant's contract with the United States a part of his contract with plaintiff:

"Whereas, the builder has entered into a contract with the United States of America of date March 26, 1910, for the reconstruction of a federal build-

ing at Richmond, Va., according to certain plans and specifications referred to in said contract and made a part thereof, which contract, together with the said plans and specifications therein referred to, is to such extent as the same is and are applicable to the subject-matter of this contract made a part hereof, to the same extent as if herein fully written."

Because the Miller Company was under obligation to the government for \$50 a day damages, it exacts, and Bedford agrees to give, his like obligation. It is true that, while indemnity against this obligation of the Miller Company to the government was clearly the primary or chief protection intended, the mention of that one item by no means warrants the exclusion of any other items of damage from the protection of Bedford's obligation comprehending in general all damages. But, to the extent that Bedford's obligation was intended to protect the Miller Company against the demands of the United States, it was dependent on the Miller Company's obligation to the demands of the United States, and to that extent it fell when it appeared that the Miller Company had not incurred liability or was released from its obligation to the United States. To express the matter differently and in the light most favorable to the defendant, two factors of damage were in the minds of the parties when they estimated the liquidated damages, and these two separate factors in combination were expressed in the contract with reasonable clearness as the damages to be paid for, namely, the damages to be exacted of the Miller Company for its failure to turn over the building within the time specified, and the anticipated damages to the Miller Company independent of its obligation to the government. These two factors, added together, were estimated and agreed upon as \$50 a day. When one of these separate and distinct factors fell out, the other cannot represent the damage which it was intended should be taken as the sum of both; and hence a reduction must be made. The primary and controlling obligation was that of the Miller Company to the United States; and the obligation of Bedford to the Miller Company was secondary and in part, at least, dependent on the Miller Company's obligation to the United States. When the primary and controlling obligation was canceled, the secondary obligation went with it to the extent that it was dependent.

We find no case which presents precisely the same features as this, but the principle which controls it has been applied in other courts. *Shute v. Taylor*, 5 Metc. (Mass.) 61; *Lampman v. Cochran*, 19 Barb. (N. Y.) 388; *Cook v. Finch*, 19 Minn. 407 (Gil. 350). In these cases the rule is laid down that where a sum is agreed on as liquidated damages for breach of two or more provisions of a contract, and breach of only one occurs, the sum stipulated for breach of all the provisions cannot be recovered, but the actual damages must be proved. It results that \$50 a day cannot be accepted as the liquidated damages intended by the parties to be paid to the defendant for his damages apart from his obligation to the government. We have tried to show that this is the conclusion required in the application of the rules of law, giving full force to the decisions of the Supreme Court of the United States and the Supreme Court of Appeals of Virginia. It requires no argument to show that, when we look away from precedent

to the intent of the parties and the justice of the matter, the conscience would be shocked by a construction of the contract which would require the plaintiff to pay as damages \$50 a day as an absolute obligation assumed by him when the main factor which entered into that estimate and obligation, as expressed by the contract itself, has been canceled. The unjust consequences of such a construction are still more apparent when it is considered that the defendant had like contracts with four or five other subcontractors, all expressing, as the special feature of the obligation, protection against the liability of \$50 a day which the defendant might incur to the government. It could not have been contemplated that the defendant should recover in the aggregate four or five times \$50 a day from its subcontractors, when the special liability which their obligation was intended to provide against had entirely disappeared.

The result is that the judgment must be reversed, and the cause remanded to the District Court for a new trial to ascertain the actual damages suffered by the defendant for the plaintiff's delay in the completion of his contract. Under this view it is only necessary to say, as to the third assignment of error, that it cannot be material whether the defendant has demanded of other subcontractors damages for their delays, since the plaintiff will be responsible only for the damage due to his delay.

Reversed and remanded for a new trial.

WEST VIRGINIA PULP & PAPER CO. v. CHEAT MOUNTAIN CLUB.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1914.)

No. 1206.

1. LANDLORD AND TENANT (§ 47*)—GAME PRESERVE—INTERFERENCE BY LANDLORD.

Where a tract of forest land, remote from a railroad, was leased to a club for fishing and hunting, subject to the owner's right to prevent waste, farm, and conduct lumbering operations on the land, the owner was bound to exercise its rights reasonably and not arbitrarily and had no right to interfere with a ten-acre cleared tract around the clubhouse used for a garden and pasture.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 112, 113; Dec. Dig. § 47.*]

2. LANDLORD AND TENANT (§ 47*)—USE OF PREMISES.

Where certain forest land was leased to a club for hunting and fishing and the construction and use of certain camps and lodges thereon, subject to the landowners' right to use the land as lumbermen, farmers, or grazers, evidence held insufficient to show a necessity on the part of the owners to use a cleared ten-acre tract around the clubhouse for farming purposes, so as to entitle it to forbid the further use of such tract by the club.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 112, 113; Dec. Dig. § 47.*]

3. WATERS AND WATER COURSES (§ 158½*)—LEASE OF RIGHTS—REMEDY OF LESSEE—INJUNCTION.

Where a lease of forest land for hunting and fishing authorized the lessee to construct and maintain a fish hatchery on the land, it was en-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

titled to maintain a suit for injunction restraining the landowner from polluting the streams as the result of conducting certain lumbering operations on the land.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 189; Dec. Dig. § 158½.*]

4. LANDLORD AND TENANT (§ 134*)—GAME PRESERVE—TAKING TIMBER—REPAIR OF BUILDINGS.

Where a lease of certain forest land for hunting and fishing for 50 years provided that the lessee might take timber from the land to build one or more camps or lodges, etc., the lessee was entitled to timber from the land to rebuild and repair the lodges so constructed.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 482–485; Dec. Dig. § 134.*]

5. LANDLORD AND TENANT (§ 132*)—ENJOYMENT OF PREMISES—INTERFERENCE BY LANDLORD—INJUNCTION.

Where complainant held a lease of the hunting and fishing privileges of an extensive forest tract with the right to construct and maintain lodges, fish hatchery, etc., it was not barred of the right to an injunction to restrain the landowner from taking possession of all of the land except that covered by complainant's clubhouse or from depriving it of the use of timber to keep its buildings in repair and from polluting the streams, on the ground that complainant had an adequate remedy at law.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 460–464, 467–469, 1198; Dec. Dig. § 132.*]

6. INJUNCTION (§ 48*)—THREATENED TRESPASS.

The rule that one person cannot take the property of another without his consent, or continually trespass thereon and compel the owner to accept money in satisfaction, applies where the threatened trespass will result in depriving complainant of the enjoyment of a property right.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 101; Dec. Dig. § 48.*]

Appeal from the District Court of the United States for the Northern District of West Virginia, at Philippi; Alston G. Dayton, Judge.

Suit in equity by the Cheat Mountain Club against the West Virginia Pulp & Paper Company. Decree for complainant (205 Fed. 195), and defendant appeals. Affirmed.

E. D. Talbott, of Elkins, W. Va., for appellant.

W. E. Baker, of Elkins, W. Va., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. On May 17, 1913, the District Judge made a final decree enjoining the defendant, West Virginia Pulp & Paper Company, from interfering with the enjoyment of rights which he adjudged the plaintiff, Cheat Mountain Club, had acquired in the use of a large tract of land owned by the defendant company. It is unnecessary to set out the conveyances in detail; since it is admitted that the company acquired the land through Dewing & Sons, that Dewing & Sons on January 12, 1887, made a lease for 50 years to the Sportsmen's Association, that the plaintiff club acquired the rights of the Sportsmen's Association under the lease, and that the appeal depends on the construction of the lease. The lease expressed that it was made to the Sportsmen's Association "for the sole purpose of a hunting estate and the protection and propagation of game and game fish" on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the land therein described, "together with the right of way into, out of, and over and across said land; the right to build private roads into, out of, over, and across the same; the right to use water from the same; the right to cut timber upon the said land and use the same for the purpose of building one or more camps or lodges upon the said land; and the right to build, and use rent free when built, such camps or lodges as may be deemed necessary by the party of the second part; and the right to take coal and wood from the said land for the domestic use of said camps and lodges." The lease expressed the following conditions:

1. "All rights, titles and privileges under this indenture demised, are, and shall be, subject to the right of the owners of the land herein described to prevent waste and unnecessary injury to the property or commercial values thereof, through the exercise of any of said rights by the party of the second part, its agent or servants."

2. "None of the rights and privileges under this indenture granted shall in any way interfere with, limit, or hinder the owners of the said land in their operation as lumbermen or farmers or grazers thereon."

3. "It is understood that no right and privileges by this indenture granted shall prevent A. H. Winchester or his invited friends from exercising freely any and all the rights and privileges herein granted."

4. "The premises herein described and demised shall be used for the purpose herein specified and be subject to the conditions herein set out, and for none other whatsoever."

The defendant company was enjoined from interfering with the club's use of about ten acres of cleared land adjacent to the clubhouse, or cutting any of the shade trees thereon, from polluting in any manner the streams on the land, or putting in them anything injurious to fish, from interfering with the fish hatchery or fish ponds of the club or its reservoirs or conduits used to conduct water thereto, and from interfering with the club in cutting timber for the repair of its clubhouse, lodges, and other houses necessary for the enjoyment of the land for the purposes named in the lease; and the company was ordered to surrender to the club any portion of the cleared land adjacent to the clubhouse. The company assails all the provisions of the order, alleging that none of them was warranted by the lease or the other evidence.

The rights conferred on the Sportsmen's Association now held by the club, having been made subordinate to the use of their land by Dewing Bros., whose title is now held by the defendant company, the questions vital to the appeal are: First, is the use now claimed by the club within the limits fixed by the contract; and, second, if such use was permissible under the contract at the time the use was entered upon, has it come to pass that it now interferes with the superior right of the company in their operations as lumbermen, farmers, or grazers?

[1] The principles of law relevant to the construction of the contract and the other matters involved seem too plain and well settled by the Supreme Court of West Virginia and other courts for discussion or citation of authorities. It will not be doubted that the contract meant that the lessee should have such use of the land as was reasonably necessary to the enjoyment of the rights granted, and that, while this use must yield to the superior right of the owners to the full ben-

efit of the land for the purposes named, yet the owners were bound to be reasonable, and could not arbitrarily interfere with the lessee's use provided for in the contract.

We consider first whether the District Judge was right in enjoining the company from planting or otherwise interfering with the plot of open land about ten acres in area surrounding the clubhouse, and used by the club for a garden and for pasturage. The lease is not in a strict sense ambiguous, but there must always be a degree of indefiniteness in such a contract, since it is impossible for the parties contracting for privileges like those here expressed to anticipate and provide for every detail. Hence it is plain beyond all doubt that when questions arise as to the extent of the use which is reasonably necessary for the enjoyment of the right granted, and as to the extent to which the use of the lessee must from time to time yield to the superior right of the lessor to have the full use of the land as far as necessary for lumbering, farming or grazing, the court must ascertain the circumstances of the parties at the making of the contract, what they have done under it, and the changes from time to time in the reasonable requirements which one party may make of the other, and in the duties they owe to each other.

When the lease was executed, the tract of land referred to therein, containing about 50,000 acres, was almost a trackless wilderness 40 miles or more from a railroad station. These conditions made it necessary for the Sportsmen's Association to build a substantial lodge or clubhouse with outbuildings, a house for a superintendent, and several hunting lodges or camps. It would not have been possible for the association to enjoy the privileges they had acquired without horses and other domestic animals; and the transportation of food and other supplies was so evidently expensive and burdensome that it must have been contemplated that the association should use some land for a garden and to pasture stock. Accordingly, the Sportsmen's Association at a large expense constructed the buildings needed, cleared and brought into use about ten acres of land, and established a fish hatchery. The right of the Sportsmen's Association to do these things seems perfectly plain even when attention is confined strictly to the contract and the subject-matter. There was in addition evidence which appears to be worthy of credence, though disputed, that A. H. Winchester, the agent of the original lessor, had agreed to the location of the clubhouse and laid off roughly the land since used by the lessee which was regarded necessary. But even if this evidence be rejected, it is undisputed that the lessee has used the clubhouse and the land for many years with the acquiescence of the owners, and this acquiescence tends to show that the parties understood the occupancy of the land to be reasonably necessary to the use contemplated.

[2] The contention now is, however, that even if the occupancy and use of the ten acres of land by the Sportsmen's Association was originally within its rights, it must yield now because the owner now needs the land for its purposes. Setting up this claim, that in the course of its development the company now requires the land to farm and for the construction and operation of a manufacturing plant, and that

therefore the time has come when the company has a right to forbid its further use by the club and to take possession of it for its own business, the superintendent of the company wrote to the Sportsmen's Association, saying, among other things, that it needed and would take possession of all the cleared land around and near the house, and that the association would not be allowed to use the timber to repair the clubhouse and other buildings, as the right had not been conferred by the contract. In pursuance of this notice the defendant company did take possession of and plant a part of the ten acres near the clubhouse.

At this time the defendant company is using the 50,000 acres of land only to cut the timber from it, but there is evidence of its purpose to build manufacturing plants and villages to the end that it may use the timber and land to better advantage, and it insists that this ten acres is necessary to the carrying out of the plan. There is conflicting evidence on the point whether a reasonable necessity has arisen for the defendant to have the area adjacent to the clubhouse for the purposes mentioned; some of the company's witnesses testifying that the land around the clubhouse is the only land available for the purpose. The weight of the evidence is against this opinion. Indeed, the testimony of Stewart Carrs, the engineer employed by the company to locate the proposed plant, is sufficient to turn the scale, being to the effect that the land below the clubhouse is more available and desirable for the new enterprise. No doubt it would be some slight advantage to the defendant company to take the land, but that is not sufficient. The showing must be made that the use of the land is of such serious and substantial importance as to make it reasonably necessary for its business before the company will be allowed to impose upon the club the great and irreparable injury which deprivation of its use would entail.

[3] The right conferred by the contract to propagate fish connoted the right to maintain a hatchery, provided it be maintained without interference with the superior rights of the owner set out in the lease. Even if the right of the club to protection of its hatchery from pollution of the stream on which it is situated were dependent on the statute of the state of West Virginia forbidding pollution of streams or on the common law of nuisance, the club would not be restricted to the remedy of indictment, for it is evident that it has a special interest quite different from that of the public at large. But the club's right is not dependent on the statute nor the common law of tort, for it has a contractual right under the lease to protection of the fish in its hatchery from injurious pollution of the stream not necessary to the company's use of its land.

There was much apparent, but little real, conflict in the evidence on this point. Consideration of the entire evidence leaves no doubt that the company unnecessarily located its lumber camp just above the hatchery on the stream which supplied it, and unnecessarily befouled the stream with the excrement of men and beasts and other offal of the camp to the destruction of the fish.

[4] The company insists lastly that the privileges conferred by the lease to use timber to build lodges and camps did not embrace the

privilege of using timber to repair them. We agree with the District Judge that this construction would lead to absurd results. The lease was for 50 years, and it was known to be almost impossible for the Sportmen's Association to obtain lumber except from the adjacent lands. When these and the other circumstances of the parties are considered, it seems clear that they must have contemplated that the buildings would fall into decay, and that they should be rebuilt or repaired from the timber on the land.

[5, 6] The position that the plaintiff has an adequate remedy at law is untenable. If the defendant be allowed to take possession of all the land except that covered by the clubhouse, or to deprive the club of the use of timber to keep its buildings in order or to befoul the stream it uses for its hatchery, it would derive little, if any, benefit from the privileges granted by the lease. We think it elementary that, except in the special cases provided for by law, one person cannot take the property of another without his consent or continually trespass upon it and compel the owner to accept payment of money in satisfaction. The rule applies with special force where the threatened trespass would result in depriving the complainant of the enjoyment of a property right. *Union Mill & Mining Co. v. Warren* (C. C.) 82 Fed. 522; *King v. Stuart* (C. C.) 84 Fed. 546; *U. S. Freehold Land & Emigration Co. v. Gallegos*, 89 Fed. 769, 32 C. C. A. 470.

The decree of the District Court is affirmed.
Affirmed.

INTERNATIONAL AGRICULTURAL CORPORATION v. STADLER.

(Circuit Court of Appeals, Sixth Circuit. April 7, 1914.)

No. 2438.

1. SALES (§ 119*)—CONTRACT—CONSTRUCTION.

Plaintiff, by means of a broker's sale note, purchased certain "crushed tankage" for fertilizing use, not to contain over 10 per cent. moisture, "analysis guaranteed 5.60 per cent. ammonia and 30.56 per cent. bone phosphate of lime or equivalent on destination," analysis, if any, by certain designated chemists, buyers' option, from samples drawn at time of shipment, cost at buyer's expense if guaranty was sustained, otherwise at seller's expense and pro rata deduction to be allowed. *Held*, that the contract contemplated that the exact proportions of the tankage might not always be the same; that the percentages might vary from the specified standard, in which case the buyer had no right to rescind, but should receive the tankage and claim a deduction.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 293; Dec. Dig. § 119.*]

2. SALES (§ 72*)—CONTRACT—CONSTRUCTION.

A contract evidenced by a broker's sale note, for a specified number of tons of crushed tankage to be shipped in dry merchantable condition, containing not over 10 per cent. moisture, "analysis guaranteed, 5.60 per cent. ammonia and 30.56 per cent. bone phosphate of lime, or equivalent," etc., "analysis, if any, buyers' option," by specified chemists, etc., was a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

contract for the sale of "tankage," and could not be construed as a contract to purchase specified units of ammonia and bone phosphate.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 197-202; Dec. Dig. § 72.*]

3. SALES (§ 168*)—CONTRACT—CONSTRUCTION—ANALYSIS—OPTION—EXERCISE—REASONABLE TIME.

Where a contract, evidenced by a broker's sale note, for the sale of crushed tankage, provided that it should contain not more than 10 per cent. moisture, and that the analysis should be guaranteed 5.60 per cent. ammonia, and 30.56 per cent. bone phosphate of lime or its equivalent at \$17.25 per ton of 2,000 pounds, f. o. b. cars at point of shipment, analysis, if any, by specified chemists, buyers' option, from samples drawn at the time of shipment, the contract did not apply the stated test and measurement before fixing the final purchase price; and hence the buyer's right to analyze must have been exercised within a reasonable time.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 403-408; Dec. Dig. § 168.*]

4. WORDS AND PHRASES—REASONABLE TIME.

What is a reasonable time is a question of law only when the ultimate facts are undisputed, and if the evidence or probative facts are such that reasonable men might draw different inferences therefrom, the question must be submitted to the jury.

5. SALES (§ 168*)—CONTRACT—CONSTRUCTION—PAYMENT OF PRICE.

Where a contract for the sale of crushed tankage in car load lots provided that it should contain not over 10 per cent. moisture, and that analysis should be guaranteed 5.60 per cent. ammonia, and 30.56 per cent. bone phosphate of lime, price \$17.25 per ton of 2,000 pounds, f. o. b. cars at C., analysis, if any, by certain chemists, buyers' option, from samples drawn at time of shipment, the contract did not require analysis before payment of the price, evidenced by drafts with bill of lading attached.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 403-408; Dec. Dig. § 168.*]

6. SALES (§ 182*)—QUALITY—ANALYSIS OF SAMPLES—REASONABLE TIME—QUESTION FOR JURY.

A contract for the sale of crushed tankage at a specified price per ton, guaranteed not over 10 per cent. moisture, and 5.60 per cent. ammonia, 30.56 per cent. bone phosphate of lime, analysis, if any, by certain Baltimore chemists, buyers' option, from samples taken at the time of shipment. The last samples taken reached Baltimore October 19, 1910, and the analyses were made November 7th. The seller was then notified that the material was below grade. As to the remaining shipments, the greatest time elapsing between analysis and receipt of samples was 11 months, and the shortest, 40 days. *Held*, that whether the analysis was had within a reasonable time was for the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 492-495; Dec. Dig. § 182.*]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; William R. Day, Judge.

Action by the International Agricultural Corporation against August W. Stadler. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

The plaintiff in error, whom we will call the plaintiff or the buyer, brought a suit at law, in the court below, against the defendant in error, hereafter called the defendant or the seller, to recover damages under the sale con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tract. Upon the statement of the case by plaintiff's counsel to the jury, the court directed a verdict for defendant. By the pleadings and the statement, these facts must be taken as appearing:

The plaintiff was engaged at Wilkesbarre, Pa., in manufacturing a fertilizer, and for this purpose it needed ammonia and bone phosphate of lime. The residuum of defendant's product, at Cleveland, Ohio, was called "crushed tankage," and contained the desired ammonia and phosphate. For one or more years the fertilizer company had purchased the defendant's entire output of this tankage, and on November 24, 1909, a broker's sale note was made whereby the fertilizer company purchased from the defendant his output for the ensuing year. The material parts of the note are as follows:

"Stock on hand and entire product to Dec. 1st, 1910, estimated fifty (50) to sixty (60) tons monthly, of seller's regular make crushed tankage, to be in dry merchantable condition, not over 10 per cent. moisture like goods shipped on contract of Nov. 5th, 1908, analysis guaranteed 5.60 per cent. ammonia and 30.56 per cent. bone phosphate of lime or equivalent on destination, price at seventeen dollars and twenty-five cents (\$17.25) per ton of 2,000 lbs. f. o. b. cars at Cleveland.

"Shipment as ready in One (1) or Two (2) carload lots, seller's option, in bulk.

"Analysis, if any, by Wiley & Hoffman or Gascoyne & Co., Baltimore, buyers' option, from samples drawn at time of shipment, cost of same to be at buyer's expense if guaranty is sustained, otherwise at seller's expense and prorate deduction to be allowed.

"Settlement on seller's sworn certificate of f. o. b. weights.

"Terms: Sight draft vs. B. L. for full amount of each invoice. Draft to be drawn for presentation through Wyoming Valley Trust Co., Wilkesbarre, Pa."

Thereafter, at dates running from November 30, 1909, to October 11, 1910, the seller shipped 26 cars of tankage, each consigned to its own order at Wilkesbarre, and with each shipment drew a sight draft for the amount of the invoice upon the purchaser, attached this draft to the bill of lading, and sent the same to the Wilkesbarre bank for collection. The drafts were paid promptly, the bills of lading taken up, and the shipments received and used by the buyer. At the time of each shipment, the seller took from the car a sample in a two quart glass jar, and sent the sample by express to the brokers, at Baltimore, who had acted for both parties in making the contract. These samples were received by the Baltimore brokers sometimes at about the same day, often several days after, and in only two instances materially before, the day on which the corresponding draft was paid at Wilkesbarre.

In August, 1910, the buyer, for the first time, made any claim that the tankage was not up to the contract standard, the seller proposed to investigate, shipments ran along, and in November, 1910, the buyer, for the first time, requested the Baltimore chemists to analyze the samples which had accumulated in the brokers' possession. From the analyses, it appeared that every shipment was excessive in moisture and deficient in ammonia and phosphate. The buyer computed the pro rata deduction to which it was entitled under the contract to be various sums upon each car, aggregating about \$6,700, and for the recovery of this amount this suit was brought.

The verdict seems to have been directed upon the ground that the purchaser, by paying the draft before getting its analysis, or by its general course of conduct, or by both, had waived its right to the pro rata deduction; and this is the ultimate question which, in one aspect or another, is presented by all the assignments of error.

J. M. Butler and Max Goldsmith, both of Columbus, Ohio (White & Case, of New York City, of counsel), for plaintiff in error.

Martin W. Sanders and Westenhaver, Boyd, Rudolph & Brooks, all of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1-3]

1. This contract was not the ordinary contract of warranty, a breach of which in some jurisdictions does, and in other jurisdictions does not, require prompt notice from the purchaser in order to preserve his right of complaint. It is true the contract incidentally refers to its "guaranty," but the contract was informally drawn by brokers, and its true character cannot be determined by the casual use of a term; indeed "guaranty" is not always synonymous with "warranty," nor is it inapt in this situation. We think the contract plainly contemplates that the exact proportions of the tankage may not always be the same, that the percentages may vary from a specified standard, and that, in such case, the purchaser has no right of rescission, but should receive the tankage and claim the contract deduction. Of course, we do not mean that the discrepancy might not be so extreme as to render the material unsuitable for its intended use, and so justify rescission; but that is not the condition foreseen and covered by the words chosen. It is now the argument of the buyer's counsel that the contract should be characterized as one for the purchase of units of ammonia and bone phosphate. This is a proper characterization, with two exceptions: First. Other material of value may have been contained in the tankage; as to that, the present record is not clear. Second. Instead of being, on its face and primarily, a contract for the purchase of these units, it was primarily a contract for the purchase of tons of tankage, and only at the option of the buyer could it be transformed into one for units of ammonia and phosphate. The material was to be shipped as tankage, invoiced as tankage, and paid for as tankage. The analysis which was to resolve the tankage into its units of value was not certain to occur, but was contingent upon the exercise of the buyer's option that there should be an analysis. Whether the words "buyer's option" refer to the analysis or to the alternative chemists is immaterial because the phrase "analysis, if any," of itself sufficiently imports that there should be one only if the buyer wished, for he was the sole party who could possibly be benefited thereby. When we thus construe the contract as one which did not automatically apply the stated test and measurement before fixing a final purchase price, but which rather adopted a quantity measurement as the price criterion which should be followed until and unless one of the parties demanded the alternative method, it necessarily follows that the contract right to this option, which right carried no fixed time limit, must be exercised within a reasonable time. The determinative question, therefore, is whether the buyer, within a reasonable time, exercised this contract option.

[4] 2. It is said that the question of reasonable time is, when the facts are undisputed, a question of law, and language to that effect is cited from Supreme Court opinions. *Paine v. Central R. R. Co.*, 118 U. S. 152, 160, 6 Sup. Ct. 1019, 30 L. Ed. 193; *Earnshaw v. U. S.*, 146 U. S. 60, 67, 13 Sup. Ct. 14, 36 L. Ed. 887. The statement is entirely accurate, if by "facts" we mean ultimate facts; but we think it inaccurate, if applied to evidential or probative facts from which reasonable men may draw differing inferences; and the very

question as to how long a man may reasonably wait must often be one upon which minds may fairly differ. As applied to a situation of the general character here involved, there must be a minimum, delay within which the court can clearly say was, as matter of law, not unreasonable, and there must be a maximum, delay beyond which becomes unreasonable as matter of law; but between these limits, there is a field where the unreasonableness of the delay is either a question of fact or a mixed question of law and fact, so that its determination falls within the province of the jury. We take this statement of the rule to be a proper summary of the authorities (*Long Bell Co. v. Stump* [C. C. A. 8] 86 Fed. 574, 30 C. C. A. 260; *Druse v. Wheeler*, 26 Mich. 189, 200; note V, p. 341, 29 L. R. A. [N. S.]; note, p. 142, 4 L. R. A. [N. S.]); and for a discussion of the difference between ultimate facts and evidential facts see *Kentucky Co. v. Hamilton* (C. C. A. 6) 63 Fed. 93, 97, 11 C. C. A. 42.

[5] 3. Upon the record now presented, we can safely say that the contract did not require analysis before paying the draft. Such inference cannot be drawn from the face of the contract, nor from the construction which the parties, in their course of business, put upon the contract, according to the pleadings and the offered proofs. The normal inferences are that a sight draft is to be paid on presentation, and that a draft and bill of lading sent by mail would reach Wilkesbarre and be presented and paid at least as soon as samples would reach Baltimore, and before samples sent to Baltimore could be analyzed and the results returned to Wilkesbarre. The second recited inference might not be safe, if the purchaser's only protection had been by rejection, but the right to reclaim for the deficiency was expressly preserved, and this right may well apply to a subsequent reclamation rather than to a mere reduction from the payment to be made for the current shipment.

Further, the careful provision that the buyer should not get possession except by paying the full invoice price, contrasted with the affirmative promise of a compensatory allowance, is persuasively inconsistent with the idea that paying the draft waived any reclamation. We do not think the parties intended that a draft should go dishonored and a car accumulate demurrage for days or weeks while they negotiated about a claimed deficiency. If it should appear that, owing to the nature of the material or some custom of trade familiar to the parties, rights would be prejudiced by allowing the option for analysis to survive the payment of the draft, the subject-matter of this paragraph might require further consideration; but upon this record we see no such prejudice.

[6] 4. The last samples reached Baltimore October 19th, the corresponding drafts were paid October 31st, and the analyses were made November 7th. The delay was, therefore, 19 days, and the seller had been notified that the material was below grade. As to the remaining shipments, the greatest time elapsing between analysis and receipt of samples was 11 months; the shortest 40 days. Whether the delay in analysis of the last shipment (and indeed of all sent after the August complaint) was too great depends wholly, so far as this record in-

dicates, upon the probability of material change in the samples. As to the earlier shipments, there is the further question whether the delay and seeming approval were likely to affect the seller's conduct to his prejudice. We cannot say, as we are urged to do, that the latter result might not happen. If the seller had known after the first shipment or two that the tankage did not meet the standard, he could, we would naturally assume, have reduced the moisture and so have avoided the payment of freight on water, ultimately to be charged back to him. It may be that he could have changed his process so as to have produced more or lost less ammonia, and that, without disadvantage, he could have changed his raw material so as to have bettered his residual product. On the contrary, the previous years' dealings, or some other consideration, may furnish justification for failing earlier to subject the tankage to the agreed test. We do not determine the force of these things; we are only illustrating that there is or may be a field of doubtful fact affecting the ultimate question of what delay was more than reasonable.

5. In all that we have said, we have assumed that the contract, with the aid of that expert knowledge and that familiarity with the trade customs which should be attributed to the parties, furnishes a means of ascertaining the "pro rate reduction" which it promises. On its face, it does not do this. The excess of water could be presumed to be worthless, and so that allowance could be computed; the other constituents, beyond ammonia and phosphate, may or may not have had value enough to justify the freight. If no, they furnish no difficulty to the computation; if yes, then with reference to them, as certainly with reference to the phosphate and the ammonia, there must be expert aid in proportioning values. We have not hesitated to make this assumption, although not directly supported by the present record, because it seems improbable that the parties would have made a contract which was unintelligible to them.

6. Our conclusion that the contract itself required the exercise of its option by plaintiff within a reasonable time makes immaterial the question so much discussed by counsel whether the laws of Ohio or of Pennsylvania should control. There is no conflict. The meaning of the words "at destination" has not been argued or considered.

For the error in directing the verdict, the judgment must be reversed, with costs, and the case remanded for a new trial.

LOWENSTEIN et al. v. LEVY.

FOLZ v. LEVY.

(Circuit Court of Appeals, Sixth Circuit. April 7, 1914.)

Nos. 2434, 2474.

1. GARNISHMENT (§ 144*)—ANSWER OF GARNISHEE—CONSTRUCTION.

Plaintiff sued in Tennessee defendant F., a nonresident, and on July 13, 1907, garnished L. Bros., who on August 5th answered that F. had sued them in New York and recovered a verdict of \$24,217.02, but a new trial had been granted, unless F. would consent to a reduction of the ver-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dict to \$5,189.52, and that the garnishees denied liability for breach of the contract on which they had been sued by F. *Held*, that since the answer of a garnishee speaks from the date of the service of garnishment, the answer should be construed as alleging that a suit was then pending in New York, based on the indebtedness sought to be garnisheed, and that the New York court had acquired complete jurisdiction over such indebtedness.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 270; Dec. Dig. § 144.*]

2. GARNISHMENT (§ 235*)—PROCESS AGAINST NONRESIDENT.

Where garnishment proceedings are instituted against a nonresident, leading to a judgment and a deprivation of property without personal service, jurisdiction must clearly appear when the proceedings are attacked directly.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 423-427, 443, 444, 447, 450-452; Dec. Dig. § 235.*]

3. GARNISHMENT (§ 231*) — PROPERTY SUBJECT — INDEBTEDNESS — SUBJECT OF SUIT IN FOREIGN JURISDICTION.

Where, prior to garnishment proceedings in Tennessee against F., residing in New York, it appeared by the garnishee's answer that at the time of the garnishment a suit was pending in New York by F. against the garnishee to recover on the identical indebtedness, and that the New York court had acquired full jurisdiction of the subject-matter, the indebtedness could not serve as a basis of jurisdiction of the courts in Tennessee.

[Ed. Note.—For other cases, see Garnishment, Dec. Dig. § 231.*]

4. COURTS (§ 37*)—JURISDICTION—SUBJECT-MATTER—WAIVER.

Where jurisdiction of a nonresident was sought to be obtained by garnishment of an indebtedness owing by a resident, but it appeared on the face of the record that the indebtedness was unavailable for that purpose, a waiver of the objection would not be found, unless it clearly appeared from a record unambiguous on that point.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 147-149, 151, 156; Dec. Dig. § 37.*]

Appeals from the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action by Isaac Levy against Solomon Folz, in which Elias Lowenstein and others were garnisheed. Defendant Folz, having removed the cause to the federal court, moved to dismiss the principal suit because of his nonresidence, and because the garnishment had reached no property within the district. This motion being denied, and judgment subsequently rendered against both Folz and the garnishees, they bring separate appeals. Reversed.

Levy and Folz had business relations out of which grew a claim by Levy against Folz for \$9,000. Levy was a resident of Memphis, Folz, of New York. Lowenstein Bros., also residing in Memphis, were indebted to Folz. Levy brought suit in the state court, at Memphis, on his claim against Folz; and, on July 13, 1907, upon a showing that the defendant was a nonresident, took out a garnishee attachment against Lowenstein Bros. To the garnishment, Lowenstein Bros., on August 5th, filed this answer:

"Solomon Folz sued B. Lowenstein & Bros. for breach of contract, and the case was tried in New York City before Judge Seabury, and resulted in a verdict of \$24,217.02 in his favor, but Judge Seabury granted a new trial unless Folz would consent to a reduction of the verdict to \$5,189.52; that being the amount for which the court found a verdict would be justified.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

B. Lowenstein Bros. deny liability for breach of contract, as the contract between them and Folz was terminated by mutual agreement."

Plaintiff proceeded by publication against Folz, and the latter thereafter appeared specially, removed the case to the District Court, and moved to dismiss the principal suit because of his nonresidence and because the garnishment had reached no property within the district, and hence there was no jurisdiction to support a substituted service. Pending this motion, all parties stipulated that the case might stand without further action while the New York litigation continued. In February, 1912, Lowenstein, in answer to plaintiff's summons, further answered:

"Said firm of B. Lowenstein & Bros. is indebted to the defendant, Solomon Folz, in the sum of \$5,189.52. The amount has been fixed by judgment of the Supreme Court of the city of New York, which was affirmed by the Court of Appeals of the state of New York. This judgment was recently rendered, in December, 1911."

Thereafter Folz's motion to dismiss was denied, he did not answer, an order pro confesso was entered against him, and thereafter a final decree, awarding to Levy \$5,189.52 against Lowenstein and judgment of the same amount against Folz, the principal defendant, without prejudice to Levy's right to recover the remainder of his claim against Folz in any subsequent proceeding. The principal defendant and the garnishee defendant bring separate appeals.

Lehman, Gates & Martin, of Memphis, Tenn., for appellants Lowenstein and others.

A. W. Biggs, of Memphis, Tenn., for appellant Folz.

J. C. Wilson and Israel H. Peres, both of Memphis, Tenn., for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and SANFORD, District Judge.

DENISON, Circuit Judge (after stating the facts as above). [1] We find it necessary to consider only one question, among the many presented. The power of the court to enter judgment against the garnishee defendant and the independent judgment against the principal defendant is challenged, because it rested solely upon the supposed seizure within the district of an indebtedness already the subject of suit and judgment in a foreign jurisdiction. This challenge questions the true meaning and effect of the first answer or disclosure by the garnishee. It is not clear and unambiguous. It does not in terms say that the New York judgment, to which it refers, had been rendered, or even that the New York suit had been commenced, before July 13th, the effective date of the garnishment; and it is theoretically possible that such a suit might have been brought and a judgment been had and a motion for a new trial been passed upon in the interval between July 13th and the date of the disclosure, August 5th. It, therefore, would not be hopelessly inconsistent with the disclosure to conclude that the New York suit had been commenced later than the Memphis suit, so that it could cut no figure, in bar or in abatement, of the Memphis suit.

However, we cannot think that this is the natural or reasonable construction of this disclosure; and we say so for two reasons: The first is that the date of the service of the garnishment upon them seems to be the date which the garnishees would naturally have in mind in mak-

ing their answer, and so naturally to be considered as the date as of which their answer would intend to speak. The writ notified them on July 13th that "all the property, money, goods and effects of the said defendant now in your custody or possession has been attached," and "not to pay said defendant any debts now due or hereafter to become due." This general situation, common to all garnishment or attachment proceedings with which we are familiar, strongly suggests that when the garnishees thereafter answer and say that a suit has been brought or a judgment has been rendered, they mean to refer to the condition of things when they were served. This inference is strengthened by the thought that if the foreign suit was commenced after the garnishment suit, there would be little or no object in mentioning it at all. It is true that the Tennessee statute (Shan. Code, § 4816), as developed in the form of the writ of garnishment, requires the garnishee to retain possession of "all property and effects of the said defendant which are now or may hereafter come under your control or into your possession until you shall have made full answer to this garnishment"; but this provision for additional liability against the garnishee, arising after issue of the writ, is for an unusual thing, and the fact that the language of the answer might possibly refer to a situation which had arisen since the issue of the writ is not of much force in deciding the fair and reasonable meaning of the general statement which was made, particularly in a case where there is nothing affirmatively indicating that there was any change between the two dates in question. The other reason above mentioned is this: While it is not incredible that a suit could be brought and tried and a verdict rendered and a motion for a new trial made and disposed of, all within 23 days, it is extremely improbable; from what we all know of the customary way of doing things, it is not likely that any more could have happened during that time than the making and hearing and disposing of the motion for new trial.

[2] Then, in construing this answer, we have further help from the familiar rule that in this class of proceedings leading to a judgment and deprivation of property without any personal service, and especially when the attack is not collateral but direct, the jurisdiction must clearly appear. The burden must be upon the party asserting the extraordinary jurisdiction. Accordingly, it is held in Tennessee that the liability of the garnishee is not to be arrived at by surmises or inferences, but only from direct admissions or necessary conclusions. *Moses v. McMullen*, 44 Tenn. (4 Cold.) 242, 245. It is true that some Tennessee decisions seem to put the burden upon the garnishee to set up matter in avoidance of his liability, but this is only where the disclosure admits an original liability. Here Lowenstein denied the existence of any indebtedness to Folz. This denial accentuates the necessity that the party who charges the liability in spite of the denial should make it clearly appear, and emphasizes the requirement, that any doubt whether the New York suit was the earlier should be solved against the plaintiff. Putting all these considerations together, we conclude this answer was intended to say, and must be treated as if it did at least say, that on the 13th of July a suit was pending in the New York Supreme Court, based upon the indebtedness in question,

Whether it also should be treated as saying that a judgment had then been rendered against the garnishee defendant, we need not decide.

[3] This interpretation of the disclosure presents the question whether, when a suit is pending in the courts of one state, brought by the principal creditor against the principal debtor, and full jurisdiction over the cause of action and the debtor's person has been obtained, the same indebtedness can serve as the basis of jurisdiction for the courts of another state in a suit by his creditor against the plaintiff in the first suit as principal defendant, and against the defendant in the first suit as garnishee defendant. This question must be answered in the negative. In the cases where the first suit has reached the stage of a judgment, the ruling of the Supreme Court in *Wabash R. R. Co. v. Tourville*, 179 U. S. 322, 327, 21 Sup. Ct. 113, 45 L. Ed. 210, should be accepted as controlling; but it is not necessary that the first suit should have developed into a judgment. The principle involved is not the necessity that a court must control its own judgments, although this has been given importance in many cases; it is rather the familiar principle that prior seizure of the property involved gives exclusive jurisdiction over that property. As said in *Covell v. Heyman*, 111 U. S. 176, 182, 4 Sup. Ct. 355, 358 (28 L. Ed. 390), speaking of federal courts and state courts:

"They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void."

This was said regarding an actual seizure of physical property, but it must be no less true regarding the only kind of seizure which can be made of intangible property. The thing here involved, the debt from Lowenstein to Folz, could be seized or appropriated at Memphis only by the service of process like a summons on Lowenstein; but the same thing had already been impounded in the same way by the Supreme Court in New York. This consideration of the reasons involved sufficiently distinguishes the converse situation, and cases like *Barnsdall v. Waltemeyer*, 142 Fed. 415, 418, 73 C. C. A. 515 (C. C. A. 8), where it has been held that the pendency of a prior garnishment in another jurisdiction did not bar a suit by the principal defendant therein against his debtor, the garnishee defendant therein, in a court having jurisdiction of the latter's person. In such case the jurisdiction of the court in the second suit is complete by personal service upon defendant, while in cases like the present, the challenged jurisdiction rests only on a supposed seizure of property which had already been taken by another court, and so could not be seized in the second case. This court held, in *Mack v. Winslow*, 59 Fed. 316, 8 C. C. A. 134, that the reasoning of the Supreme Court in *Wallace v. McConnell*, 13 Pet. 136, 10 L. Ed. 95, reached a case essentially like the present one, and we see no occasion to doubt the correctness of that ruling. See, also, *Clark v. 505,000 Feet of Lumber*, 65 Fed. 236, 240, 12 C. C. A. 628 (C. C. A. 7), and cases cited in *Menees v. Matthews* (D. C.) 197 Fed. 633, 635.

We find nothing to the contrary in Tennessee. In *Huff v. Mills*, 15 Tenn. (7 Yerg.) 42, the first suit and the garnishment suit were in the same county court, and jurisdiction in the second suit did not depend on the successful seizure of a debt. The sweeping language of the court indicates a view of the scope of the Tennessee statutes, which view, in *Paper Co. v. Shyer*, 108 Tenn. 444, 67 S. W. 856, 58 L. R. A. 173, was withdrawn. So far as *Huff v. Mills* may support the right of garnishment in a second suit in another court, it seems inconsistent with the later case of *Clodfelter v. Cox*, 33 Tenn. (1 Sneed) 330, 340, 60 Am. Dec. 157.

[4] The only hesitation we have in reversing these cases on the ground we have discussed is because the record does not make very clear that the point was ever brought to the attention of the District Judge. Folz's motion to dismiss did not specifically raise the question of a prior suit pending, and there is nothing to show what objections or defenses Lowenstein did make to the final decree, or, indeed, that he made any, save the recital that on final hearing the case was "argued by counsel." However, the point involved a total failure of power to proceed; the defect appears upon the face of the record; and, although it may have been in the nature of a personal privilege which would be ineffective if not insisted upon, we think waiver of such an obstacle should clearly appear, and should not be inferred from a record ambiguous on that subject, and that this record may be ambiguous is the most that can be said.

The decree is reversed, with costs, on both appeals, but appellants will recover only one docket fee. Folz's motion should be granted, and the garnishee proceedings be dismissed. This conclusion makes unimportant the question of equity jurisdiction. The case is remanded accordingly.

LUCKENBACH v. PEARCE.

(Circuit Court of Appeals, Fifth Circuit. February 17, 1914.)

No. 2563.

MARITIME LIENS (§ 9*)—SERVICE OF STEVEDORE.

A stevedore, rendering services in loading or discharging a vessel in other than her home port, has a maritime lien therefor, and cannot be held to have abandoned the right to such lien because the person with whom he contracts may represent a charterer, or for other reason be without actual authority to bind the owner, of which fact the stevedore has no knowledge.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 13; Dec. Dig. § 9.*]

Appeal from the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Suit in admiralty by J. E. Pearce against the steamship *Jacob Luckenbach*; Edgar F. Luckenbach, claimant. Decree for libellant, and claimant appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Jas. B. Stubbs, of Galveston, Tex., and Peter S. Carter, of New York City, for appellant.

John C. Walker and Marsene Johnson, both of Galveston, Tex., for appellee.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PARDEE, Circuit Judge. This is a libel in rem to recover for stevedore's services in unloading the steamship Jacob Luckenbach in the port of Galveston in June, 1911. The Jacob Luckenbach was claimed for owner Edgar F. Luckenbach of New York, and was under charter to George R. Dilkes & Co., of Philadelphia, who sublet the same to Jacob F. Lent, manager and agent of the Baltimore & Texas Steamship Company of Baltimore, and this last-named company had an agent, H. N. Bernheimer, at Galveston. The charter parties provided that the expense of unloading the vessel should be paid by the charterers.

The case shows that under similar charters to the same parties the steamships Jacob Luckenbach and D. N. Luckenbach had been coming to the port of Galveston for some time, and at the request of the agent of the Baltimore & Texas Steamship Company had been unloaded by the libelant, and that on June 9, 1911, when the D. N. Luckenbach arrived at Galveston the situation was that for previous services rendered by the libelant in unloading the Luckenbach vessels the libelant had not been paid and there was due him \$2,500.

The libelant testifies:

"When the D. N. Luckenbach came into the dock on or about June 9, 1911, I went aboard the steamer and stated to Capt. Coonan that the affairs of the Baltimore & Texas Steamship Company here were in very doubtful condition, and that their credit was bad, and at that time they owed me quite a lot of money, which I expected them to pay that day—the day I was talking to him—but their credit was so bad I did not care to continue to handle the business on their account, unless it was guaranteed in some way by the owners of the ships, so I could look to the vessels for the stevedore's charges, and Capt. Coonan said that he would take the matter up right away with his owners in New York, but he felt that his people would make it all right, and along during the day the account of the Baltimore & Texas Steamship Company was paid by them, and I went ahead and discharged the boat, expecting to hear from the owners of the boat before she got away. I knew she would be here 8 or 10 days, and after the discharge was finished at Galveston, she shifted to Texas City and discharged coal, and Capt. Coonan came over to Galveston and telephoned me and said: 'Come down and meet me; I have good news for you'—and I met him at the Model Market, and he said: 'The reason I asked you to come down was that I just received a letter from my people directing me to tell you not to libel our boat; that they would see that all stevedores' bills were paid.' Q. Did that relate to both vessels? A. That related at that time to his own vessel, because the other had not come in—she followed 15 or 20 days after—and on the strength of that I permitted the boat to get out of town without making any further effort to libel, or take the matter up any further, because I knew the credit was good; the general reputation of Luckenbachs was good. Q. Did you intend to libel the boat at that time for the services, if it had not been guaranteed? A. If I had not received these assurances from Capt. Coonan that they would be paid. Q. That assurance from Capt. Coonan, the master of the D. N. Luckenbach? A. Yes, sir. Q. When did the other vessel come? A. She followed something

like 15 days afterwards. Q. Did you discharge her, too? A. I discharged her on the strength of the understanding I had with Capt. Coonan, because his conversation referred to all other boats and not the D. N. Luckenbach in particular—their boats he referred to. Q. Did Capt. Coonan exhibit any letter to you? A. No, sir; he did not. He said that he had the letter. Q. Told you that they had given him authority to do so? A. Yes, sir. * * * Q. Do you know of any charter party to any other persons by the Luckenbachs? A. I do not know, sir. Q. You never knew of it? A. No, sir. Q. You are friendly with the agent of the vessels, the master—were you friendly, or not, with the agent of the Baltimore & Texas Steamship Company—did any one who was presumed to have possession or knowledge of its charter party ever tell you anything about one? A. My recollection of it is that no one here seemed to know how the boats were operating in here, and nobody at this end of the line seemed to have any knowledge of what arrangements were made here.

"Court: Did you not work with the Baltimore & Texas Steamship Company to unload the vessels at previous dates? A. All previous trips. Q. As between the same parties? A. Yes, sir. Q. When the credit of that concern grew indifferent, or became bad, as I understand, you were not willing to enter into a contract with them any longer, unless the payment for the loading and unloading was guaranteed by the ship? A. Yes, sir; I would not discharge the vessels on these two occasions had I not received assurances from Capt. Coonan that the bills were to be paid. It developed that George R. Dilkes & Co. were connected with the proposition, but up to the taking of the depositions I never heard of them having any connection with the vessels at all. * * * Q. Passing from that now, how long after that was it that you unloaded the Jacob Luckenbach? A. As I stated before, it was something like 12 or 15 days; I have not the exact number of days. Q. In the meantime had you presented your bill to any one? A. Yes, sir; that had been presented to Mr. Bernheim in the usual manner. Q. To the Baltimore & Texas Steamship Company's agent? A. Yes, sir. Q. What did he do with it? A. I do not know. He did not pay me. Q. When was the first time you presented it to the Luckenbach line, the owners of the vessel? A. The company failed just about that time. Q. What company? A. The Baltimore & Texas Steamship Company, or, at least, suspended their sailings just at that time. The Jacob Luckenbach was here, and I immediately turned the affairs over to my attorneys. Q. When was she here? A. I say she was here from 12 to 15 days after I handled the D. N. Luckenbach. Q. What time, about? A. That would be about the 25th or 30th of June, I judge; I may be a day or two off. I can tell what date I rendered the bill, if that would be any assistance to you. The bill was made on June 29th. At that time the boat was discharged, and the probabilities are I handled her about the 25th of June. Q. At that time the boat was entirely discharged? A. Yes, sir; at the time the bill was made. Q. To whom was it made? A. To Bernheim, representative of the Baltimore & Texas Steamship Company. Q. Did you receive any further assurances from the Jacob Luckenbach? A. I had received nothing because I had not had sufficient time to hear from my first bill. The first bill was made on June 22d, and only a week before the two bills—the second bill on June 29th. Q. When was the first time you communicated with the Luckenbach people? A. I do not remember the exact date of that telegram, Mr. Stubbs. Q. Is this a copy of the telegram? A. My copy has been misplaced. Q. Is that a copy? A. This is the New York original, I guess. Q. The New York original? A. Yes, sir; that is correct. This is the original itself. This is the receiving operator's telegram of the message.

"Mr. Stubbs (Counsel for Respondent): I will read the telegram. It is dated Galveston, Texas. 'Received 16—paid ——. July 12, E. F. Luckenbach, Bridge Street, New York. Rumored here that Lent has suspended further sailings. Can you advise if true. Reason for inquiry he owes me for stevedoring last two steamers, confidential. J. E. Pearce.'

"Q. What two steamers were these? A. The two in question. Q. Who was Lent, referred to? A. The general manager of the Baltimore & Texas Steamship Company. Q. Did you receive a reply? A. Yes, sir. Q. Have

you the reply? A. It was filed in the papers, and I do not know where it is now. I know what the reply is. Q. Look at that and state whether or not that is the correct reply. [Shows witness carbon copy.] A. Yes, sir; this is correct.

"Mr. Stubbs: I offer this in connection with same: 'Mr. J. E. Pearce, July 12, 1911. Understand Lent has sent out notices that shipments have been suspended. Take matter up with him direct at Pittsburg. E. F. Luckenbach.'

"Q. Did you take the matter up with Mr. Lent to be adjusted? A. No, sir; I took it up with my attorneys, when I knew he had suspended. Q. Did you communicate further with Luckenbach, or any other of the owners or managers? A. No, sir; Judge Walker and Judge Johnson have handled the case since that time.

"Re-examined (by Judge Walker): Q. Did you understand Capt. Coonan, that one of his undertakings was to guarantee to see you had payment for your services, and that it was to extend to the other vessels?

"Counsel for Defendant: Ask what the understanding was.

"Court: He stated what the agreement was.

"A. I answered that, that all he said to me was that he received a letter from his owners with further reference to the matter of stevedoring, and that they had told him to tell me not to libel their vessel; that they would see that the stevedoring bills was paid, not only on one vessel, but I construed it to continue on bills for handling their steamers. Q. Did you rely upon that promise? A. I relied upon it to the extent of permitting him to go to sea without any further effort to libel the vessel and to handle the following steamer. Q. Would you have done the work on the Jacob Luckenbach if it had not been for this guarantee? A. No, sir.

"Counsel for Respondent: We object to that.

"Q. Would you have handled the second at all if you had not had that assurance? A. No, sir. Q. And on that account that you did handle the D. N. Luckenbach? A. On that account I handled both of the Luckenbachs—the D. N. and Jacob Luckenbach."

The evidence by the libelant is practically uncontradicted, though there is much evidence in the transcript tending to show that Capt. Coonan had no authority to represent the owners as to discharging the Jacob Luckenbach, and that Capt. Coonan did not tell the libelant exactly what the libelant says he did, and did not tell the libelant anything showing, or tending to show, that he was representing the owners as to discharging other vessels than the D. N. Luckenbach of which he was master, so that, as to whom the libelant gave credit the evidence is that on June 9, 1911, the libelant who had theretofore been discharging the Luckenbach vessels under an agreement with the agent of charterers and possibly on the sole credit of the charterers, though thinking he had a lien therefor on the vessels discharged, decided that on account of failure of the charterers to pay and their bad credit he would no longer discharge the Luckenbach vessels unless upon a guaranty from the owners and on the credit of the vessel discharged; and thinking from the notice to Capt. Coonan and Capt. Coonan's representations as to the attitude and wishes of the owners that they would be responsible, he discharged the Jacob Luckenbach upon the credit of the vessel.

In *Dennett v. The Main*, 51 Fed. 954, 2 C. C. A. 569, this court held that a stevedore rendering services in loading and unloading cargo in other than the home port has a maritime lien therefor; and we followed this in *The Norwegian Steamship Co. v. Washington*, 57 Fed. 224, 6 C. C. A. 313, a case very similar in circumstances and issues to the

case in hand; and we quote from the opinion of the court in the latter case as applicable here:

"The duties of consignees or agents of ships, or the agents of charterers or owners, are so similar and undistinguishable that without some positive knowledge of their relations, contracts, and agreements, it is impossible to determine to which class an agency may belong; and the fact that a merchant purchases supplies, or procures services to be rendered a vessel, raises no presumption that he therefore sustains relations with the owners that make him responsible, and relieve the vessel from a lien. In the great majority of instances, in ordinary practice, the materialman or stevedore contracts with, and takes his bill for payment to, the agent of the ship, whether he represents the owners or charterers, without the intervention of the master; but by so doing he does not abandon his right to look to the vessel in event of a nonpayment. It cannot be presumed or expected that he can be informed as to the exact provisions of the charter, or the responsibilities of the parties, in each particular case.

"Examining this case in the light of these general principles, we fail to find any affirmative proof that the libelant was informed of the character or conditions of the charters, or either of them, or the responsibilities of the vessel or charterers, or in any way gave the agent personal credit, to the exclusion of the vessel, or that the circumstances are shown to be such that he should be held to have done so. The final charter—the one under which he was loading at this time—specified distinctly that the vessel should pay for the stevedoring; and, had he known of this, it was in no way compulsory upon him to go back of that, and find to whom the term 'the vessel,' there used, referred to, whether owners or previous charterers; and, were he ignorant of the provisions of either charter, it cannot be presumed he knew of, or contemplated, any paymaster but the vessel. There is nothing that shows that he knew what relation Hoadly & Co., through whose instrumentality he was employed, held to the vessel, any more than that they were the agents of Andress & Mitchel, whom he says he supposed to be the charterers' or owners' agents, some one who looked out for the business."

We concur with the District Court in holding that for services rendered by the libelant in unloading the cargo of the Jacob Luckenbach he has a maritime lien on the vessel.

The decree appealed from is affirmed.

LUCKENBACH et al. v. PEARCE.

(Circuit Court of Appeals, Fifth Circuit. February 17, 1914.)

No. 2564.

MARITIME LIENS (§ 9*)—SERVICES OF STEVEDORE.

A stevedore, who unloaded a vessel at the instance of the master and on the credit of the vessel, *held* entitled to a maritime lien therefor.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 13; Dec. Dig. § 9.*]

Appeal from the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Suit in admiralty by J. E. Pearce against Edgar F. Luckenbach, owner of the steamship D. N. Luckenbach and others. Decree for libelant, and respondents appeal. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Jas. B. Stubbs, of Galveston, Tex., and Peter S. Carter, of New York City, for appellants.

John C. Walker and Marsene Johnson, both of Galveston, Tex., for appellee.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PARDEE, Circuit Judge. We are satisfied from the evidence in this case that Pearce, the stevedore, unloaded the D. N. Luckenbach at the instance of the master on the credit of the vessel, and that for such services the owners of the D. N. Luckenbach are liable. See *Dennett v. The Main*, 51 Fed. 954, 2 C. C. A. 569; *The Norwegian Steamship Co. v. Washington*, 57 Fed. 224, 6 C. C. A. 313, and the case of *Luckenbach v. Pearce* (No. 2563 of the docket of this court) 212 Fed. 388, just decided.

The decree appealed from is affirmed.

CARTER et al. v. BROWN.

(Circuit Court of Appeals, Fifth Circuit. February 23, 1914.)

No. 2570.

1. SEAMEN (§ 29*)—PERSONAL INJURY—LIABILITY OF VESSEL OR OWNERS.

It is not a defense to a suit by an employé against the owners of a vessel, to recover for an injury caused by the improper stowage of cargo, that the negligence was that of fellow servants; it being the duty of the master or mate, for which the owner is responsible, to see to the proper stowage of cargo.

[Ed. Note.—For other cases, see *Seamen*, Cent. Dig. §§ 186, 188-194; Dec. Dig. § 29.*]

2. SEAMEN (§ 29*)—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

Contributory negligence is not a complete defense to a suit in admiralty for injury to an employé, but, if proved, goes only to a reduction of damages.

[Ed. Note.—For other cases, see *Seamen*, Cent. Dig. §§ 186, 188-194; Dec. Dig. § 29.*]

Appeal and Cross-Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit in admiralty by Joseph Brown against Henry M. Carter and others. Decree for libellant, and both parties appeal. Affirmed.

James Legendre and Edward Rightor, both of New Orleans, La., for appellants and cross-appellees.

W. J. Waguespack, of New Orleans, La., for appellee and cross-appellant.

Before PARDEE, Circuit Judge, and GRUBB, District Judge.

GRUBB, District Judge. This was a libel in personam, filed by the appellee against the appellants in the District Court for the Eastern

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

District of Louisiana to recover damages, alleged to have been suffered by appellee by reason of a personal injury received by him while in the employment of the appellants, as a laborer on the Mississippi river steamboat *Queen of the Bends*. The injury was caused by the fall of sacks of sugar on the appellee, which were piled on the deck of the boat. The fact of injury, and that it was so caused, is not in dispute. The disputed questions relate to the condition in which the sugar sacks were piled, and the responsibility of the appellants therefor, and to the conduct of the appellee at the time he was injured, as bearing upon the question of his own fault as a contributing cause of his injury. The facts, other than those stated, are in irreconcilable conflict. There is even a dispute as to whether the accident occurred in nighttime or daytime, and as to whether the boat was tied up at a landing or moving in midstream.

The appellants can only be responsible for the injury because of fault on their part which had causal relation to it. The appellee asserted the existence of such fault, and that it consisted in the negligent manner in which the sugar was piled on the deck of the boat, in that it was piled eight sacks high with one tier and no support, other than the sacks themselves, when it should have been piled but five sacks high in the absence of such support.

The record shows that it was not customary to pile sugar sacks of the dimensions of those which fell higher than five or six in a single tier, and, in the absence of additional support, and the inference of fault in some person, if the sacks were piled as asserted by appellee, was properly drawn by the District Judge.

The testimony as to the height of the tier of sacks that fell, whether eight high or only five high, is in hopeless conflict. There is no dispute that the sacks fell from a single tier, which had no support other than the sacks themselves. We concur with the District Judge's conclusion that the weight of the evidence of the witnesses, taken in connection with the probabilities fairly deducible from such few facts as are undisputed, and from the physical situation, shows that the sacks were piled eight high.

[1] Having reached the conclusion that the sacks which fell were negligently piled, the next inquiry concerns the appellants' responsibility for the negligent piling. The causal relation to the injury is obvious. The appellants invoke the fellow-servant rule, as a defense. It is manifestly, however, the duty of the master or the mate to see to the proper stowage of the cargo, and that the boat was kept properly trimmed. Failure of the master or mate to properly discharge this duty would bind the owners of the boat, whose vice principals as to the performance of this duty they were. The record fairly shows that the master, H. M. Carter, one of the appellants, had actual knowledge of the method adopted for piling the sacks that fell, and either directed it or acquiesced therein. Under such a state of the record, the District Judge properly held that the fellow-servant rule afforded appellants no protection as against the appellee's claim.

In the case of *Anderson v. The Ashebrooke* (C. C.) 44 Fed. 124,

Circuit Judge Pardee, speaking of the application of the fellow-servant rule, said (page 127):

"Reliance is placed upon the case of *The Dago* (C. C.) 31 Fed. 574, and the authorities there cited. Conceding the law to be as stated, the defense is not good in this case, because the improper location of the ladder and steam-hoisting apparatus was so patent that the court is bound to hold that the owners had notice of it; and the * * * defective machinery, arising from wear and tear was brought home to the agents of the owners by actual notice."

And again in the same case the same judge said (44 Fed. page 128):

"The trouble with this position is that, under the evidence in the case, the promoting cause of the injury, so far as the ship was concerned, was its defective appliances and tackle. It does not relieve the ship from fault, because fellow servants of the libellant contributed with him to the injury."

[2] The last inquiry relates to the conduct of the appellee as to contributing fault. It is contended that his fault consisting in his attempt to climb up on the tier of sacks to get his jumper, which he had previously placed there, and that the sacks, though piled eight high, would not have fallen but for his interposition in that way. There is an equally hopeless conflict between the witnesses upon this question. On the one hand, the appellee and his witnesses deny that he climbed upon or touched the sacks, while the appellants' witnesses assert that he did. We do not feel it necessary to resolve this conflict, because, conceding the appellee to have been in some degree in fault himself, this would only serve to cause a division of damages, and not to deprive him of the right to recover at all.

In the case of *Anderson v. The Ashebrooke* (C. C.) supra, the court said (44 Fed. page 127):

"In admiralty, contributory negligence does not necessarily prevent the recovery of damages by a party injured in case of maritime tort occasioned by concurring negligence. In such cases the admiralty rule is to divide the damages. This court fully considered this question in the case of *The Explorer* (D. C.) 20 Fed. 135, where it is held that 'in cases of marine torts it is the rule of the courts of admiralty to exercise a conscientious discretion, and give or withhold damages upon enlarged principles of justice and equity.' And in the well-considered case of *The Max Morris* (C. C.) 28 Fed. 881, following *The Explorer*, it was held that: 'In suits in admiralty for personal injuries, contributory negligence on the part of the libellant is not a bar to his recovery, and that the admiralty rule apportioning damages, where both parties are in fault, extends to all causes of maritime tort occasioned by concurring negligence.'"

In the case of *The Max Morris*, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. Ed. 586, the Supreme Court, after citing cases supporting the rule of division of damages, and among them the cases of *The Explorer* (D. C.) 20 Fed. 135, and *The Wanderer* (C. C.) 20 Fed. 140, decided by Circuit Judge Pardee, said:

"All these were cases in admiralty, and were not cases of collision between two vessels. They show an amelioration of the common-law rule, and an extension of the admiralty rule in a direction which we think is *manifestly just and proper*. Contributory negligence, in a case like the present, should not wholly bar recovery. There would have been no injury to the libellant but for the fault of the vessel; and while, on the one hand, the court ought not to give him full compensation for his injury, where he himself was partly in fault, it ought not, on the other hand, to be restrained from saying that the fact of his negligence should not deprive him of all recovery of damages. As stated by the District Judge in his opinion in the present case, the more equal

distribution of justice, the dictates of humanity, the safety of life and limb, and the public good will be best promoted by holding vessels liable to bear some part of the actual pecuniary loss sustained by the libellant, in a case like the present, where their fault is clear, provided the libellant's fault, though evident, is neither willful nor gross, nor inexcusable, and where the other circumstances present a strong case for his relief. We think this rule is applicable to all like cases of marine tort founded upon negligence and prosecuted in admiralty, as in harmony with the rule for the division of damages in cases of collision. The mere fact of the negligence of the libellant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery."

The District Judge allowed the appellee \$1,000. As he also found that he was guilty of no contributory negligence, that sum must have been assessed by him as full compensation for appellee's injuries. The appellee complains by his cross-appeal of the insufficiency of the District Judge's award. Even though there was some concurring negligence shown upon the part of the appellee, we think, in view of the serious character of the injuries received by him and their probable effect on his present and future earning capacity, that the appellants have no cause of complaint, since the sum awarded would not be excessive, though the amount had been fixed upon the theory of divided damages. On the other hand, in view of the conflicting evidence as to appellee's concurring negligence, we do not feel disposed to increase the award at the appellee's instance.

The judgment of the District Court is affirmed upon both the direct and cross-appeal, and the appellants taxed with the costs of the appeal.

SUDERMAN & DOLSON v. FREDERICK LEYLAND & CO., Limited.

(Circuit Court of Appeals, Fifth Circuit. February 17, 1914. Rehearing Denied March 31, 1914.)

No. 2572.

TOWAGE (§ 18*)—COLLISION BETWEEN TUG AND STEAMSHIP—FAULT.

A decree affirmed which found a steamship without fault for a collision with a tug, which was attempting to take a towline from the steamship.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 40; Dec. Dig. § 18.*]

Collision with or between towing vessels and vessels in tow, see note to The John Englis, 100 C. C. A. 581.]

Appeal from the United States District Court for the Southern District of Texas; Waller T. Burns, Judge.

Suit in admiralty for collision by Suderman & Dolson, owners of the tug Ima Hogg, against Frederick Leyland & Co., Limited, owner of the steamship Alexandrian. Decree for respondent, and libellants appeal. Affirmed.

John C. Walker and James B. Stubbs, both of Galveston, Tex., for appellant.

Mart H. Royston, of Galveston, Tex., for appellee.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. This is a libel for damages caused by a collision between the steam tug Ima Hogg and the steamship Alexandrian, the tug at the time being engaged in an effort to take a towline from the steamship. On the evidence, practically admitted without objection, the District Court found that the steamship Alexandrian was without fault in the premises, and dismissed the libel.

We have read and considered the evidence in the transcript, and we conclude that the decree of the District Court finding the Alexandrian without fault in the premises is fully sustained thereby. See *The Alaska* (C. C.) 33 Fed. 107; *The Minnehaha*, 124 Fed. 210, 59 C. C. A. 674.

The judgment of the District Court is affirmed.

In re WRIGHT-DANA HARDWARE CO.

(Circuit Court of Appeals, Second Circuit. February 17, 1914.)

No. 166.

1. BANKRUPTCY (§ 326*)—PREFERENCES—SET-OFF BY BANK.

Under Bankr. Act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]) § 68, providing that, in cases of mutual debts or credits between the estate of a bankrupt and a creditor, one debt shall set off against the other and the balance allowed or paid, section 60, subd. "a," as amended by Act Feb. 5, 1903, c. 487, § 13 (U. S. Comp. St. Supp. 1911, p. 1506), relative to preferences, and subdivision "b," as amended by Act June 25, 1910, c. 412, § 11 (U. S. Comp. St. Supp. 1911, p. 1506), which provides that a transfer, within four months before the filing of the petition, is voidable if the bankrupt be insolvent, the transfer operate as a preference, and the person receiving it had reasonable cause to believe that its enforcement would effect a preference, a bank within four months before the filing of the petition may apply a deposit by the bankrupt on a debt due it, though it knows of the bankrupt's insolvency, where it has no reasonable cause to believe that a preference will be effected.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. § 326.*]

2. BANKRUPTCY (§ 326*)—PREFERENCES—SET-OFF BY BANK.

The right of a bank to apply a deposit on a debt due it within four months before the filing of a petition in bankruptcy cannot be denied upon a mere suspicion or bare inference that it had reasonable cause to believe that a preference would be effected.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. § 326.*]

3. BANKRUPTCY (§ 311*)—PREFERENCES—AVOIDANCE—FILING NEW CLAIM.

Where the court in a bankruptcy proceeding found that the application of a deposit by the bankrupt on a debt due a bank constituted a preference, its decree properly authorized the bank, upon payment of the deposit, to file a new or amended claim for the sums found to be preferences.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 497-500; Dec. Dig. § 311.*]

4. BANKRUPTCY (§ 311*)—PREFERENCES—AVOIDANCE—OFFSETTING DIVIDEND.

In a bankruptcy proceeding where a creditor has received a preference less than the amount of its claim, the court, instead of requiring the repayment thereof, may properly permit proof of the creditor's claim, and provide by its final decree for the deduction of the amount of the preference, with interest from the dividend due such creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 497-500; Dec. Dig. § 311.*]

Appeal from the District Court of the United States for the Northern District of New York.

In the matter of the Wright-Dana Hardware Company, bankrupt. From an order (207 Fed. 636), respecting the claims of the Utica City National Bank and another, such claimants and John A. Cantwell, trustee, bring cross-appeals. Reversed and remanded.

See, also, 205 Fed. 335.

The Utica City National Bank, George S. Dana, and Robert L. Kinne, on January 17, 1912, filed a petition for adjudication of bankruptcy against the Wright-Dana Hardware Company. The said company was duly adjudicated a bankrupt on February 5, 1912. The Wright-Dana Company for a number of years prior to this adjudication of bankruptcy had kept an account and received accommodation by way of loans at the Utica City National Bank. Four months before the petition in bankruptcy was filed, or about the middle of September, 1911, the bank owned and held promissory notes, made and given by the company, of the face value of more than \$14,000, and was likewise the owner and holder of several promissory notes on which the company was liable as indorser. Payments were made to the bank by the Wright-Dana Company on account of the principal and interest of these notes at the following times and in the following amounts:

1911		
Dec. 18	Interest	\$ 30 11
" 20	Principal	723 55
" 26	Principal	376 45
" 26	Interest	76
Oct. 7	Principal and interest.....	100 42
1912		
Jan. 4	Interest	48 77
" 8	Principal	200 00
" 8	Interest	1 27
Total		\$1,481 33

On January 10, 1912, the balance on the books of the bank to the credit of Wright-Dana Company was \$52.69. Thereafter the following deposits were made by the company:

Jan. 11	.....	\$109 55
" 13	.....	300 73
" 15	.....	166 07
" 16	.....	100 00
" 18	.....	271 42
" 19	.....	123 14
" 22	.....	174 81
" 24	.....	78 94
" 27	.....	220 29
" "	.....	95 75
" 30	.....	121 36
Feb. 2	.....	132 33

Only one check was drawn by the company after January 10th against its balance on deposit in the bank, and that was one in the sum of \$14.35. On January 16, 1912, the bank applied \$639.04 of the deposit then standing to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r indexes

the credit of the company to the partial payment and satisfaction of a note owned by the bank and made by the company, and on January 26, 1912, the bank applied and credited \$75 of the deposit standing to the company's credit to the payment of another note owned by the bank, and upon which the company was liable. There was a balance in the bank to the credit of the company, at the time it was adjudicated a bankrupt on February 5, 1912, of the sum of \$2,032.73, disregarding the deductions of \$629.04 and \$75.00.

The court below allowed the set-offs made by the bank prior to January, 1912, and disallowed those made during January and subsequent thereto. The order of the court provided that the claims of the bank and of Robert L. Kinne against the company should not be allowed unless the bank should, within 10 days from the date of the order, pay over to the trustee in bankruptcy the sums appropriated by the bank after it had reasonable cause to believe its appropriation would effect a preference in its favor, viz., in and after January, 1912, together with the balance of the account applied and retained at the time the petition was filed, the whole aggregating \$2,282.77. The order goes on to provide as follows:

"Further ordered and decreed, that if said Utica National Bank shall pay over said sum of \$2,282.77 unto said John A. Cantwell, as trustee, within the said time, then and in that event within five days after said payment the said Utica City National Bank shall be entitled to file a new claim or an amended claim against the estate of the said bankrupt for the following amounts, received and credited by the said bank at the following times to said bankrupt, and herein decreed to be preferences: \$48.77 January 4, 1912; \$200 January 8, 1912; \$1.27 January 8, 1912; \$629.04 January 16, 1912—and the claim filed by said bank on the 27th day of February, 1912, shall be allowed at the sum of \$7,047.25, without any offset therefrom, and the claim filed by the said Robert L. Kinne on the 27th day of February, 1912, shall be allowed at the sum of \$5,356, and the claim filed by the said bank on the 30th day of July, 1912, shall be allowed at the sum of \$222.49."

Cross-appeals from a final decree of the United States District Court for the Northern District of New York.

Lynch & Willis, of Utica, N. Y. (Charles I. Taylor, of New York City, of counsel), for appellants and cross-appellees.

Martin & Jones, of Utica, N. Y. (Richard R. Martin, of Utica, N. Y., of counsel), for Cantwell as trustee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The question involved in this case is as to the effect of the bankruptcy of a depositor in a bank upon the bank's right to set off sums due from it to the bankrupt against sums due from the bankrupt to it.

The bankruptcy act in section 68 contains the following provisions on the subject of set-offs and counterclaims:

"a. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

"b. A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy."

In section 60 the act contains the provision relating to preferences. It provides in part as follows:

"a. A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after

the filing of the petition and before the adjudication, * * * made a transfer of any of his property, and the effect of the * * * transfer will be to enable only one of his creditors to obtain a greater percentage of his debt than any other such creditors of the same class."

And in subdivision "b" of the same section it is provided:

"If a bankrupt shall have * * * made a transfer of any of his property, * * * being within four months before the filing of the petition in bankruptcy, or after the filing thereof and before the adjudication, the bankrupt be insolvent and the * * * transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

And in section 57, subdivision "g," as amended by Act Feb. 5, 1903, c. 487, § 12, 32 Stat. 799 (U. S. Comp. St. Supp. 1911, p. 1504), it is provided as follows:

"The claims of creditors who have received preferences, voidable under section sixty, subdivision "b," or to whom * * * transfers * * * void or voidable under section sixty-seven, subdivision "e," have been made or given, shall not be allowed unless such creditors shall surrender such preferences. * * *"

In considering the facts in the present case it is necessary to keep in mind the foregoing provisions of the bankruptcy act. It is also necessary to remember that the petition in bankruptcy was filed on January 17, 1912, and that the adjudication followed on February 5, 1912.

The evidence shows that between October 7 and December 26, 1911, the bank charged off various sums for principal and interest, aggregating the sum of \$1,231.29. During the whole of that period the relation of debtor and creditor existed between the bank and the company, and at the various times when the bank charged off the several set-offs, the company was indebted to the bank on promissory notes. The several transactions were done in the due, regular, and usual course of business, and at a time when the company's business was being conducted in the usual manner; there being no evidence to show that the company contemplated bankruptcy prior to January 1, 1912.

The claim of the trustee is that the items aggregating \$1,231.29, which the bank charged off prior to January 1, 1912, were preferential payments or transfers to the Utica City National Bank, not because that sum of money had been deposited in the bank by the Wright-Dana Company, but because they were payments or transfers made within four months of the filing of the petition in bankruptcy, at times when the Wright-Dana Company was insolvent and when the Utica City National Bank had reasonable cause to believe that the enforcement of the transfer would effect a preference in its favor.

The right of a bank to a set-off as against a bankrupt depositor was passed upon by the Supreme Court of the United States in *New York County National Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, a case which went up from this circuit, and which was decided in 1903. The bank in that case, as in this, had exercised a right of set-off, and it was claimed that the transaction amounted

to giving a preference to the bank by enabling it to receive a greater percentage of its debts than other creditors of the same class. But the Supreme Court upheld the bank's right to the set-off. The court in reaching its conclusion said that a deposit of money to one's credit in a bank did not operate to diminish the depositor's estate, for when he parted with the money he created at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor might see fit to draw a check against it. It did not amount to a transfer of property as a payment, pledge, mortgage, gift, or security. It continued:

"It is true that it creates a debt, which, if the creditor may set it off under section 68, amounts to permitting a creditor of that class to obtain more from the bankrupt's estate than creditors who are not in the same situation, and do not hold any debts of the bankrupt subject to set-off. But this does not, in our opinion, operate to enlarge the scope of the statute defining preferences so as to prevent set-off in cases coming within the terms of section 68a. If this argument were to prevail, it would, in cases of insolvency, defeat the right of set-off recognized and enforced in the law, as every creditor of the bankrupt holding a claim against the estate subject to reduction to the full amount of the debt due the bankrupt receives a preference in the fact that to the extent of the set-off he is paid in full."

The question came before the Supreme Court again in *Studley v. Boylston National Bank*, 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313, decided in 1913, where it was held that nothing in the bankruptcy act deprives a bank with which the insolvent is doing business of the rights of any other creditor taking money without reasonable cause to believe that a preference will result; and, it being found that the deposits and payments of notes were not made to enable the bank to secure a preference by the right of set-off, the bank had a right to set off the deposits against the notes within four months of the bankruptcy.

[1] But conceding the law to be as above stated, it is insisted that the facts of the case at bar are such as to deprive the Utica City National Bank of the right of set-off which, under other circumstances, it might exercise. Our attention is called to the fact that the referee found that the Wright-Dana Company was insolvent on September 15, 1911 (four months before bankruptcy), and continued to be insolvent to the date of its adjudication in bankruptcy on February 5, 1912, and that during the whole of that time the fact of its insolvency was known to the bank. All this may be true and yet not deprive the bank of its right to set-off. A bank may do business in the usual manner with one it knows to be insolvent. The mere fact of insolvency, or mere knowledge of the insolvency of the depositor, is not alone sufficient to take away the bank's right of set-off. As said in *Studley v. Boylston National Bank*, *supra*:

"There is nothing in the statute which deprives a bank, with whom an insolvent is doing business, of the rights of any other creditor taking money without reasonable cause to believe that a preference will result from the payment. The bankruptcy act contemplates that by remaining in business and at work an insolvent may become able to pay off his debts. It does not prevent him from continuing to trade, depositing money in bank, drawing checks, and paying debts as they mature, either to his own bank or any other creditor. It does provide, however, that if bankruptcy ensues, all payments

thus made, within the four-months period, may be recovered by the trustee. If the creditor had reasonable cause to believe that a preference would be thereby effected."

[2] It seems, however, that the referee found that the bank had cause to believe that the payments now under consideration would effect a preference in its favor. It is undoubtedly the case that if the bank had reasonable cause to believe that these set-offs would effect a preference in its favor, they would be voidable by the trustee under section 60, subdivision "b," of the bankruptcy act. The difficulty is that the court below took a different view of the evidence from that taken by the referee, and that the view this court takes of it accords with that taken by the court below, and not with that taken by the referee. Counsel for the trustee asks us to believe that the court below overlooked this finding of fact by the referee, inasmuch as the finding was not formally vacated or changed by the District Court. We do not agree with him. The court below in express terms set up that finding, and in effect modified it by allowing the bank to set off the items prior to January 1, 1912, but not any made after that time. And the court declared in its opinion that there was no evidence, unless by inference, that bankruptcy was contemplated, or that any preference was intended by the company, prior to January 1, 1912. We think that as to the set-offs thus allowed, the court below was right in sustaining them, as it was not made to satisfactorily appear that the bank had reasonable cause to believe, at the time they were made, that a preference would be thereby effected. The right of the bank to make the set-offs made prior to January 1, 1912, cannot be denied upon a mere suspicion or a bare inference. If courts were to proceed so to administer the law, banks could not safely do business with insolvents. The intention of the act that insolvency should not deprive one of his right to remain in business would be destroyed in large part, and bankruptcy in many cases would be precipitated, if the courts should, upon slight inferences, deny the right of set-off.

As to the set-offs made by the bank after January 1st, and after the bank had reasonable grounds for believing that the set-offs thereafter made might effect a preference, they were properly disallowed by the court below. Indeed the bank did not insist upon this appeal that any error had been made by the court below as respects the set-offs made after January 1, 1912. The transfers made after that date must be regarded as preferences. The total amount of preferences the bank had improperly received amounted to \$2,282.77.

[3] The court below in its order decreed that if the bank should pay over to the trustee this sum of \$2,282.77 within the time allowed, then it should be entitled, within five days after such payment, to file a new claim or an amended claim against the estate of the bankrupt for certain sums which had been found by the court to be preferences. This provision of the decree the trustee claims is error, and asks us to direct that it be stricken out of the decree. This we cannot do. In *Page v. Rogers*, 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332 (1909) the Supreme Court said:

"Now that this litigation has come to an end, and the defendant has been compelled to surrender the preference which he received, he is entitled to

prove his claim and to receive a dividend on it upon an equality with other creditors. *Keppel v. Tiffin Savings Bank*, 197 U. S. 356 [25 Sup. Ct. 443, 49 L. Ed. 790]."

[4] It seems to us, however, that the decree may be modified, although upon a point not mentioned in argument. Instead of requiring the defendant to pay into the bankruptcy court the full amount of the preference it has received, and then resort to the same court to obtain it back by way of dividend, it would seem the better plan, and a less circuitous proceeding, to permit the defendant to prove its claim against the estate of the bankrupt and the bankrupt court to settle the amount of the dividend coming to it. And then the final decree should direct the trustee to pay over the amount of its dividend to the bank, less the amount of the preferences which the bank has received, together with the interest on such preferences. This would be in accord with what the Supreme Court directed in the analogous case of *Page v. Rogers*, *supra*. In that case the creditor had received in preferences a sum in excess of the amount of his claim, and the Supreme Court thought he should not be required to pay over the full amount of the preference, but that the bankrupt court should settle the amount of the dividend coming to him and the final decree direct him to pay over the full amount of his preferences, with interest, less the amount of his dividend. In the case at bar the amount of the preferences which the bank has received is less than the amount of its claim. But we do not see that this difference makes the principle applied in the former case any less applicable to this.

In all other respects than that just mentioned we affirm the decree, and we reverse the case and remand it to the District Court for no other purpose than to enable that court to modify its decree in the particular above mentioned.

Decree reversed.

LINS COTT SUPPLY CO. V. HOPEWELL.

(Circuit Court of Appeals, First Circuit. February 13, 1914.)

No. 1033.

PATENTS (§ 328*)—INVENTION—ANNULAR TIRE CASE.

The Hopewell patent, No. 854,215, and the Kinder patent, No. 881,411, each for a cover or case for spare tires carried on automobiles, to protect them from water and dirt, consisting of an enveloping strip or ring of any suitable material of a width sufficient to inclose the tire and overlap its tread face and one of its sides, and having at its edge a pocket through which a gathering cord is run to hold the cover in place, both held void for lack of patentable invention.

Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Suit in equity by Charles F. Hopewell against the Linscott Supply Company. Decree for complainant, and defendant appeals. Reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

William K. Richardson, of Boston, Mass. (Edwin P. Corbett, of Columbus, Ohio, on the brief), for appellant.

W. Orison Underwood, of Boston, Mass. (Clarence C. Colby, of Boston, Mass., on the brief), for appellee.

Before PUTNAM and BINGHAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. The Hopewell and Kinder patents at issue relate to a case, or cover, designed for the protection of spare tires carried on automobiles. The Hopewell patent is numbered 854,215, and the Kinder patent is numbered 881,411.

The case, or cover, is described as one which shall twice overlap the tread-face of the tire and one side thereof. The purpose of the cover in question is to protect the tire against water and dirt, and the claims, speaking generally, cover an annular tire case adapted to overlap.

It is said in the specification of the Hopewell patent:

"It will be noticed that the tire case is ring-shaped, or made as a ring; that is, without an end."

It is urged on one side that the feature of an endless cover involves an essential idea, and one which should be accepted as presenting a substantial element of a patentable invention; while, on the other hand, it is contended that it is not an element of substance; that it was not so considered by Hopewell at the time he applied for a patent; and that if it had been deemed an essential element the idea of an endless strip would have been expressed in some of the claims.

There is considerable weight in the proposition that, if Hopewell had relied upon the endless feature as one of substance, he would have used the word "endless" in his claims, as, for instance, "an annular, endless tire case." But, for the purposes of decision, we may as well assume, in view of the statement in the specification, that the claims as explained cover a tire case without an end.

Hopewell intended that the tire case should be made of any suitable material, preferably waterproof or water-repellant material, to be composed of several pieces so united as to form a strip of proper length to cover the circumference of the tread of the tire, and of a width to inclose the tire and twice overlap its tread-face and one of its sides. It was intended that the edge of the strips so made should have a pocket to contain a cord of any suitable flexible material, which upon a pull, or upon contraction, if the cord used should be longitudinally elastic, would hold the edge of the case in proper position to protect the tire. It is highly probable that the principal thought of Hopewell, and Kinder as well, related to the idea of overlapping and to the contracting cord which should bring the edges of the strip, formed to cover the tread of the outer circle, into a circle smaller than the outer circumference of the tire. The cord used for such a purpose performs the function of holding the overlapping strip in such a position as will exclude or minimize damage from water and other material. It is hardly conceivable that much importance could have been attached to the familiar idea of joining the ends of a strip to be drawn around a fixed and determinate circle as a substantial element of an invention; and, as has

already been said, the principal thought must have had reference to the shaping of the strip and its adaptation to the outer and inner circles through the instrumentalities of a contracting cord.

In the specification the strip is spoken of as having a pocketed edge, and the cord, which is to be of flexible material, as cord or wire cord, as a thing to be located in a pocket, and under strain to pucker or contract the edge of the case into a circle smaller than the outer circle or circumference of the tire.

The employment of a cord for the purpose of contracting or gathering in the edges of fabrics, or leathers, involves no new conception, and the scheme of the patents in question involved only an ingenious adaptation of old devices to the particular use in question.

The idea of the gathering-string, cord, or ribbon of our grandmothers, which was "usually run through a shirr or tuck in a garment or other article, for the purpose of drawing it up into folds or puckers"; or the running-string of those skilled in the modern art of fitting fabrics and leathers, which is "a cord, tape, or braid passed through an open hem at the top of a bag or anything which it is desirable to draw tight at pleasure," with its manifold uses, was the idea and the thing which Hopewell and Kinder both employed as the most important element of the alleged inventions. The idea and the use of the scheme of overlapping at exposed places is as old, if not older, than the gathering-string. From time immemorial overlapping has been used in leather coverings, in clothing, particularly rubber clothing, upon horse coverings, upon ship furniture and fittings, upon army wagon trains and ordnance, in connection with tents and emigrant wagons, and in hundreds of other places where it was necessary to protect material from the ravages of water and the storms.

The point of nonpatentability is strongly urged, and we think the position fatal to both these patents.

Under a very old expression as to what amounts to invention, and, though very general, a tolerably good one, patentable invention is made to depend upon the question whether the thing described is something worthy of protection by the law, and protection by the law is spoken of, of course, in this connection in the sense of a protection which will give monopoly.

In the case of the Russell patent (*American Sulphite Pulp Co. v. Howland Falls Pulp Co.*, 80 Fed. 395, 25 C. C. A. 500), the inventor conceived the idea of a structural lining for a wood pulp digester which should be of one piece, and of a material which should adhere to the shell, and where the material of the lining must be acid-resisting, and the idea of the continuous structure was supplemented by the discovery that the ordinary commercial cement, like Portland cement, would stand against hot sulphite liquor; yet such a combination as that, involving the discovery of a new force in matter, has been criticised, as not answering the rules in respect to what amounts to patentable invention.

Upon the question of invention or noninvention, it is difficult to find adjudicated cases which apply themselves aptly to any new combination, or a new device, because combinations and devices in different fields are generally quite unlike, and never exactly alike in detail.

There are differences. The principles and rules which govern the question of invention are very general, and, as a result of the consequence of differences in detail and of adaptation, each case must usually, as of necessity, stand upon its own merit in respect to the question of patentable invention.

While the patentee in *Andrews v. Thum*, 67 Fed. 911, 15 C. C. A. 67, was dealing with a different situation from the one here, he was at least dealing with an article of manufacture, and the problem was one of protecting material which was to be kept on hand and opened up for future use when needed. There the materials used were old, yet they were rearranged and adapted, under a very useful idea, to a needed commercial purpose, with the result of getting a better and a more merchantable article. Judge Colt says, 67 Fed. at page 913, 15 C. C. A. at page 69:

"Such a rearrangement required no invention, but would suggest itself to anyone skilled in the art. It is not sufficient that the patentee may have produced a better and more merchantable article, but there must have been something novel in the means which were employed in its production."

As was said in *Knapp v. Morss*, 150 U. S. 221, 228, 14 Sup. Ct. 81, 84 (37 L. Ed. 1059), a case which Judge Colt uses in his discussion of the *Thum* Case:

"All that Hall did was to adapt the application of old devices to a new use, and this involved hardly more than mechanical skill."

And again, in the same case, the Supreme Court, taking the expression from an earlier case, says:

"All that he did was to adapt them (means in earlier use) to the special purpose to which he contemplated their application, by making modifications which did not require invention, but only the exercise of ordinary mechanical skill; and his right to a patent must rest upon the novelty of the means he contrived to carry his idea into practical application."

Tested by these rules, we are unable to find patentable invention in either the *Hopewell* or the *Kinder* patent.

Though not used in exactly the same way, both the idea of a contracting cord and of overlapping had been employed in earlier patents in the art to which the patents in question relate. The result of the adaptations or rearrangements of both *Hopewell* and *Kinder* could, we think, have been accomplished by any one skilled in the art of fitting fabrics or leathers, if given the problem of covering the tread of a tire twice and its side once, and of making the cover fit the outer and inner circles. The problem, of course, involves ingenious cutting and shaping of the strip, for the purpose of having its shape conform in a general way to the outer and inner circles as it is drawn over and around the tire, and the scheme of a closer fit is ingeniously reinforced through the functional use of the gathering-string or contracting cord.

Holding this view of nonpatentability as to both patents, there is no occasion to consider the questions in respect to infringement.

The decree of the District Court is reversed, and the case is remanded to that court, with directions to dismiss the bill; and the appellant recovers costs in both courts.

DART et al. v. SAYLOR ELECTRIC CO.†

(Circuit Court of Appeals, Third Circuit. April 6, 1914.)

No. 1834.

PATENTS (§ 328*)—VALIDITY—CONDUIT FOR ELECTRIC WIRES—INFRINGEMENT.

The Speer patent, No. 693,916, for a conduit for electric wires, claims 2 and 6, *held* to involve inventive originality, not anticipated, and infringed by a conduit constructed by defendant under the Saylor patent, No. 1,049,771.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by Russel Dart and others against the Saylor Electric Company. Judgment for defendant (210 Fed. 462), and complainants appeal. Reversed and remanded.

Charles F. Perkins, of Boston, Mass., for appellants.

C. M. Clarke, of Pittsburgh, Pa., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. In this case Dart and others, plaintiffs and owners of patent No. 693,916, granted February 25, 1902, to Edward D. and Horace N. Speer, for a conduit for electric wires, charged the Saylor Electric Company with infringement thereof. On final hearing, the court below, in an opinion reported in 210 Fed. 462, held infringement had not been shown and dismissed the bill. Thereupon the plaintiffs took this appeal.

The patent concerns flexible conduits for electric wires. As the specification of this patent states:

"In order to be practicable, safe and durable, the duct must be so constructed that it shall be waterproof to prevent deterioration from moisture, that it shall be fireproof to prevent ignition by a possible electric spark, and that it shall be flexible, so that it can be readily carried around the corners and bends which are frequently found in buildings without breaking or buckling."

The first patented development of a flexible conduit appeared in patent No. 456,271, of July 21, 1891, to Herrick. This conduit was commercially developed and extensively used, and was commercially known as Circular Loom. Its essential features were, first, an inner resilient helix; second, wrappings to cover the helix and close the spaces between its convolutions; and third, a woven outer jacket. By suitable treatment it was made waterproof and fireproof, or at least not readily inflammable. It will be seen that when a tube is bent to turn a corner, it tends to flatten or collapse. Herrick prevented such collapse and secured a circular instead of an angular turn by his interior spiral member, the patent stating:

"By forming the lining as a spiral, the requisite flexibility is secured, and this flexibility is increased by slightly separating the turns of the spiral."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

†Rehearing denied May 20, 1914.

It was found, however, that this circular loom device was subject to objections, among which we note the electric wires when forced through the tube were liable to catch the edges of the helix and were thus stopped. Moreover, unprincipled contractors, owing to the helix being loose, were able to tear it out and thus evade specifications calling for conduits of large diameter. In 1904, it was dropped by the National Board of Underwriters as an approved device. This latter difficulty was obviated by patent No. 652,806, granted July 3, 1900, to Harry G. Osburn, for a flexible electrical conduit. In this construction longitudinal threads were interwoven into the helix which prevented its being either stretched or removed. But while this was so, the rolls of thread, while preventing removal of the helix, acted as an obstruction to the introduction of electric wires. Such was the nature of flexible conduit development when the Speers devised the simple but effective device of the patent in suit. They first provided a flexible inner tube, which would alone come in contact with the electric wires that were being forced through such tube, and made it so smooth that it would not hinder the passage of the wire. The tube was, as stated in the patent—

“formed in any suitable manner—as for example, on a mandrel—and of any suitable material, as paper or muslin, or other like material, the meeting edges * * * making a lapped joint and being cemented together.”

It had a longitudinal seam and was suitably treated so as to become both fire and water proof.

“While the waterproof coat is still soft and sticky, a cord 6 of any suitable material, as cotton, hemp or other cord, is wound tightly spirally from end to end of the tube 1, the said cord 6 having been first thoroughly saturated with fireproofing solution and dried. The waterproof coat 4 being still sticky and soft, the cord 6 embeds into it and is held firmly upon the tube 1 when the said coat 4 dries. The windings of the cord utilize the principle of the arch to keep the duct open and firm against collapsing when carried around bends.”

A cover was then braided from fireproof yarn over the wound cord. After which a coat of waterproof paint was applied to the duct. Upon this device the claims here in question were granted, viz.:

“3. A duct for electric wires having an inner tube composed of a fireproof flexible longitudinally-arranged sheet of material, a waterproof coating thereon, a spirally-wound fireproof cord outside of said tube, a fireproof cover outside of said cord, and a waterproof coating on said cover, substantially as described.”

“6. In a duct for electric wires, the combination of an inner flexible longitudinally arranged fireproof sheet forming a tube, a layer of cord around outside said tube, and a cover on the cord, substantially as described.”

In all these constructions the function of the spiral winding or helix to prevent conduit collapse was known and utilized. But the novelty of the Speer device consisted in enclosing an inner longitudinally formed tube in an enveloping supporting helix. The result of this was that the inner tube was made to flex in a curve instead of bending at an angle. Moreover, and herein was the novelty, while the helix imparted flexibility and non-collapsibility to the tube, it did not detract from its smooth surface whereon the electric wire could pass. The result was a tube which was smooth, flexible, non-collapsible and from which

the helix could not be detached. The proofs show the Speer device was of merit. As illustrating its advantages, it suffices to refer for example to a single witness who says:

"It is of great practical advantage. It lends strength to the conduit to prevent longitudinal extension and diametrical contraction; it presents a smooth interior through which wires can be easily fished, and it presents an inner tube which cannot be pulled out of the conduit. * * * The longitudinally arranged inner tube of flexible material such as set forth in the specification also prevents any waterproofing or fireproofing material or insulating material, while in its plastic state, from entering the interior of the conduit, to render the same sticky and rough, and whereby the interior of the conduit would be rendered impracticable for the purpose of fishing a wire therethrough."

That it went into rapid, wide and growing use is shown by the sales, which were unusually large. The validity of the patent has been conceded by strong competitors taking license thereunder. The novel combination of a supporting helix inclosing a longitudinally formed tube was found in no prior structure. We are of opinion such combination involved invention. A collapsible inner tube made non-collapsible by an inclosing spiral without losing flexibility, was a device involving marked originality. It will thus be seen that the inventive feature of the device was not in the particular character of the tube, for there was no novelty in a longitudinally formed tube. Nor did it lie in the particular character of a supporting helix, which was itself old. These elements and their functional characteristics were not new, but what this patent did first disclose was placing the two in a new relation to each other, namely, the supporting helix around the longitudinal tube. This relation and the result produced were both new. What was accomplished by this simple and effective device was a step that was for some years vainly sought for by those skilled in the art. The patent is therefore one of substantial merit and the patentees should be protected to the full extent of the disclosure they made. So regarding the patent, we think the defendant infringes.

Its conduit is made substantially under patent No. 1,049,771, granted January 7, 1913, to F. D. Saylor for a conduit for electrical conductors. The specification thereof shows an inner tube of fireproof canvas, with longitudinally abutting edges, thus providing a smooth interior. This tube is then subjected to a bath of caladium, pitch and asphaltum, and while the coating is soft the tube is annularly wound with spirally arranged strips of fabric or duck or of any suitable fibrous materials, in this case a helically wound strip of compressed paper fiber. This paper sleeve is stiffened by the asphaltum with which it is treated and becomes from its spiral winding resilient, so that for functional purposes it is the equivalent of Speer's enveloping helix, and falls within the broad definition which the patentee gave to the word cord in the specification and claims, namely:

"Any filamentary body which is capable of being wound around * * * the inner tube."

Formed around its longitudinal canvas tube, the two unite to form a conduit which embodies every feature of the Speer device. Had it existed in the prior art it would have completely anticipated every

disclosure of the Speers. Post-dating that patent, it as clearly infringes as it would have anticipated it had it ante-dated that patent.

The decree below must therefore be reversed and the case remanded with directions to enter a decree holding infringement of claims 3 and 6, and ordering an accounting.

SIEMUND v. ENDERLIN et al.

(Circuit Court of Appeals, Second Circuit. February 10, 1914.)

No. 191.

1. PATENTS (§ 328*)—VALIDITY—PROCESS—IMPOSSIBILITY OF PERFORMANCE—WELDING APPARATUS.

The Siemund patent, No. 967,579, claims 1, 2, and 5, for an electric welding process, specifying that the temperature of the portions of metal to be welded shall be raised, so that it shall be the same as the material employed for filling the weld, *held* void, as impossible of performance, since, if the metal on which the molten electrode is to be deposited were equally fluid, a hole would be cut through, instead of a weld.

2. PATENTS (§ 157*)—SCOPE—RECONSTRUCTION.

A patent cannot be reconstructed to meet new conditions and new facts subsequently discovered; but the patentee must abide by what he has said in his specifications and claims, and if his process so described and claimed will not work, he cannot collect tribute from a subsequent process that will work.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 229-232; Dec. Dig. § 157.*]

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in equity by Heinrich L. J. Siemund against Joseph Enderlin, Sr., and another, doing business as Joseph Enderlin, Jr., & Co. Decree for defendants (206 Fed. 283), and complainant appeals. Affirmed.

On appeal from a decree of the District Court of the United States for the Eastern District of New York, dismissing the bill, which is based upon claim 2 of letters patent No. 967,578 and claims 1, 2 and 5 of letters patent 967,579 granted to Heinrich L. Siemund August 16, 1910, for improvements in electric welding and repairing. The court found claim No. 2 of 967,578 invalid for lack of patentable invention and that claims 1, 2 and 5 of 967,579 were invalid "from the standpoint of the defendant's prior use."

Regarding claim 2 of No. 967,578, the appellant states in his brief that he is convinced that appellees have not used the specific arrangement defined therein and therefore he has abandoned the charge of infringement. That patent is therefore not involved in this appeal. The errors assigned as to No. 967,579 are that the court was wrong, first, in holding claims 1, 2 and 5 invalid for lack of patentable invention; second, in holding that they were invalid because of defendant's alleged prior use; and, third, in holding that they were anticipated by the patent to Kjellberg, No. 948,764.

In the view we take of the patent in suit it will not be necessary to consider the second and the third assignments of error, although we may say incidentally that we do not regard the Kjellberg patent as part of the prior art. *Vacuum Co. v. Dunn*, 209 Fed. 219, 126 C. C. A. 313, decided November 11, 1913.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

William H. Davis and John C. Pennie, both of New York City, for appellants.

Robert W. Hardie, of New York City, for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). [1] We understand that the only question involved in this appeal is the validity of claims 1, 2 and 5 of the Siemund patent No. 967,579. Infringement is not denied if the claims be held valid and are given the broad construction contended for by the complainant.

Siemund's contribution to the art was simply carrying forward and amplifying the process of the Russians De Bernardos and Olszewski, who in 1887 received a patent for a process for joining or separating metals by the electric current directly applied, which consists in forming the voltaic arc at the desired point along the desired line on said metal by a conductor approached thereto, which constitutes one pole, while the metal constitutes the other pole. This was a distinct advance as it substituted the voltaic arc for the gas flame of a blow pipe in metal working. De Bernardos used the carbon pencil of the electric light to produce his arc, but the form and material of the conductor are stated by him not to be essential features. The De Bernardos invention went into general use for welding, repairing and cutting. Siemund's patent is for improvements over the prior art, chiefly because his process enables the workman to carry his tool into inaccessible places, like the interior of the boiler of a ship, and mend the broken parts there without overheating them and producing cracks or fissures, even if the fractures are at distant parts. It is insisted that Siemund has added two novel features to the art embodied in two principal conceptions.

First, that if the two parts are to be united into one harmonious whole the surface of the old metal must be brought into a condition of incipient melting and, secondly, that the new metal is so brought to a state of incipient melting that the end of the wire will progressively detach itself and adhere to the surface of the work with which it is to coalesce. In this way there is no running away of the metal from the weld and the structural change of the metal which results in heating to a fluid condition is avoided. So far as it is possible for laymen to understand so difficult a problem, it seems to be that Siemund's alleged improvement consists in depositing the molten metal from the end of the pencil progressively upon the surface of the work, and building up the repair part at the joint.

De Bernardos used his voltaic arc to melt the two parts to be welded and let them flow together to form a joint. Siemund, on the contrary, used the metal of the pencil which is detached and deposited upon the work to form the joint.

Coffin's patent was also an improvement on De Bernardos and is described by Expert Arendt as a process intended "to produce a fusion and commingling of the abutting ends of the objects to be welded, and to combine with this fused material such metal as may drop off of the welding pencil."

Coffin describes a process of welding two articles together by subjecting them to the action of a voltaic arc of which one pole is a metal conductor, fusing the conductor, depositing the molten metal on the joint of the two articles and reinforcing said joint by such molten metal. It is asserted by the defendants' expert Kenyon that the Siemund patent describes and claims an impossible operation, for the reason that it requires that the new metal of the electrode and the old metal of the welding surface shall be brought to the same degree of temperature and to the same molten condition at their points of contact.

The specification says:

"Thus, in the practice of my invention I take precautions to raise the temperature of the portions to be welded to the same temperature as the material employed for filling in the weld (i. e., to the welding temperature) and to substantially restrict this high welding heat to the immediate location of the weld, instead of raising the neighboring portions of the work to that temperature."

The same statement, substantially, is asserted over and over again in the specification. Referring to this condition, Mr. Kenyon says:

"Regarding the temperature of the metal being welded and the metal used for filling, it is evident that the metal leaving the electrode is molten enough to flow, and that if the metal upon which this electrode metal is to be deposited were equally fluid, a hole would be cut through instead of a weld."

[2] Of course the patent cannot be reconstructed to meet new conditions and new facts subsequently discovered. The patentee must abide by what he has said in his specification and claims. If the machine or process so described and claimed will not work he cannot collect tribute from a subsequent machine or process that will work.

We are convinced that the contention of the defendant is correct in this respect and that an electric weld cannot be made "if the temperature of the metallic electrode and that of the work is the same."

It seems to us that enough has been said to show that what Siemund did does not rise to the dignity of invention. The prior art shows all that he shows except perhaps the adaptation of the process, assuming it to be workable, to overhead welding. This required some ingenuity, but not an exercise of the inventive faculties.

The decree is affirmed with costs.

COCA-COLA CO. v. HORSTMAN et al.

(Circuit Court of Appeals, Fifth Circuit. February 17, 1914.)

No. 2478.

TRADE-MARKS AND TRADE-NAMES (§ 93*)—SUIT FOR INFRINGEMENT—SUFFICIENCY OF EVIDENCE.

A decree dismissing a bill for infringement of trade-mark affirmed.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104-106; Dec. Dig. § 93.*]

Pardee, Circuit Judge, dissenting on the merits, but holding that on the record the court was without jurisdiction.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Western District of Texas; Thomas S. Maxey, Judge.

Suit in equity by the Coca-Cola Company against Frederick Horstman and Angelo Bassetti, doing business under the firm name of the Austin Bottling Works. Decree for defendants, and complainant appeals. Affirmed.

M. M. Crane, of Dallas, Tex., and H. O. Head, of Sherman, Tex., for appellant.

John W. Brady, of Austin, Tex., for appellees.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. Finding this case was correctly ruled and decided in the District Court, the decree appealed from is affirmed.

PARDEE, Circuit Judge (dissenting). It seems to me that the District Court was without jurisdiction. Diverse citizenship is not sufficiently alleged in the bill, nor otherwise shown in the record (*Grace v. American Central Ins. Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932; *Wrisley v. Rouse Soap Co.*, 90 Fed. 5, 32 C. C. A. 496), and the bill does not allege, nor is it shown by evidence in the record, that the defendants are infringing complainant's trade-mark in interstate, foreign, or Indian commerce. *Ryder v. Holt*, 128 U. S. 525, 9 Sup. Ct. 145, 32 L. Ed. 529; *Warner v. Searle & Hereth Co.*, 191 U. S. 195, 24 Sup. Ct. 79, 48 L. Ed. 145.

As the record stands, the decree below is one dismissing the bill on the merits. In my judgment, on the merits the complainant below and appellant here is entitled to relief, and the decree below, dismissing the bill, should be so qualified as to permit complainant to bring another suit.

STROMBERG MOTOR DEVICES CO. v. PARKER.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1914.)

No. 2028.

PATENTS (§ 328*)—INFRINGEMENT—CARBURETER.

The Perkins patent, No. 731,218, for a vaporizer for internal combustion engines, conceding its validity, *held* not infringing.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Arthur L. Sanborn, Judge.

Suit by the Stromberg Motor Devices Company against Leonard A. Parker. Decree for defendant, and complainant appeals. Affirmed. For opinion below, see 204 Fed. 462.

Charles A. Brown, of Chicago, Ill., for appellant.

Hillary C. Messimer, of New York City, for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

KOHLSAAT, Circuit Judge. Appellant filed the bill herein in the District Court to restrain infringement of claims 1 and 2 of patent No. 731,218, issued June 16, 1903, to O. B. Perkins for vaporizer for internal combustion engines. The claims read as follows, viz.:

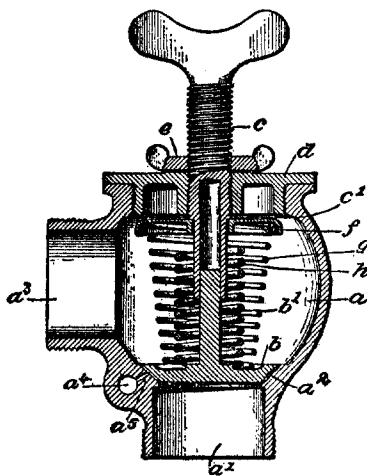
"A vaporizer, comprising a shell having air and oil supplies and a valve coacting therewith, two springs, and means for bringing one or both of said springs into action to resist the opening of the valve.

"A vaporizer, comprising a shell having air and oil supplies and a valve coacting therewith, two springs, and means for bringing one or both of said springs into action to resist the opening movement of the valve, said means comprising a member adapted to engage the springs to hold them engaged with the valve, and an adjustable screw for said member."

The District Court found there was no infringement and dismissed the bill for want of equity. Whereupon this appeal was taken.

"The prime object of the present invention," says the patentee, "is to provide a vaporizer in which the ratio of the air and fuel in the explosive mixture will remain the same, according to the adjustment of the vaporizer. This end I attain by certain special features of construction, the most prominent of which is the arrangement of two springs which by adjustment may be successively brought into action, so that when one spring is active the engine may be run at high speed and when both springs are active the supply of mixture will be choked or throttled, thus cutting down the speed."

The following is a reproduction of the one drawing of the patent:



At line 71 of page 1 of the specification it is said:

"In the operation of the invention, after the gasoline supply is adjusted, to run it full speed the screw *c* should be moved upward, placing the spring *g* under minimum tension, and thus the valve *b* will be lifted at the very inception of the suction-stroke and the gasoline and air will be drawn into the cylinder throughout the whole of the stroke, thus attaining a maximum charge. This may be slightly decreased by increasing the tension of the spring *g* without, however, bringing the spring *h* into action; but to merely slow down or throttle the engine the screw *c* and plate *f* should be screwed down until the spring *h* is placed under tension. This increased pressure on the valve *b* will prevent the valve from lifting until a material part of the suction-

stroke is traversed, and the result is that the cylinder will be charged only during part of the suction-stroke. The quality of the combustible mixture is, however, unchanged. It is by this means that I am able to vary the volume of the charge at will without in any way affecting its composition."

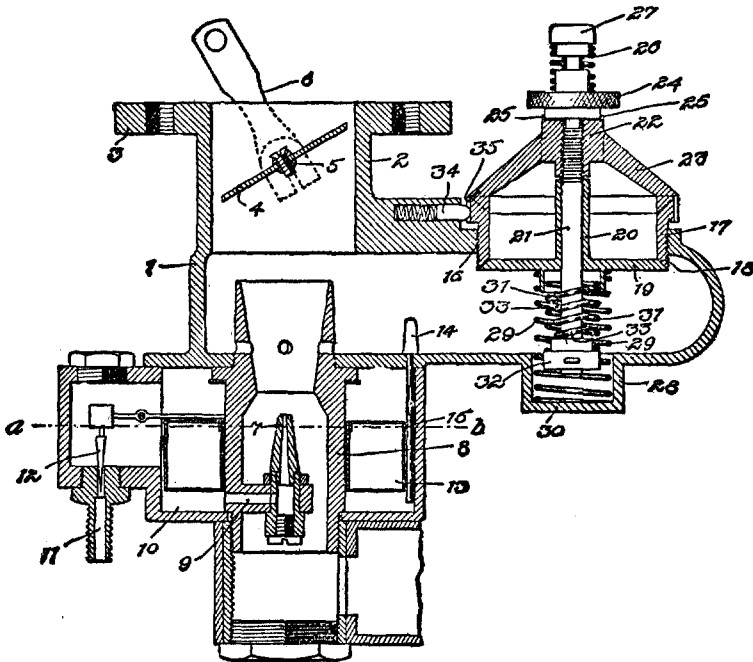
Both claims, it will be seen, call for air and oil supplies and a valve coacting therewith.

In the above drawing *a*⁴ denotes the oil supply and *a*⁵ the discharge passage thereof, *b* indicates the valve which works on the seat *a*² and opens into the shell *a*, *a*¹ represents the air inlet. The stem *b*¹ of the valve *b* is fitted to slide freely in the hollow lower end of the screw *c* which works in the head *d*. The latter is threaded or otherwise

fastened in the top of the shell *a* to close same and *e* indicates a lock-nut working on the screw *c* above the head *d* so that the screw may be held firmly in place. On the screw *e* is a shoulder *c*¹ and against this shoulder bears a preferably circular plate *f*; *g* and *h* indicate two spiral springs, the spring *g* being of less strength than the spring *h*, the former always engaging both the valve *b* and the plate *f*. The spring *g* is normally active with regard to the plate *f*. The spring *h*, being shorter than the spring *g*, is supported on the valve *b*. By means of the screw *c* the tension of spring *g* may be increased, and the spring *h* may be brought into engagement with the plate *f*, when both springs will become active.

The contention of appellant is that defendant's supplemental air supply device, taken in connection with certain features of the primary air and fuel supply of defendant's carbureter, constitutes infringement of the patent in suit. Defendant denies both the validity of the claims in suit and the alleged infringement thereof.

Assuming the patent to be valid, for the present purpose, does the record show infringement? The drawing of defendant's carbureter is here reproduced:



As will be seen, this device consists of a carbureter having a constant level gas supply 11 leading to a needle valve 12 controlled by the hollow metallic float 13 in the float-chamber 10, whereby the oil is automatically maintained at the level *a-b* within the chamber 10 and thence conducted to the oil nozzle 7 through the passage 9. By these means the oil remains below the outlet of nozzle 7 so long as no air

is entering through the tube 8. When air-flow occurs, the conical form of the interior of tube 8 leads to a diminution of pressure at the point of smallest diameter, and thus sucks the oil upwardly through the nozzle 7. Here the oil is overtaken and aspirated by the air rushing up through the air inlet at the bottom into tube 8 and thence to the throttle. This carbureter also includes a second nozzle 14, fed through the pipe 15, located an inch or so higher up than the other. Inasmuch as the flow of gasoline out of the nozzle practically depends on the suction resulting from the speed of the engine, gasoline will flow out of the low nozzle at all engine speeds but will not commence to flow out of the high nozzle until a certain engine speed is reached, thus providing a more economical operation of the engine. An auxiliary air supply valve is shown at the right of the drawing. It consists of the valve 19 opening downwardly from the atmosphere into the central chamber between the tube 8 and the throttle. This valve is held elastically shut by the compression of spring 29. It is otherwise free to move vertically under the influence of atmospheric pressure. Spring 29 is seated in the pocket 30 of the outward wall of the device and bears upwardly against the bottom of valve 19 which is guided in its vertical motion by the central rod 21, and this in turn is supported in the yoke; its position in reference thereto being adjustable vertically by a rotation of the thumb-nut 24 which is held engaged with the yoke by the spring 26. The yoke is also adjustable vertically by rotation in the screw thread 16 in the casing. Springs 26 and 34 control the two adjustments against accidental rotations. The tension of spring 29 is adjusted by the rotation of the yoke and valve seat. The stiffer springs 31 and 33 may by vertical adjustment of the rod 21, by means of thumb-screw 24, be brought into contact with valve 19, which when closed, will ordinarily be resisted only by the light spring 29, coming into contact with springs 31 and 33 seriatim as it opens more widely. The valve 19 responds more readily to the suction in the engine when under the control of spring 29 than when under control of either spring 31 or 33, or of all three springs.

Comparing the two devices in suit, we find that by the terms of the claims in suit it is essential that the valve coact with the air and oil supplies. These latter are fed into the so-called shell through tubes or openings which are completely closed by the valve when resting in its seat. In appellee's primary device, the air and fuel supply pipes are always open into the shell and do not depend on or coact with any valve for admission to the so-called shell or mixing chamber. Their operation is practically controlled by the suction in the engine, just as is the case in the patent in suit after the valve *b* is opened. Appellee's so-called primary device is old in the art, but it is claimed by appellant that appellee's supplemental or auxiliary air supply device, taken in connection with the primary element of his carbureter, constitutes an infringement of the claims in suit. If the auxiliary element of appellee discloses a fuel and air supply coacting with the valve 19, the claim of appellant would seem to be justified. But is there any such coaction? In the first place, the auxiliary device has no oil supply in itself. If there be anything corresponding to appel-

lant's fuel supply feature, it must be found in the so-called device of appellee. It will be seen that both the primary and auxiliary fuel supply tubes are supplied with air through the same constantly open inlet. It is conceded that it ordinarily requires greater suction power to drive the fuel from the auxiliary oil supply pipe than from the primary supply and that, as a rule, the former comes into use only when the latter in conjunction with the air supply is choked in its exit or otherwise becomes inadequate to relieve the vacuum in the engine, or supply the proportion of fuel and air required from time to time to the engine. There is no satisfactory evidence to show that the opening of the valve 19 in any way within the meaning of the claims coacts with the primary or auxiliary fuel supply or with both of them.

Appellant's expert Boettcher in answer to cross-question 56, speaking with reference to the device of the claims in suit, says:

"It is my opinion, however, that the flow of the gasoline depends upon the inrush of air, since it is this very inrush of air which satisfies the vacuum, rather than upon the direct application of the vacuum created by the engine."

And again, in reply to cross-question 60:

"Whether or not this vacuum which is produced before the valve is opened to admit air is sufficient to raise the oil in the passageway *a*⁵ to the point of overflowing, I cannot say."

Appellant's expert Miller speaks of appellee's fuel openings 7 and 14 as openings through each of which fuel may flow under the suction of the engine into the mixing chamber. This witness further says that what appellee terms an auxiliary air supply has air and oil supplies, the air being supplied through valve 19 and the fuel supplied through nozzle 7 or 14 of the so-called primary vaporizer, and has also a valve 19 coacting with said air and fuel supplies and that it otherwise corresponds with claim 1 in suit. In answer to cross-question 47, whether in appellee's carbureter the flow of gasoline through the two gasoline inlets depends upon the partial vacuum created by the suction stroke of the engine, he says:

"Yes. The partial vacuum within the carbureter being that resulting * * * from the suction-stroke of the engine, and as modified by the position of the butterfly throttle, the action of the auxiliary air valve and the flow of air through the main air inlet * * * although the fact that there was a greater rush of air by the nozzle of the fuel openings might, in itself tend to increase the flow of gasoline."

In answer to cross-question 19, "Are you able to say how much effect, if any, there would be upon the flow of fuel in defendant's device from the opening and closing of the valve 19 as shown in complainant's exhibit drawing of defendant's device?" appellee's expert answered, "No."

The ex parte experiments with appellee's device are of doubtful evidentiary force and by no means convincing. As will be seen, the expert evidence on this point is indefinite and theoretical.

Even if it be conceded that the fuel supply seemed to be accelerated after the opening of the valve 19, it by no means follows

that there must be the co-operation or coaction called for by the patent in suit between the oil supply nozzles, the auxiliary air supply, and the valve 19. On the most favorable theory of appellant, the co-operation is indirect. The opening and closing, or partial opening and closing, of the valve 19 does not simultaneously affect both the air supply and the fuel supply. Mere acceleration of the flow of fuel from an otherwise constant supply, by means of aspiration, cannot be said to be the same as an absolute control of the means of supply. The matter involved in the claims in suit is a unitary machine or device in which the sources of supply of air and fuel are absolutely opened or closed by the positioning of the valve b.

It is appellee's contention that in its carbureters the gasoline nozzle and the main air intake constitute an ordinary vaporizer, and, because this vaporizer has a tendency to furnish an unnecessary quantity or proportion of fuel on higher speeds, the auxiliary air intake is provided, and is so constructed and adjusted that as the engine speed increases it will furnish additional and appropriate quantities of excess air to weaken the mixture and produce engine economy. Appellee's expert Reeve says that the function of the auxiliary air valve (of appellee's device) is "to supply that portion of air which is needed, in addition to that entering through the 'carbureter proper,' to adjust automatically the richness of the mixture to the needs of the engine under various conditions of operation, as nearly as possible. This it does, not by varying the amount of fuel in the mixture, but by varying the quantity of air with which the preliminary mixture furnished by the 'carbureter proper' is diluted to bring it to a proper strength." In this we concur. Inasmuch as appellee's fuel supply is always open to the influence of the suction of the engine, it follows that it cannot be regulated by adjustment, and that when the air supply is changed, by adjustment, necessarily the ratio of the fuel and air is changed in the mixture. Thus the amount of air is varied while the amount of fuel remains stationary. In case the springs regulating the valve 19 are so adjusted as to increase their tension to the degree that the resistance of the valve to the suction influence will be increased, there will result a higher vacuum in the carbureter chamber before the valve 19 will open. This increase in vacuum will increase the suction and produce a greater flow of fuel from the fuel inlets. This will decrease the percentage of the air supply, whereby it is apparent that a richer mixture is produced when the stiffer springs of the auxiliary device are brought into action than when only the weaker spring is used. Thus in appellee's auxiliary device increase of spring pressure tends to enrich the mixture for given speed, while the avowed object of the claims in suit is to produce a device which will vary the volume of the mixture by spring adjustment without varying the proportions thereof. If this be so, it is evident that there can be no coaction between the air and fuel supplies of appellee's carbureter and the valve 19 of the auxiliary air supply device within the meaning of the claims in suit. We find no physical evidence of coaction between appellee's supplementary air valve, and his air and fuel supplies, on the one hand, and on the other we find that in appellee's device the mixture supplied to the engine varies in the relative percentage of its parts with

relation to each other, whereas in appellant's mixture the volume so supplied is varied, but the quality must and does remain constant.

This difference in results clearly indicates that appellee's auxiliary air supply device is not the device of the claims in suit. Appellee's device does not therefore infringe that of the claims in suit, and the decree of the District Court is affirmed.

STROMBERG MOTOR DEVICES CO. v. JOHN A. BENDER CO.

(District Court, N. D. Illinois, E. D. February 13, 1914.)

No. 65.

1. PATENTS (§ 167*)—CONSTRUCTION—SCOPE AND CHARACTER OF INVENTION.

An inventor is entitled to all that his patent fairly covers, even though its complete capacity is not recited in the specification and was unknown to him prior to the patent issuing.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CARBURETER.

The Ahara patent, No. 684,662, for a carbureter, designed for an explosive engine of the hit and miss type but adapted for and used on automobile engines, *held* not anticipated, valid, and infringing.

In Equity. Suit by the Stromberg Motor Devices Company against the John A. Bender Company. On final hearing. Decree for complainant.

Charles A. Brown, of Chicago, Ill. (Charles A. Brown and Arthur H. Boettcher, both of Chicago, Ill., of counsel), for plaintiff.

W. M. Swan, of Detroit, Mich. (C. P. Byrnes, of Pittsburgh, Pa., of counsel), for defendant.

SANBORN, District Judge. Final hearing on bill for infringement of the Ahara patent, No. 684,662, October 15, 1901, and the Richard patent, No. 791,501, June 6, 1905.

While it is difficult, if not impossible, to know just what takes place inside of a carbureter, under varying suctions of the engine, yet if it works well in such conditions a comparison between its internal arrangement and the old single jet device, which did not give satisfactory results for variable speed, should give a reasonably satisfactory conclusion. It is true that the Ahara device was intended for a hit and miss engine, with a constant speed. The theory of its construction was that the auxiliary tube would have time to fill up with fuel during a nonshot instant, to be ready for an increased supply of fuel on the next shot or two, when a richer and more potent mixture was needed. And it is equally true that the Baverey device was intended for a variable speed engine, with no missed strokes under normal operation. But the real question is whether the Zenith device as made, not strictly fol-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lowing the Baverey patent in all respects, has substantially the same principle of operation as Ahara and Richard, or either one of them, assuming all three patents to be valid, as I think they are.

The conflicting devices may be roughly illustrated by the letter L inside of the letter U, thus:



Suppose the two tubes or conduits are supplied with gasoline from a constant level tank, whose upper level is a little below the level of the left-hand upper ends of the L and U, and that the lower horizontal end of L is connected with this tank; also, that the L tube has a small opening into the U tube, so that the fuel may run into it; and that the L tube is closed to the air except at its top or nozzle, while the U tube is open to the air at its upper right-hand end.

One of the difficult problems of the development of the automobile was the carbureter. The old single jet device worked well at constant and low speeds, but could not take care of high speeds at varying loads, because it produced too rich a mixture. The first notable success in meeting this problem was made by Krebs in 1902. He found that, by attaching to the old form of carbureter an automatic air valve controlled by a spring so adjusted as to open and let in air as the speed increased, the proper fuel mixture was obtained. This will be found illustrated by the defendant's device shown in the opinion of the Circuit Court of Appeals of this circuit in *Stromberg Motor Devices Co. v. Parker*, 212 Fed. 413, 129 C. C. A. 106, decided January 6, 1914. Automatic compensation for the increasing richness of the explosive mixture was in this way obtained.

The same problem has been solved in a different way by other carbureters, of which the Baverey patent of 1908, No. 907,953, is a type. Defendant's device is made under this patent, but the alleged infringing carbureter, known as the Zenith, varies from the patent in the particular mentioned later. Ahara did not consciously attempt to improve carbureters for use on automobiles, but on hit and miss engines only, though he builded much better than he knew. In his specification he says:

"This invention relates to a feeder for explosive engines, and particularly to a structure adapted to vary the amount of fuel mixed with the air fed to such an engine.

"The invention is adapted for application to explosive engines of the type in which the speed is governed by omitting or cutting out explosions of the fuel and in which, when the different parts are properly adjusted, the maximum power can be secured with a certain amount of fuel to a given quantity of air. As the quantity of this fuel relative to a given quantity of air is diminished, a mixture is obtained which finally gives no explosion, and, as the predetermined relative quantity of this fuel is increased, the explosive action is rendered much higher. Therefore it will be seen that mixtures of the fuel and air when properly determined will govern the power applied to the piston, and consequently the speed of the engine, under a fixed relation of parts. In explosive engines governed by cutting out or omitting explosions, the plan usually adopted is to admit a certain quantity of fuel into the engine cylinder for each explosion; this quantity of fuel being such that when mixed with the quantity of air drawn into the cylinder during one suction-stroke will give a maximum efficiency to the engine. This gives a uniform and efficient mixture for each explosion, except for the first explosion after one or more charges have been omitted. This first

explosion after a cut-out will always be a weak or poor one, because a larger quantity of air than usual is mixed with the regular quantity of fuel for an explosion."

During the nonshot period the fuel runs from the L tube into the U, thus supplying an excess for a more powerful explosion on the next shot after a miss.

So the question here is whether the carbureter claimed to infringe, although made generally under Baverey, has the same principle of operation as Ahara, though the latter was not working to the same end, and though his device has had no effect on the problem of carburation for automobiles.

Both the Ahara and Zenith devices agree generally in the following particulars: Referring to the L and U tubes, the lower end of L is connected with the float-chamber, and the right-hand upper end of U with the air. With the suction on the upper left-hand ends of both tubes the effect is to pull fuel through L and air through U. L and U being connected, the fuel will run from L to U by gravity, so that both tubes will supply fuel to the mixing chamber at low speeds. As the pull increases with the speed, all the fuel will be pulled out of U, and air only supplied by it, thus thinning the mixture, and preventing the over-richness occurring with a carbureter using only the L tube or single jet. This is the same result obtained by Krebs with his auxiliary air valve, with more economy of space and a cheaper device, perhaps a better result.

It will be readily understood that, if the U tube has an opening to the atmosphere so large as to keep normal air pressure in that passage, fuel will run into it from L, and be carried along to the mixing chamber with the air in U and the fuel also in L; but if the opening to the air is restricted a slight vacuum will occur in U, with little or no fuel. So, in order to obtain the object sought, of making the fuel leaner as the speed increases, the air opening in U must be properly restricted, sufficiently to produce the best result, as shown by trying it out.

At this point the claims of Baverey and Ahara meet literally, as they do substantially in other respects. Referring to the U tube, Baverey claims "a chamber open to the atmosphere," and Ahara "a passage communicating with the atmosphere." Ahara's claims admit of restricting the opening so as to get a slight vacuum in U. This is what he does, and so does the Zenith company in the devices shown in evidence. If the Zenith were made substantially like either figure 1 or 2 of the Baverey drawings, it seems there could be no infringement, because there would never be any subatmosphere in U. But the infringing Zenith device restricts the opening in the upper part of U to one or two very small holes, while the drawings show the right-hand leg very much enlarged, with its upper end either wide open or covered only with a wire screen.

I think that Ahara's claim 4 is clearly infringed, and perhaps also claim 7. On the trial it was earnestly contended by defendant that those of the Ahara claims which count on means for controlling the amount of fuel running from the tank into L, and thence into U cannot possibly be infringed, because the Zenith has no such means. But, as I understand the device, both of the threaded nuts around which the

fuel passes are readily adjustable, so as to either increase or diminish the fuel passage.

[1] While it is true that Ahara did not address his attention to the problem substantially solved by Krebs, yet in devising a carbureter for hit and miss engines he incidentally made a device which covers the same field as the Zenith, and as a matter of course he is entitled to this new or additional use.

"An inventor is entitled to all that his patent fairly covers, even though its complete capacity is not recited in the specifications and was unknown to the inventor prior to the patent issuing." *Diamond Rubber Tire Co. v. Consolidated Rubber Tire Co.*, 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527.

This consideration, as well as the manner and the purpose for which plaintiff acquired the Ahara patent, as disclosed by the evidence, would be worthy of some attention in a case of doubtful infringement. But these two devices work just alike. If the Zenith will work with a modern, high-class variable speed internal combustion engine, so will the Ahara. This must be so, because they operate on identical principles.

I have not given very much attention since the hearing to the relation held by the Richard patent sued on. This is a specialized improvement on Ahara, designed for the same purpose. It is not necessary to consider whether it is infringed by the Zenith device.

[2] Understanding as I do that the amount of fuel supplied to both the L and U passages is adjustable in the Zenith, I find that claims 1, 2, 4, 5, and 7 of the Ahara patent are infringed.

As to the matter of novelty or anticipation, I do not think Ahara was in any way anticipated by Crossley in his English patent, No. 24,584, of 1893. This is the best prior disclosure.

Plaintiff is entitled to a decree adjudging validity of the Ahara patent, and infringement by defendant.

HOSKINS MFG. CO. v. GENERAL ELECTRIC CO.

(District Court, N. D. Illinois, E. D. November 10, 1913. On Reargument, April 15, 1914.)

No. 30,262.

1. PATENTS (§ 172*)—CONSTRUCTION OF CLAIMS—CHANGES MADE IN PATENT OFFICE.

Changes of expression in the claims in an application for a patent, made to overcome the examiner's objections, which do not substantially change the meaning, will not defeat a meritorious patent, and it is entitled to a fair construction of the claims as allowed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 247; Dec. Dig. § 172.*]

2. PATENTS (§ 172*)—CONSTRUCTION—EFFECT OF CANCELLATION OF CLAIMS.

Patent claims must be read and interpreted with reference to claims which have been rejected by the Patent Office and to the prior art, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cannot be construed to cover either what was canceled by the patentee or disclosed by prior devices or publications.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 247; Dec. Dig. § 172.*]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ELECTRIC RESISTANCE ELEMENT.

The Marsh patent, No. 811,859, for an electric resistance element or material consisting of an alloy of nickel and a metal of the chromium group, was not anticipated and is valid; also *held* infringed by an alloy of the same metals, with the addition of iron and manganese in such small quantities as not to affect it as a resistance element.

4. WORDS AND PHRASES—"MATERIAL"—"ELEMENT."

As used in the phrases "electric resistance material" and "electric resistance element," the words "material" and "element" are synonymous.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4404.]

5. WORDS AND PHRASES—"CONSIST"—"COMPRISE."

The word "consist" is a more specific term than "comprise," as it means to stand together, to be composed of or made up of, while "comprise" means comprehend, include, contain, embrace; but the terms "consisting of a strip" and "comprising a strip," as used in a patent claim, are synonymous.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, p. 1450; vol. 2, p. 1374.]

6. WORDS AND PHRASES—"FORMED OF"—"COMPOSED OF."

"Formed of" and "composed of" are synonymous; they both mean consisting of.

On Reargument.

7. PATENTS (§ 165*)—SCOPE—UNDISCLOSED USES OR PROPERTIES OF INVENTION.

A patentee is entitled to all uses and properties of his discovery, whether known or disclosed or not.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

8. PATENTS (§ 314*)—SUIT FOR INFRINGEMENT—EVIDENCE.

Ex parte tests of electrical resistance materials to determine their similarity in the properties of resistance and durability under high temperatures, apparently fairly made, if not objected to on the hearing, may properly be considered on a question of infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 550-553; Dec. Dig. § 314.*]

In Equity. Suit by the Hoskins Manufacturing Company against the General Electric Company. On final hearing. Decree for complainant.

Dyrenforth, Lee, Critton & Wiles, of Chicago, Ill., for complainant.

Charles Neave and Clarence D. Kerr, both of New York City, and Frank J. Seabolt, of Schenectady, N. Y., for defendant.

SANBORN, District Judge. Infringement suit on patent No. 811,859, to Albert L. Marsh, assignor of the plaintiff, applied for March 15, 1905, and issued February 6, 1906. The defenses are that the patent is invalid for anticipation, and in any event not infringed. Defendant claims that the patent is not meritorious, and contributed nothing to what previously existed, and is entitled to no consideration

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from any point of view. On the other hand, plaintiff claims that the patentee discovered that an electrical resistance element or material composed of nickel and chromium in certain proportions is suitable for all-around use in the various situations in which electrical resistances are desirable for rheostats, electric heaters, toasters, cookers, soldering irons, flatirons, etc. Plaintiff's material may be called the "Marsh resistor," and defendant's bears the name of "calorite." The great benefit claimed for these two materials is their extraordinary durability, as compared with the prior art. They have more than 70 times the resistance of copper, and twice that of nickel, copper alloy, and more than 150 times the durability of anything known in the prior art.

The case presents some rather unusual features, particularly the action of the Patent Office in rejecting claims afterwards allowed, the character of the Placet disclosure, and the fact that almost the sole utility of Marsh's discovery resides in the quality of durability, apparently unknown to him at the time he received his patent. The patentee thus describes his alleged discovery:

"My object is to provide, as an improved electric resistance material, a metal which has the property of being particularly low in electric conductivity, has a melting point exceeding that of pure copper, and may be drawn or otherwise shaped to form particularly durable, efficient, and desirable strips, strands, or filaments suitable for use in the various connections where electric resistances are desirable. I have discovered that the metals of what is termed the 'chromium group,' particularly when mixed with nickel, form an alloy having the properties of being very low in electric conductivity, very infusible, nonoxidizable to a very high degree, tough and sufficiently ductile to permit drawing or shaping it into wire or strip form to render it convenient for use as an electric resistance element. * * * These metals are chromium, molybdenum, tungsten, and uranium. Any one of these metals is suitable for my purpose, though for various reasons I prefer to employ chromium. * * * As the above metals possess characteristics in common which adapt them to my purpose, any one of them may be employed, though when alloyed with nickel or cobalt, for example, proportions may vary to produce the best electric resistances, taking into consideration the necessary toughness and degree of ductility desirable for the particular purpose in hand. I have found, for example, that an alloy consisting of 90 per cent. nickel and 10 per cent. commercially pure chromium may be drawn into a fine wire and annealed, producing a tough metal having a melting point exceeding that of pure copper and with an electric resistance approximating 50 times that of pure copper. Its temperature coefficient is particularly low, it does not become crystalline and brittle under heating and cooling, it resists oxidation to a remarkable degree under very high temperature, and likewise keeps a polish under all atmospheric conditions, even where corrosive fumes are present.

"Any metal of the chromium group possesses desirable qualities for electric resistance material, whether employed alone or alloyed with nickel or cobalt. At the present time I am of opinion that the most practical and desirable electric resistance material may be formed of an alloy of nickel and chromium in suitable proportion, drawn into strips, strands, or filaments and annealed. In its broadest sense, however, my invention is not to be limited to an alloy of the last-named metals.

"The accompanying drawing shows a rheostat of a well-known type, in which the coiled wires *a* are resistance elements formed of a metal alloy, consisting of less than 50 per cent. of a metal of the chromium group and more than 50 per cent. of nickel or cobalt, or both. In practice I prefer, mainly for commercial reasons, to form the alloy of preferably less than 25 per cent. chromium and more than 75 per cent. nickel. Variations in the relative proportions of the metals would affect more or less the variations in strength,

durability, and resistivity of the alloy. It may be stated, for example, that a metal alloy consisting of 15 per cent. chromium and 85 per cent. nickel drawn into a wire .016 of an inch in diameter has a resistance approximating 2.3 ohms per foot.

"As stated before, either nickel or cobalt is suitable for my purpose, when alloyed with a metal of the chromium group in a proportion of more than 50 per cent. nickel or cobalt, or both, and less than 50 per cent. chromium or the like. Nickel and cobalt alloy readily with metals of the chromium group and resist oxidation to a high degree. Iron, on the other hand, is readily oxidizable and will not answer my purpose when alloyed with a metal of the chromium group. Where I mention in the claims a metal having the properties of nickel or cobalt, I wish to designate only the metals nickel and cobalt, which have properties that are the same for my purpose, but which cannot both be classed under any single term of which I am aware."

The patent is not directed specifically to the use of resistance elements for electric heaters or cookers, but rather to a resistance element or material for any and every purpose for which such elements may be used. The only drawing accompanying the patent shows a rheostat, whose purpose is to throttle the electric current. Such resistances are commonly used in street cars, and other locations where it is desired to start up motors and cut down the current while the motor is being started. The patent is designed for resistances for such uses as much as for any other.

It turns out, however, to the surprise of the patentee as much as anybody, that the Marsh resistor is peculiarly adapted to those situations where very high temperature is required, 1,000 degrees centigrade or more, where prior devices were so short-lived as to be of comparatively little use. Both plaintiff's and defendant's material will last 400 hours or more at the temperature mentioned; and it is this feature which gives them their very great value and utility. Defendant's material, called calorite, is substantially the same as plaintiff's, except that it is a quarternary alloy of four substances, nickel, chromium, iron, and manganese, while plaintiff's is a binary alloy, composed of nickel and chromium only.

Shortly after the patent was issued a sample of the Marsh resistor was sent to defendant, and a proposal made to sell the patent for \$75,000, or give a perpetual license, under rather onerous terms. Defendant obtained a copy of the patent, and also directed that the prior art be examined, whereupon the British patent of Placet, of 1896, was discovered. This patent was regarded by defendant as being a complete anticipation of Marsh, and for that and other reasons it did not purchase or take any license from him or his assignee. Defendant has a thoroughly equipped laboratory, in which it has produced some very remarkable results, and at once instituted a series of experiments to obtain a resistance element which should be as durable, and as good or better in all respects, as the Marsh material. It succeeded in producing calorite, which is substantially the same as Marsh's material, except that it contains a small amount of iron and manganese. It is impossible to tell them apart, except by chemical analysis. They look alike, they have the same color, they last the same length of time under use, and they have the same resistance, the same melting point, and the same temperature coefficient of resistance. If the patent is

valid, therefore, it is infringed, and the only questions are whether Marsh gave up his invention by canceling claims in the Patent Office, and whether his discovery was anticipated by the prior art.

The File Wrapper. The only substantial changes which Marsh made in his journey through the Patent Office were to change the word "material" in his claim to the word "element," and to give up all claim to an electric resistance material or element of which one constituent part was chromium, or one of the metals of that group. The following shows substantially what occurred in the Patent Office:

Claims Absolutely Rejected.

Patent Claims.

1. Electric resistance material comprising an alloy containing one of the metals of the chromium group. (Rejected 5-3-'05.)

1. An electric resistance element formed of a metal alloy containing one of the metals of the chromium group. (Rejected 8-15-'05.)

1. An electric resistance element composed of a metal alloy consisting of one of the metals of the chromium group, in the proportion of less than 50 per cent. of the element, and more than 50 per cent. of metal having the properties of nickel and cobalt.

Claims Rejected in Form but Allowed in Substance.

2. Electric resistance material comprising a strip, strand, or filament of an alloy of nickel and one of the metals of the chromium group.

3. Electric resistance material comprising an annealed strip, strand, or filament of an alloy of nickel and one of the metals of the chromium group.

4. Electric resistance material comprising an alloy of nickel and chromium.

2. An electric resistance element comprising a strip, strand, or filament formed of an alloy of nickel and one of the metals of the chromium group.

3. An electric resistance element comprising an annealed strip, strand, or filament formed of an alloy of nickel and one of the metals of the chromium group.

4. An electric resistance element formed of a metal alloy consisting of nickel and chromium.

5. An electric resistance element formed of a metal alloy consisting of chromium in the proportion of less than 50 per cent. of the element and nickel in the proportion of more than 50 per cent. of the element.

Defendant takes the position that its calorite is the material defined in the original fourth claim. The argument is that calorite *comprises* an alloy of nickel and chromium, and also iron and manganese. The claim was not limited to nickel and chromium, but only comprised or included them. Hence it is argued that the rejection and erasure of this claim preclude the patentee from claiming again what was so erased by him, and what the defendant now uses.

[1, 2] In this circuit the rule of construction of the file wrapper contents is exceedingly liberal to the patentee. He cannot claim what he definitely abandoned in the Patent Office. The question is: Did he there disclaim the construction he now contends for? Did Marsh ever

yield his claim for the discovery of an improved resistance material or element? He did narrow some of the claims, but did he ever give up this main idea? Changes of expression, having substantially the same meaning, made to overcome the examiner's objections, are not permitted to defeat a meritorious claimant; and he is entitled to a fair construction of his claims as actually granted. *Hubbell v. United States*, 179 U. S. 77, 21 Sup. Ct. 24, 45 L. Ed. 95. In *Gray Telephone Pay Station Co. v. Baird Mfg. Co.*, 174 Fed. 417, 98 C. C. A. 353, the patentee seemed to have abandoned his basic claim at one time, but continually returned to it, until a narrower one was finally allowed on appeal. Marsh never abandoned his main contention, but did cancel claims for alloys of chromium with other metals not described, and is claimed to have narrowed the fourth claim by substituting the words "formed" and "consisting" for the word "comprised." It is true that patent claims must be read and interpreted with reference to claims which have been rejected and to the prior state of the art, and cannot be construed to cover either what was canceled by the patentee or disclosed by prior devices or publications. *Hubbell v. United States*, supra; *Computing Scale Co. v. Automatic Scale Co.*, 204 U. S. 609, 27 Sup. Ct. 307, 51 L. Ed. 645; *Cotto-Waxo Chemical Co. v. Perolin Co.*, 185 Fed. 267, 107 C. C. A. 373. The patentee cannot be allowed a construction which will include what he expressly abandoned and disavowed as a condition of the grant. 185 Fed. 267, 269, 107 C. C. A. 373.

[3, 4] The problem, therefore, is whether Marsh, in order to obtain his grant, narrowed original claims 2, 3, and 4 to procure his present claims bearing the same numbers. In claims 2 and 3 he changed "material" to "element" and inserted "formed." Clearly there was no change in sense. "Material" and "element" are in this connection absolutely synonymous. The material of the compound is the metal strip, strand, or filament—the wire—which carries the current and resists it to produce heat and light. So is the element. As defendant's counsel well say:

"I recognize and can think of no difference. * * * An electric resistance element is an electric resistance material, and an electric resistance material is an electric resistance element."

We cannot comprehend (or comprise) the argument of plaintiff's counsel in saying that a claim on a resistance *material* would cover it in all its uses, while a claim on a resistance *element* would not. The words mean absolutely the same thing. Any other construction would make the "element" claims functional, and might also exclude plaintiff from claiming the hidden use of extraordinary durability now put forward. Still less reason exists for thinking that the added word "formed" was more than a verbal change. "A strip of an alloy of nickel" cannot be any more or less than "a strip *formed* of an alloy of nickel."

The examiner, therefore, both rejected and allowed original claims 2 and 3, and Marsh canceled and claimed both. This leads to the inquiry whether any substantial change was intended to be made in claim 4, both forms of which are here reprinted for greater clearness. Ver-

bal changes only were made in 2 and 3; why not in 4? The possibility, at least, that no substantial change was thought of, is suggested. Regarding, as I do, the Marsh invention as meritorious, I think fairly liberal rules of construction and definition should be applied, especially in view of the Patent Office history.

Original Claim 4. Electric resistance material comprising an alloy of nickel and chromium.

Patent Claim 4. An electric resistance element formed of a metal alloy consisting of nickel and chromium.

[5] The verbal change from "material" to "element" has been considered, but the change from "comprising" to "consisting" is more difficult to explain by similar reasoning. The word "formed," as before, adds nothing but letters. "Element of an alloy" and "element formed of an alloy" are identical. But at first sight "comprise" and "consist" seem to be words of different meaning. The true question, however, is whether they were so regarded by the examiner and by the patentee. Looking at the Century Dictionary, "comprise" means comprehend, include, contain, embrace; as, the German Empire comprises a number of separate states, which is like saying that New England consists of six separate states. "Consist" means to stand together, to be composed of or made up of. It is a more specific term than the other.

[6] Turning now to the context, it will be observed that the claims always use "comprise" with an object in the singular number; "comprising a strip," "comprising an alloy," and also use the word as synonymous with "formed of," as in claims 3, 4, and 5, and in both canceled claims numbered 1, and also as synonymous with "composed of" in patent claim 1. Now "formed of" and "composed of" are the same; they both mean consisting of. "Comprising a strip" and "consisting of a strip" would seem to signify one and the same thing. It would hardly be asserted that "comprising a strip" means two or more strips, or a strip of metal and some other substance.

In view of the whole situation, therefore, it does not seem unreasonable to conclude that no substantial change was intended to be made in the verbal alterations of claim 4, any more than in claims 2 and 3, and I have therefore put claim 4 among those rejected in form but allowed in substance. No reason can be perceived why claim 4 should be changed and not the others. It is true that when a patent applicant changes a claim to avoid a reference, or to meet the examiner's notion of a reference, he usually changes the substance, and in this case Marsh evidently either convinced the examiner that "element" differed from "material," or that his references were inapplicable, when he subsequently allowed the same claims he had previously rejected. Marsh made verbal changes only, and thus succeeded in getting his patent for the identical thing he says in his specification that he wanted.

Defendant asserts that its calorite is made according to rejected claim 4; but this is on the theory that the claim covers nickel, chromium, and other metals. But I do not think that Marsh intended to rigidly restrict his claims to nickel and chromium, so long as nothing but padding is added, nothing which would affect resistance or the

ductility necessary to make the strips, strands, or filaments referred to. He does say that iron must not be used with chromium alone, because it is readily oxidized or burned up, and will not answer his purpose when alloyed with chromium. But this does not imply that it may not be used in small quantity with the nickel and chromium together. It would be excessive refinement to say that a manufacturer may put in 8 per cent. of iron, without changing resistance, melting point, temperature coefficient, or durability, even though improving ductility and perhaps other functions, and thus escape infringement. So long as added metals do not affect the alloy as a resistance element, a fair construction of the claims seems to make such additions only a double use. There is much discussion in the briefs of the question of infringement; but it need not be further discussed here, except to say I think that two compositions of matter in which the same constituent elements predominate are equivalents, when the function or essential properties of each entire composition are substantially the same. *Robinson on Patents*, § 304; *Walker on Patents* (4th Ed.) § 369; *Tyler v. Boston*, 7 Wall. 327, 19 L. Ed. 93.

The Prior Art. Legal rules on the question of anticipation are that "anticipating patents and publications must disclose the invention without patentable change or alteration to make them anticipatory." *Goodwin Film & Camera Co. v. Eastman Kodak Co.* (Aug. 14, 1913; W. D. N. Y.) 207 Fed. 351, citing *Waterbury Buckle Co. v. Aston*, 183 Fed. 120, 105 C. C. A. 410. As plaintiff's counsel expresses it, the reference—

"must be so clear and definite to enable any mechanic skilled in the art to reach the patented invention certainly, directly, and without the necessity of any experiment, and this rule is enforced with peculiar strictness when the alleged disclosure is found in a foreign patent or publication." *Badische Anilin & Soda Fabrik v. Kalle*, 104 Fed. 802, 44 C. C. A. 201; *Hogan v. Specialty Co.* (C. C.) 163 Fed. 289; *Hopkins on Patents*, 261; *Macomber's Fixed Law of Patents* (2d Ed.) § 85.

A rather extreme illustration of the strict construction of foreign patents is *Western Glass Co. v. Schmertz Wire Glass Co.*, 185 Fed. 788, 793, 109 C. C. A. 1, in the Circuit Court of Appeals of this circuit, where almost the precise process of the patent was described in an earlier British patent, but held not to be a sufficient disclosure.

Another claim to liberal construction is that plaintiff made an important advance in the practical art of electric resistance material. He has produced an alloy which lasts 150 times as long as anything in the prior art, and defendant has substantially copied it. Under these circumstances, all reasonable presumptions are in plaintiff's favor, as in the *Schmertz Case*. *Schmertz* simply improved on an old European process for making wire glass, but he made the art practical, although this old process can now be used to make as good glass, and as cheaply and rapidly, as by the *Schmertz* process, and that without using anything he discovered. This was decided in a later case between the same parties. 195 Fed. 760, 115 C. C. A. 459.

That the prior art abounds in references to a chromium-nickel alloy as a useful resistance element is not denied; but plaintiff claims the statements in all such references to be so vague as to give no informa-

tion which can be acted on without elaborate experiment. In his British patent of 1896 Placet, who was the first to produce pure chromium in considerable quantities, claims practically all chromium alloys. His best statement is that:

"Chromium increases the electrical resistance of manganese, ferro-manganese, ferro-nickel, and other metals employed in the manufacture of conductors of high electrical resistance."

This must also be taken in connection with two other statements of his, to the effect that chromium is most frequently employed in the proportions of from five-tenths to 15 or 20 per cent., but that alloys containing larger amounts are so hard that they cannot be cut with a grindstone; also that, by increasing the *durability* of metals, chromium augments their sonorousness, which renders them more suitable for the manufacture of bells, gongs, trumpets, piano strings, etc., than theretofore. In his French patent Placet adds to the above-quoted matter a further statement as follows:

"Which serve to make wires of high electrical resistance."

This is the best disclosure of the prior art. It seems to be established by the evidence that these broad statements are not strictly true when tested by experiment, so that any one skilled in the art would have to do much experimenting to reach a practical workable alloy. No one ever did make such an alloy, notwithstanding Placet's valuable disclosures, for ten years after his patent; Marsh being ignorant of his discoveries in this respect.

In view of the great merit of the Marsh invention, as it seems to me, I think it should not be held anticipated, and that it is valid and infringed. The record is full of difficulties, complexities, and scientific points, although counsel on both sides seem to have pretty fully mastered them.

A decree should be entered for plaintiff as prayed for.

On Reargument

Russell Wiles, of Chicago, Ill., for plaintiff.

Edward Rector, of Chicago, Ill., for defendant.

A reargument was had on the question of the construction of the file wrapper, a point not fully argued on final hearing. Incidentally the question of infringement was also reargued.

[7] Some of the statements of the original opinion need to be modified. It is stated that Marsh was surprised at the great durability of his alloy. This is not quite correct. It should have been said that Marsh understood the great durability of his resistor, since he says it is "particularly durable" and "nonoxidizable to a very high degree," but did not at all appreciate the relative unimportance of the quality of resistivity compared with that of durability. Since electrical resistance varies inversely as the cross-section is increased or diminished, a wire or strip of low resistance, like platinum, may be made to give as much heat as one of high resistance by lessening the cross-section. The main question is whether one will resist oxidation or last as long as the other. This misapprehension of the patentee is not material,

because he is entitled to all uses and properties of his discovery, whether known or disclosed or not.

"A patentee may be baldly empirical, seeing nothing beyond his experiments and the result; yet if he has added a new and valuable article to the world's utilities, he is entitled to the rank and protection of an inventor." The Grant Tire Case, 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527.

On the second hearing plaintiff's attorney made the point that electrical resistance material and electrical resistance element are distinguishable, as such terms are used in the Patent Office, in that the word "material" may mean a chunk, bar, or ingot of alloy, which will make either a good toaster wire or a good bird-cage, while if the word "element" is employed the use merely as a wire is excluded, and the idea of system or part of a whole is suggested, such as drawing or rolling the material, and introducing it into an electric circuit. To explain this distinction further, it is said the Patent Office is accustomed to ignore an introductory adjective or adverbial phrase in a claim, on the theory that an introductory phrase in a combination claim is not an element of the combination and does not limit the claim, as held in *W. W. Sly Mfg. Co. v. Russell & Co.*, 189 Fed. 61, 65, 110 C. C. A. 625. The distinction referred to is illustrated in the following Patent Office decisions: *Ex parte Shepler*, 102 O. G. 468; *Seeley v. Baldwin*, 117 O. G. 2633, 2634; *Andrews v. Nilson*, C. D. 1906, 123 O. G. 1667; *Ex parte Mayall*, Commissioner's Decisions 1873, 136; *Ex parte Gally*, 107 O. G. 1660, C. D. 1903, 480; *Ex parte Casler*, 90 O. G. 446, 448.

While there is force in this contention, it seems to be inapplicable, because the Marsh file wrapper contents show that the examiner understood the words in question to mean exactly the same thing. All his acts show this. In his first action, after citing four references, he says:

"These alloys being old, no invention was exercised in selecting them in place of other metals or alloys as a resistance *element*."

Marsh then amends by changing "material" to "element," both in the specifications and claims. In his next action the examiner substitutes "resistance *bodies*" for "a resistance element," showing clearly that the use of the word "element" had no particular significance with him. Applicant then amended the first claim to its final form, added claim 5, and fully explained his invention to be a high resistance element, saying that he did not discover a nickel-chromium alloy, but that such an alloy has high electrical resistance. He says:

"Some of the most important inventions have consisted in the practical application of the discovery of a new property of matter, and this invention is of that class."

Marsh had now so defined his invention that the examiner understood he was claiming a new use in an electric circuit of an old material or body, better described in such specific relation as an electric resistance element, and the claims were promptly allowed. I agree entirely with defendant's counsel in the argument on rehearing that:

"The examiner never for a moment thought to have any distinction between the words material and element."

And the whole matter of changes in the claims is clearly and satisfactorily summed up by Mr. Rector in saying that:

"In the amended claims, now explained and defined, we do not find the alloy set forth in his claims in any of the references."

That is (to quote the argument to the examiner), there is no such alloy in the prior art used as a resistance element.

It follows that Marsh did not materially change claim 4. He asked for an alloy of nickel and chromium to use as a resistance material or element, and got it under somewhat different language. The important point is that as soon as he pointed out just what he wanted, and made the examiner understand that he did not want a nickel-chromium alloy for any or all purposes, but only for one, he got it.

It is erroneously stated in the opinion that defendant's calorite contains 8 per cent. of iron. Calorite is in fact composed of nickel 65, chromium 12, iron 15, and manganese 8. It is conceded that, if the addition of the iron and manganese does not materially affect the alloy as a resistance element, then defendant's material is the same as plaintiff's. To cheapen the material or increase ductility or workability is not material, since these qualities do not affect resistivity or durability.

The question of infringement depends on whether defendant's addition of 15 parts of iron and 8 of manganese to the nickel-chromium alloy of the patent substantially changes it, not in weight, ductility, capacity to be drawn or rolled, or any other nonelectrical property, but in its properties when placed in an electrical circuit as a heat-producing element. In this position the important properties are durability under high temperature, specific resistance or resistivity, melting point, and temperature coefficient of resistance, meaning how much resistance rises or falls with each degree of change of temperature of the wire. One form of the patented alloy contains 65 parts of nickel and 35 of chromium. Calorite has nickel 65, chromium 12, iron 15, manganese 8. In other words, calorite has 65 parts nickel and 35 chromium mixed with other things, and if the other things do not change its properties infringement is established.

[8] On this question defendant called a number of witnesses, who, among other things, referred to several tests to determine resistance, durability, and other matters, together with chemical analysis to find out what the Marsh resistor wire was made of. These tests, as well as those later made for plaintiff, were entirely ex parte. Plaintiff made no objection to the tests on the ground that they were ex parte, and, as for those for durability (the most important point), it would be inconvenient to make any other than a one-sided test, on account of the time consumed. On rebuttal plaintiff called the patentee, Marsh, who gave a most complete and thorough deposition on alloys generally, and particularly those containing nickel and chromium, and in the course of his testimony related numerous tests he had made to determine the properties of his resistor as compared with calorite. He was asked by plaintiff's attorney to discuss the tests made of the plaintiff's and defendant's wires and those of the prior art, and to this question no objection of any kind was made. After Marsh had fully completed

his direct testimony, and before cross-examination, the following objection was made:

"Counsel for defendant objects to the deposition of the witness given thus far, as immaterial and incompetent, and also as speculative, argumentative, and largely hearsay."

It will be noticed that this objection does not raise the question of the tests being *ex parte*, and is much too general to apprise plaintiff that he must obtain better evidence of the properties of these alloys. The objection so made was not renewed on either of the hearings, nor raised at all in any way until suggested in a printed argument filed after the rehearing. If objection had been made at the hearing that the tests of Marsh were *ex parte*, and could not properly be considered, this would have been soon enough, because the court might even then have arranged for a test by an indifferent person in the presence of both parties, or by plaintiff with the right of inspection by defendant. This would have taken a considerable time, but was the only way to obviate objection to *ex parte* tests, which are generally disregarded by the courts, and as a general rule should not be relied on.

In this case the numerous tests on both sides seem to have been fairly made and assumed by both parties to be correct. Defendant's laboratory is evidently exceedingly well manned, and one would not look for tests intentionally misleading from that source. On the other hand, Marsh's testimony impresses me as fair, accurate, and frank. I can see no reason for disregarding the evidence on either side. I also think that the case may be rested entirely upon defendant's tests, and Marsh's testimony rejected, because its experts found the Marsh material and calorite to be quite alike in resistivity and durability, or resistance to oxidation at high temperatures, as shown by defendant's tests. The Marsh element had a resistance of 102, and "exhibits in a marked degree resistance to oxidation at temperatures approximately 800° C.," and calorite had a resistance of 110 to 112, and "resists oxidation at elevated temperature, for example, at temperatures of 800° C., to a marked degree."

It appears from defendant's testimony that it secured two specimens of the Marsh material for examination, and analyses were made, showing nickel 73.76, chromium 20.23, iron 2, manganese $\frac{1}{2}$, silicon $\frac{1}{3}$. While these small amounts of iron and manganese were probably only impurities in the nickel or chromium, of course, the idea of increasing the iron for greater ductility, and the manganese for deoxidation and better refining, was at once suggested, though probably no suggestion of the kind was necessary to chemists of the ability of those in defendant's employment. They then tried an alloy of nickel 70, chromium 20, iron 8, manganese 1, and found it exceedingly durable and of high resistance. The iron was used to get within the Placet disclosure, and outside Marsh; a proceeding entirely permissible and proper, though somewhat hazardous. An alloy of 75 nickel and 25 manganese was then suggested, so as to clearly escape the Marsh patent, and was found to give great life and resistance. It was, however, abandoned, and calorite finally adopted. An alloy of nickel 60, iron 20, chromium 15, and manganese 5 was then tried, and found to give

a high resistance and great durability. This alloy was called Placet wire, and had substantially the same properties as the calorite afterwards adopted by defendant. The engineer in charge of defendant's testing laboratory, Dr. Capp, testified that iron and manganese improve the workability of the alloy, and in his opinion increase its resistivity; but he claims no difference in durability, and only a 10 per cent. difference in resistivity.

When we come to Marsh's testimony, it is found that he obtained a resistivity of 110 in an alloy of 65 nickel and 35 chromium, and that in durability, melting point, and temperature coefficient the two alloys are practically the same. Even if a difference in resistivity be conceded, this is much less important than durability, because resistance varies inversely as the cross-section of the conductor. If a wire of lower resistance is drawn a little finer, it may have the same resistance as a little coarser wire made of a higher resistance element. Marsh's account of his tests substantially corroborates those of the defendant.

On the whole, I am satisfied that plaintiff's and defendant's alloys are substantially the same in all but composition, and that there is very little disagreement between the evidence on each side in respect to the real nature of the two.

There should be a decree for plaintiff.

COAL & COKE BY-PRODUCTS CO. v. ERNST et al.

(District Court, W. D. Pennsylvania. Feb. 10, 1914.)

No. 6.

1. PATENTS (§ 129*)—DENIAL OF VALIDITY—ESTOPPEL.

Where plaintiff claimed as assignee of defendant E., the patentee who thereafter became connected with defendant corporation, and as such contracted to manufacture a similar machine, and engaged defendant B. Company to construct the same, the patentee and his corporation were estopped to deny the validity of plaintiff's patent, and the B. Company was also subject to such estoppel so far as the machine it had contracted to build constituted an infringement; it not being liable, however, as an independent infringer.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 182½-186; Dec. Dig. § 129.*]

2. PATENTS (§ 26*)—OLD ELEMENTS—REARRANGEMENT—INVENTION.

Where a patentee took certain old elements and constructed a new apparatus, in which every element was to be found in one or other of some prior patent, but his rearrangement brought about a new invention and a new and useful apparatus, and it required inventive genius to reassemble such prior known elements and construct a complete workable machine, his invention was patentable.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.*]

3. PATENTS (§ 328*)—VALIDITY—GAS CLEANER.

Ernst patent No. 896,365 for a gas-washing apparatus, and No. 900,062 for the process, held to involve inventive genius, to be valid and infringed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the Coal & Coke By-Products Company against Alfred Ernst and others. Decree for complainant.

Kay & Totten, of Pittsburgh, Pa., for plaintiff.

Weil & Thorp and C. M. Clarke, all of Pittsburgh, Pa., for defendants.

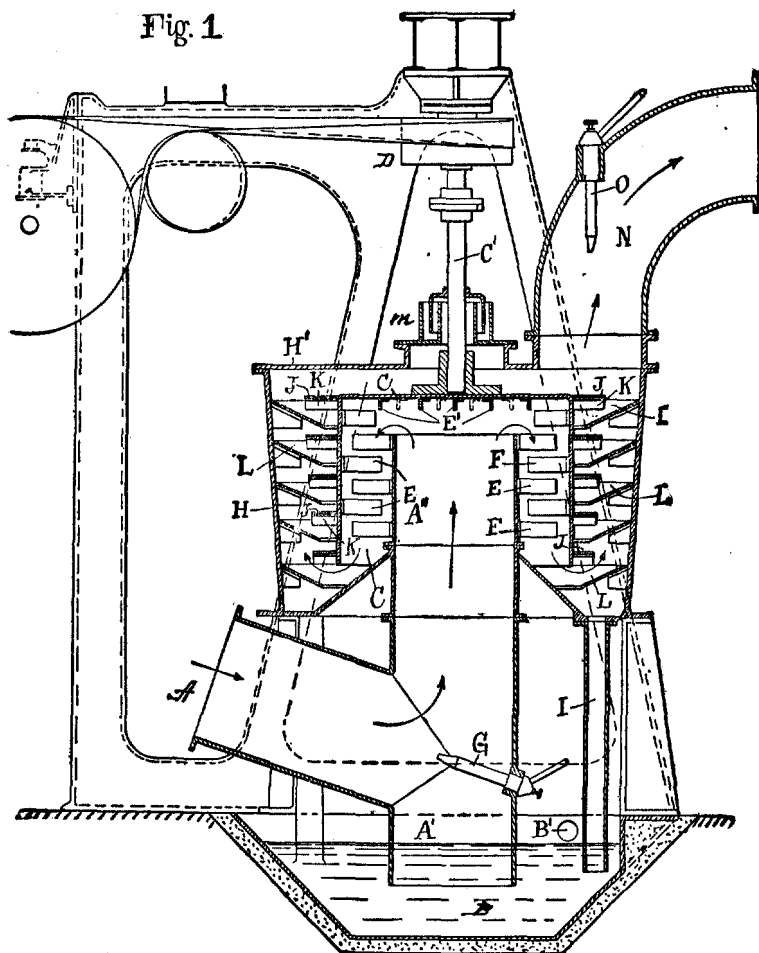
YOUNG, District Judge. The bill is filed in this case for the infringement of two patents issued to Alfred Ernst, and by him assigned to the Coal & Coke By-Products Company. Of these patents No. 896,365 is dated August 18, 1908, and No. 900,062 is dated September 29, 1908. Of the defendants, Alfred Ernst is the above-named patentee, and he is a stockholder of and prominently connected with the operations of the Roessing-Ernst Company, a corporation, also a defendant, and the other defendant is the Best Manufacturing Company, a corporation.

The pleadings and the evidence show that the Roessing-Ernst Company contracted to furnish a certain gas-washing apparatus to the Macbeth-Evans Company, and that it let the contract for the building of it to the Best Manufacturing Company, furnishing that company with drawings and specifications. It is alleged that these drawings and specifications show an apparatus which is an infringement of plaintiff's patents, and that the apparatus as constructed by the Best Manufacturing Company is an infringement likewise.

[1] The record presents an anomalous case in this: Neither Ernst nor his company may set up the invalidity of the patent because Ernst, being the inventor of the apparatus, and the assignor to another, may not be permitted to impugn its validity. This also applies to the company with which Ernst has associated himself. It applies also to the other defendant, the Best Manufacturing Company, so far as the one machine is concerned, because the record shows that the Best Company cannot be an independent infringer; the degree of its participation in the alleged wrong being simply that of a constructor according to designs prepared and furnished to it by the other defendant. Inasmuch as the larger part of the evidence bears upon the prior art as anticipating or limiting the scope of the patents in suit, and has been argued by counsel fully, a defense which is available to the Best Company generally outside of this one machine, we shall here consider the defense of invalidity raised by the pleadings and evidence.

Let us have first clearly before us what the apparatus described by these patents is; for while one is for a process and the other is for an apparatus, they may easily and fully be considered together. The apparatus consists of an inverted cup placed within an upright casing, leaving a space between the outer wall of the inverted cup and the inner wall of the casing. The inverted cup is fixed to a shaft passing vertically through its center, so that it may be made to revolve inside of the outer casing. The apparatus is sealed at the top to prevent the escape of gas. The outer casing is built upon a foundation, and within this foundation is a space filled with water for the purpose of sealing the apparatus and preventing the escape of gas downwardly, and also for the purpose of catching and retaining the tar, ammonia, and other

by-products separated in the cleaning process. Within the inverted cup an upright cylinder is placed. This cylinder is built upon the foundation referred to, and projects upwards within the inverted cup almost to the top, and is of such diameter as to leave a space between it and the sides of the inverted cup. Upon the outsides of this last cylinder, and between it and the inside of the inverted cup, are fixed vanes or blades. On the inside of the inverted cup are fixed vanes or blades, and on the outside of the inverted cup and between it and the inside of the outer casing are fixed vanes or blades. On the inside of the outer casing are fixed vanes or blades. At the bottom of the apparatus there is a pipe for the admission of gas and one for the admission of water. At the top of the apparatus there is a pipe for the exit of the purified gas and a pipe for the admission of water into the apparatus. The following drawing shows the apparatus:



The process is as follows: The gas is admitted hot into the bottom of the apparatus, and is met by a fine spray of water, saturating the gas. The gas then passes upwards through the open passage, and is diverted so as to pass downward between the inner cylinder and the inside of the revolving inverted cup, and in its passage, by centrifugal action and the beating action caused by the revolving blades and the obstructing blades, the water and gas are commingled, and the tar, ammonia, and other substances held in suspension are released and thrown against the inside of the inverted cup and find their way down into the reservoir below. The gas then turns upward between the outside of the inverted cup and the inside of the casing, and during its passage it meets with water which passes from ledges on the inside of the casing, and is also subjected to another beating, caused by the blades on the outside of the revolving cup and the blades on the inside of the outer casing. By the centrifugal action and beating the ascending gas and descending water are commingled, and the tar, ammonia, and other matters held in suspension are removed, the particles striking the inside of the outer casing and finding their way to the reservoir below.

We have carefully examined all of the patents introduced by the defendants for the purpose of showing the prior state of the art, and have also read and considered the evidence concerning the patents submitted by both plaintiff and defendants. Without discussing them in detail, we are satisfied that the evidence shows that every element set forth in the specifications and claims of the two patents in suit was old at the time of the granting of the patents. It clearly appears that the spraying of gas with water, or the bringing of gas into contact with water on its admission into the cleaning device, had been discovered and used before these patents were granted. Causing the gas to pass in one direction, either horizontally or vertically, and to meet the water passing in the opposite direction, was old. The treatment of gas by revolving fans and the beating of the gas saturated with water, so as to separate by centrifugal action the impurities or substances held in suspension, was old. The arrangement within gas-cleaning machines by which the gas on its passage toward the exit would be constantly meeting purer and cleaner water was old.

[2] What then did the plaintiff do? He took these old elements, and constructed a new apparatus, in which every element, or the suggestion of every element, is to be found in one or other of some patent before his. His invention consisted in taking these elements as he found them in the prior art, and by changing them, using their equivalents, bringing out a new function, and by rearranging them, thereby produced a new and useful apparatus. It required invention to take the disjecta membra which he found in many of the patents and from them construct and complete a workable machine. His patents are therefore valid as to the construction which the patentee has described and claimed, both as to the apparatus patent No. 896,365, and the process patent No. 900,062.

[3] Let us now see whether or not the defendants have infringed. It is a fair conclusion from the evidence that the machine designed and constructed by the defendants was designed by Alfred Ernst, the

patentee of the patents in suit, and that he brought to that task all the knowledge he had of the prior art and as set out in the two patents in suit. We find from an examination of the evidence, including the drawings of the infringing machine, that the infringing machine utilizes, just as the patents in suit do, as we have found, all the elements of the prior art. We have the three cylinders, namely, the outer casing resting on a foundation containing water, the inner cup fixed to a vertical shaft as the means of revolving it, sealed at the top, the inner cylinder within the inverted cup, resting on the foundation and continuing to almost the top of the inverted cup, forming an open passageway for the gas. The open space between these cylinders for the passage of the gas from its entrance at the bottom to its exit at the top. The innermost cylinder has on its inside walls spaced projections against which the gas and water are thrown by the fans or vanes on the prolonged shaft by which a beating action is caused. The inverted cup has on its outside fixed vanes or blades which revolve with that cylinder, and there are projections on the inside of the outer cylinder to obstruct or baffle the gas and water thrown against them by the blades. There are means for introducing the gas at the bottom; also means for introducing water to meet the gas on its last and upward passage. We have then all the material elements of the patent in suit, to which is added alone the placing of vanes on the prolonged shaft, and even this element is not new, for we have in *E'* of the drawing of patent No. 896,365 the provision for blades extending from the top of the inverted cup into the open passage, but the blades in the infringing device are placed horizontally by attachment to the central shaft, while the patent provides for vertical blades. The process is similar, with some exceptions which we shall note. The gases are introduced at the bottom and caused to flow through the water at the bottom of the apparatus, but move upward through a serrated covering having V-shaped openings. As it passes through the water, the gas, being hot, takes up moisture, and when it passes through the serrated openings it meets with the equivalent of a spray caused by the bubbling action of the water and by water thrown on the serrated cover. As it passes up through the inner cylinder saturated with water, it is baffled or beaten by the fans upon the shaft opposed by the projections on the inside of the cylinder, and by centrifugal force and beating the tar, ammonia, and other substances held in suspension are separated and thrown against the inner side of the cylinder and find their way down to the reservoir below. The gas, somewhat cleansed, is then passed by the action of the fans on the shaft out of the inner cylinder into the space between the inner cylinder and the inside of the revolving cup. During this movement it meets with no obstruction, but passes through an open passage. The gas then turns from this passage upward, and passes between the outside of the inverted revolving cup and the inside of the outer casing. Here the gas meets with a descending current of water, and the water and gas are commingled by the action of the fans on the outside of the revolving cylinder, opposed by the projections on the inside of the outer casing, and by centrifugal action and the beating process the tar, ammonia, and other substances held

in suspension are thrown against the inside of the outer casing and find their way to the reservoir below. The difference in the process is that the gas is not met with the fine spray at its entrance but first passes through the water in the reservoir. The gas is beaten on its first upward movement, but is not beaten on its first downward passage, but is beaten and subjected to water on its last upward movement. This difference in arrangement is of course very slight. The only advantage would appear to be that it permits the gas to escape, coming in contact with the discharged tar, ammonia, etc., after being cleansed, a result that occurs in the patented process, as the gas in its downward course meets at the bottom the downflowing impurities. It appears to be a useful rearrangement but one involving no degree of inventive genius. Used as it is by the patentee, it certainly would not relieve him from the charge of infringement.

It appears conclusively to us that the whole apparatus and the process, as shown by the evidence, to be used by the defendants is an infringement of plaintiff's patents, and the defendants should be restrained perpetually from such infringement.

HJARNE v. AMERICAN VOTING MACH. CO.

(District Court, D. Massachusetts. March 18, 1914.)

No. 371.

1. PATENTS (§ 328*)—VALIDITY—VOTING MACHINES.

Johnson patent, No. 960,020, claim 3, *held* fatally defective for indefiniteness in that it was impossible to determine with definiteness which of the things mentioned as elements of the combination claimed were intended to be described as permitting the key-spindle to be turned back at any time before the machine was set for the next voter.

2. PATENTS (§ 328*)—INFRINGEMENT—VOTING MACHINES.

Johnson patent, No. 1,019,476, claims 4 and 5, for an interlocking device in voting machines, *held* not anticipated by Weser patent, No. 448,308, for pedal-action for piano-fortes, but were valid and infringed.

In Equity. Suit by Carl E. Hjarne against the American Voting Machine Company for patent infringement. Decree for complainant for part of the relief demanded.

Louis H. Harriman, of Boston, Mass., for complainant.

Clyde L. Rogers, of Boston, Mass., for defendant.

DODGE, Circuit Judge. The plaintiff alleges infringement by the defendant of United States patent No. 960,020, May 31, 1910, for a voting machine, and of United States patent 1,019,476, March 5, 1912, for a locking device for registering mechanism. Both were issued to G. Johnson, assignor, and the plaintiff owned both when the bill was filed.

The first-named patent has eight claims, but we are concerned only with the third. The other patent has eleven claims, whereof the fourth and fifth only are now to be considered. The plaintiff gave

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

notice on the record, after the defendant's evidence had been closed and before taking evidence in rebuttal, that the arguments would be restricted, on final hearing, to the claims above specified.

The defendant company makes a voting machine wherein are found, according to the plaintiff's expert, the subject-matter and all the elements of the above claims, in substantially the same relation as set forth in the respective patents. No testimony in contradiction of this has been introduced by the defendant, but it denies the validity of each and all the claims in question.

The following description of a voting machine containing the mechanism described in both patents is quoted from the plaintiff's brief:

The machine "has a so-called key-spindle 50, for each candidate, each spindle having a register connected thereto, so that for each half of a full rotation forward, a single vote will be registered. A locking-lever 56 is provided for each key-spindle, which operates to lock the same against further forward rotation, when it has been rotated a half revolution forward, and means, as a pawl 49, are provided to prevent rearward rotation thereof, under certain conditions. The key-spindles are arranged in a series of vertical rows, and a vertical bar 44 is provided for each row, which is lifted, to a certain extent, when a spindle in the row is rotated forward, and limits the number of spindles in the row which may be operated by a single voter, i. e., according to the number of candidates which may be voted for under one head. This is done by providing a stop, which limits the extent to which the bar is raised, the stop being adjusted according to whether the voter is to be permitted to vote for one or more candidates for the same office. These bars are also moved to lock all the spindles against rotation, as the voter leaves the booth, so that the machine cannot be * * * operated, except in the regular way. The entrance to the machine or booth is guarded by a lever which the voter must lift as he enters, and in doing this, he unlocks these bars so that the key-spindles may be operated, and the exit from the machine is guarded by a similar lever, so that, as the voter leaves the machine, he must lift this lever, and, by so doing, he draws down all the bars and locks them, and by locking them locks the key-spindles so that the machine cannot be operated until the entrance lever is again lifted."

[1] Claim 3 of patent 960,020 relates to the key-spindles and the means for regulating or controlling their rotation. It is as follows:

"3. In a voting machine, a combination of a manually controlled key-spindle, a rack having teeth, a wheel having teeth for engaging said rack, a locking-lever and a cam-wheel, turning with said toothed-wheel and engaging said locking-lever to prevent more than a half revolution forward of said key-spindle by any one voter, but which permits the key-spindle to be turned back at any time before the machine is set for the next voter."

There is an obvious difficulty in determining from the above language used which of the things mentioned as elements of the combination claimed are intended to be described as permitting the key-spindle to be turned back at any time before the machine is set for the next voter. And the specification and drawings show that none of the elements mentioned as included in the combination can properly be said to effect this result. Means to effect it are indeed described in the specification and drawings, but they show a feature essential to the accomplishment of the result by the means described, viz., a dog or pawl 49, pivotally mounted in the casing of the machine and weighted at one end in order to keep it normally away from the cam-wheel mentioned in the claim, wherewith it is at times to be engaged. Of this dog or pawl there is no mention in the claim. I do not think it can

be brought in by implication or inference under the circumstances shown. Without it, the claim is either too incomplete and indefinite to be valid, as to the mechanism whereby turning back of the key-spindle is to be "permitted" within the limits stated, or it is anticipated by a prior voting machine patent, also issued to Johnson (No. 737,412), no infringement whereof is charged.

[2] The plaintiff's other patent, No. 1,019,476, relates to the mechanism whereby the levers lifted by the voter when he enters or leaves, unlock or lock the bars so as to permit or prevent operation of the key-spindles.

Claim 4 of this patent reads:

"4. In a locking device for registering and similar machines, the combination of a shaft provided with a plurality of transverse members adapted to engage and lock the operative parts of the machine, means to unlock said shaft, means to rotate said shaft when unlocked to release said operative parts, a finger mounted on said shaft, a cam-lever adapted to engage said finger to return said shaft to a locked position and means to operate said cam-lever."

The defendant objects that the element "a cam-lever, etc.," appears from the specification and drawings to be neither a cam in any proper sense, nor a lever in any sense, and that the claim is left by such a misdescription too indefinite and uncertain to be valid. The specification and drawings, however, leave no doubt as to the precise nature of the thing to which the name criticised is applied, or as to its construction or mode of operation. I am unable to say that the term used is so inapplicable as to be misleading, and unable therefore to hold this claim invalid.

Claim 5 of the same patent, No. 1,019,476, is as follows:

"5. In a locking device, the combination of a shaft provided with a plurality of transverse members adapted to engage and to lock the operative parts of a given mechanism, means to lock said shaft when it is in a position to lock said operative parts, means to unlock said shaft, a lever to control said unlocking means, means to operate said shaft when unlocked to release said operative parts, means to return said shaft to a locked position and a lever to operate said returning means."

The defendant contends that all the elements of this claim are found in a patent belonging to a nonanalogous art, viz., United States patent to C. L. Weser, No. 448,308, for pedal-action for piano-fortes. The mechanism there described might be said to constitute a locking device and to include a shaft, but the shaft has a plurality of transverse members adapted to engage and lock operative parts of a given mechanism only in case a crank, formed by a U-shaped lateral bend in the shaft, whereby a rotation of the shaft is made to raise or lower what is called the action-rod, can be counted as two transverse members instead of one. The patent in suit makes it clear that the means to lock the shaft when in position to lock the operative parts and the means to return the shaft to locked position, which form part of the combination claimed, are independent and distinct elements; whereas, in the mechanism of the Weser patent the same parts of the mechanism constitute the means for effecting both results. The above are not the only respects in which the attempt to find all the elements of the claim under consideration in the Weser patent requires a resort to

constructions which seem to me strained and unnatural. It is evident that the mechanism patented by Weser was neither intended to accomplish, nor capable of accomplishing, the purposes of the combination claimed, as found, by Johnson. I am therefore unable to regard this claim as anticipated.

I must therefore hold that claim 3 of Johnson patent, No. 960,020, is invalid, but that claims 4 and 5 of Johnson patent, No. 1,019,476, are valid and infringed by the defendant. There may be a decree accordingly.

McCLAVE-BROOKS CO. v. M. H. TREADWELL CO. et al.

(District Court, M. D. Pennsylvania. March 7, 1914.)

No. 108.

1. PATENTS (§ 328*)—VALIDITY—ANTICIPATION.

The McClave patent, No. 831,178, for an improvement in rocking grate bars having fuel supporting caps beveled downwardly at the edges from the top surface, and one edge of each cap overlapping its neighbor, permitting expansion without making large initial spaces between the caps, and without offering obstruction to the movement of fuel on the grate surface, required for the burning of small-sized anthracite coal, *held* void for anticipation.

2. PATENTS (§ 328*)—INVENTION.

The McClave patent, No. 831,178, for an improvement in rocking grates for the burning of small-sized anthracite coal, in so far as it provided for cutting or rounding off the angular edge of the grate points where they overlap each other, so as to avoid interference with the fireman's cleaning hoe if a point should turn or ride up beyond its adjoining neighbor, was a mere application of mechanical skill, which would naturally have suggested itself to a fireman or foundryman, and did not constitute patentable invention.

In Equity. Suit by the McClave-Brooks Company against the M. H. Treadwell Company and another for patent infringement. Bill dismissed.

Welles & Torrey, of Scranton, Pa. (Melville Church, of Washington, D. C., of counsel), for complainant.

A. A. Vosburg, of Scranton, Pa., and Clifton V. Edwards, of New York City (Julian S. Wooster, of New York City, of counsel), for defendants.

WITMER, District Judge. This suit is brought by the McClave-Brooks Company against the Stoeber Foundry & Manufacturing Company and the M. H. Treadwell Company for infringement of letters patent No. 831,178, for improvement of grates, granted September 18, 1906, to William McClave, complainant's assignor. The case is at issue on plea to the jurisdiction of the Treadwell Company and on answer filed by the Stoeber Company. The answer sets up the usual defense of want of invention, anticipation by prior patents and alleged prior uses, and noninfringement.

Though the claims of the patent are silent, the inventor testifies, and it also appears from the specifications and general design of the con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

struction, that it was his purpose, and he so constructed his grate, to serve the purpose of economically burning very small sizes of anthracite fuel, generally known as Nos. 1 and 2 buckwheat. The general nature of the invention is stated in the opening paragraph of the specification as follows:

"This invention relates to improvements in grates, and particularly to rocking grates, which are pivotally mounted or journaled in a combustion chamber of a furnace in such a manner that they are capable of being rocked for dumping the material thereon into the ash pit."

The object of the invention appears to provide a grate bar wherein the edges of the rocking bars will not lock or bind together when expanded by heat, nor interfere with the use of the fireman's tools; also to provide the rocking grate bars with edges or noses which will fit together, so as to prevent the running through of fuel between them, and, further, to provide means for tipping the bars in one direction with adjustable means to prevent the overlapping edges or noses from pounding each other. In the language of the specification:

"It is the object of the invention to provide a grate in which rocking bars may be used, the said bars tipping only in one direction for dumping materials from the grate surface, their edges being so shaped as to be capable of moving one upon the other to some extent to permit of the expansion of the bars under great heat and yet not interfere with their being rocked for dumping the materials into the ash pit, not to materially interfere with the free use of fireman's cleaning implements, such as slash bars, hoes, etc., when in normal position. It is the further object of the invention to provide a rocking grate bar with fuel-supporting portions or caps having noses which match and fit upon the noses of adjacent caps, to prevent the running through of fuel and to provide means for rocking the bars in one direction and adjustable means for controlling the return of the bars and prevent them from pounding one upon the other."

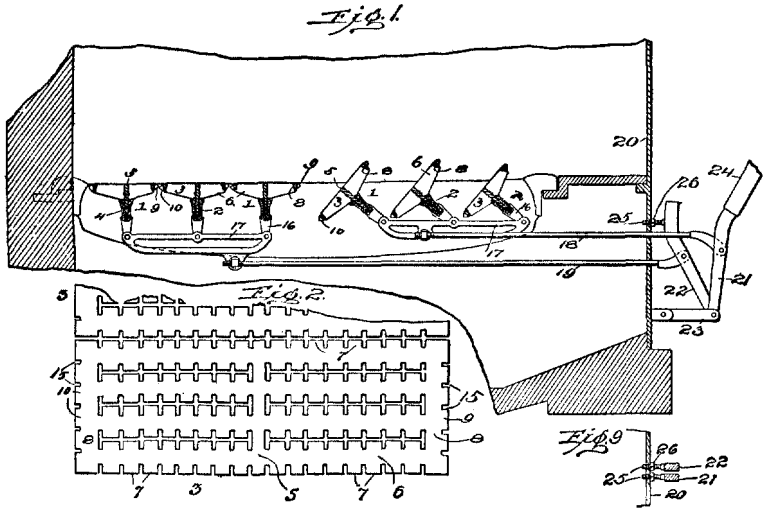
These objects are to be obtained by an invention as claimed in recitals of various combinations and permutations of the elements of construction in the patent, numbered 1, 2, 3, 5, 6, 7, 8, 13, 14, and 15, all of which, excepting the eighth and thirteenth, relate solely to the mechanism of the fuel supporting bars as typified in the following claim:

"6. A grate mechanism, comprising rocking grate bars having fuel supporting caps, beveled downwardly at their edges from the top surface, one edge of each cap extending downwardly to a greater extent than the other edge, so that adjacent edges of the bars may lap upon each other, the lapping of the bars permitting of the expansion of the caps under the action of heat without making large initial spaces between the caps, and without offering obstruction to the movement of fuel upon the grate surface, when in normal position."

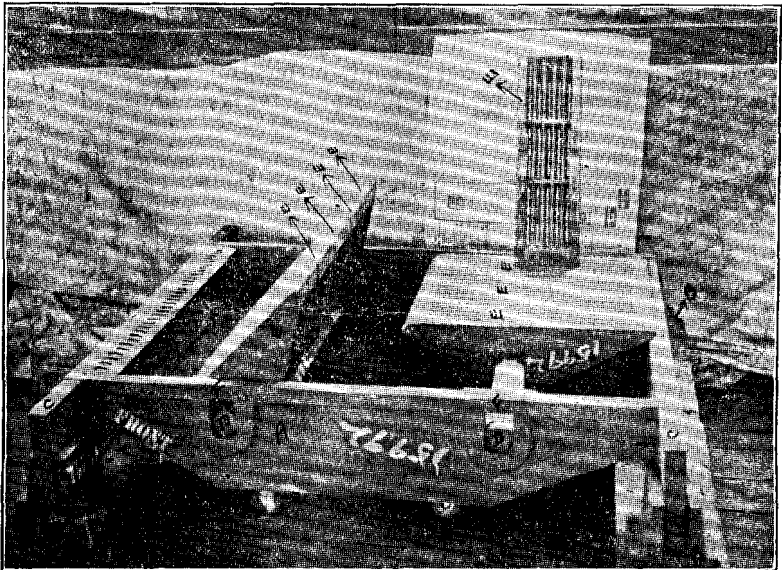
Claims 8 and 13 add the additional element of "means controlling the extent of movement of the bars, to preserve a space between the said lapping teeth."

Truly the defendant's device embodies means for preserving a space between the lapping teeth of proximate grate caps and for limiting the extent to which said teeth may approach each other. However, these means are vastly different in construction and to some extent in function, as admitted by the patentee, McClave. In the complain-

ant's device, as appears from the drawing, the links (17) by which the several grate bars are simultaneously tilted is connected by a rod (19) operated by a lever (22) which swings against an adjustable stop (25).



The defendant's grate is provided with means cast integral with the journal, namely, a projection on the journal having practically a straight side on it to strike the vertical side of the journal bearing when it is moved, and it is stopped thereby when the grate is rocked to a certain distance.



Grates of the overlapping spaced type are also not new, as shown by the prior patents to Hildreth, 112,246, Steele, 117,007, Scott, 569,063, and in the German patent 32,664. Admittedly there is no functional difference between defendant's projection on the journal and the rest bar of Scott, or the stop lug in the German patent; hence the defendant's grate cannot be said to infringe complainant's device in its additional elements or means for controlling the bars as to spacing embodied in claims 8 and 13.

As to the remaining claims, typified in claim 6, the proposition submitted appears more difficult. It is very evident that the feature of the device most emphasized lies in the double beveled end of the fuel supporting caps. The manner of their construction and the object to be obtained thereby appears from the specification, as follows:

"Instead of allowing the ends of the grate bars to butt squarely together, or approach each other closely, with a vertical joint between them, through which fuel might drop, the ends are made to overlap, preferably by inclining the end surface, each bar overlapping its neighbor at one end underlapping its other neighbor at the other end. In this way the joint between the ends of adjacent bars is inclined, instead of being vertical, and in consequence of this inclination fine fuel is less apt to drop through if the bars are not in contact; expansion will not cause them to lock tight against each other, since the bar with the overlap will merely slide upon its neighbor, causing that end of the bar to be slightly higher."

The bars with an overlap can, of course, be dropped or tilted in but one direction. This inclination of the end surface, one extending over and the other under its neighbor, produces, of course, an obtuse angle between the top and end surface of one bar (the underlapping bar) and an acute angle between the top and end surfaces of its neighbor (the overlapping bar). When the bar is expanded under the continued action of heat, and by sliding up over the inclined surface of its neighbor has been raised above the level of the surface of this neighbor, there would be a liability of the fireman's hoe to catch on this slightly projecting acute angle, and the patentee therefore proposes to cut it off, either by a plane bevel or by rounding it. In either case the liability of the hoe to catch on the edge of the grate bar would be lessened.

The functions of the two bevels are separate and distinct, as will be noted, and do not affect one another, or co-operate in any way. The function of the lower bevel is to permit the bar to rock in only one direction, and by overlapping its other neighbor will permit the use of small fuel without sifting, and also permit the bar to ride upon the adjoining bar if expanded to which they are liable when heated. The only function of the upper bevel is to prevent obstruction to the hoe or fire tool. These features of the device, the upper and lower bevel of the overlapping edge or end of the fuel-supporting cap, will be considered in their order.

That the defendant's device embodies the structural features and functions shown in the complainant's grate cannot be successfully denied. An effort at comparison is useless, and would indeed be difficult, on account of similarity. All that remains for determination is whether the complainant is entitled to a monopoly in its benefits.

That the patentee was not the first to conceive the idea of the lower

bevel or lapping edges employed in his grate is very evident from the prior patents to Hildreth, Steele and Scott, *supra*. These patents are for dumping grates in which the edges of the adjoining grate bars are beveled and overlapping, and tilting or dumping in only one direction, preventing fine fuel from dropping through, and riding upon one another under heat expansion. It will be seen that these grates may be readily adapted and used to burn any kind of fuel in so far as the element under consideration is regarded.

[2] Remaining for consideration is the matter of cutting or rounding off the angular edge of the overlapping bar, so as to avoid interference with the cleaning hoe, if the same should turn or ride up beyond its adjoining neighbor. A number of patents were cited in which bars in stationary grates were provided with rounded ends; but I have failed to find that any of them compare in function with those of complainant's device.

It is, however, proven beyond a doubt that long prior to the patent it was common in the practical art to bevel off edges in dumping grates to avoid upward projections. Grates in which the sharp corner of the overlapping edges were cut off vertically, allowing a small clearance space between the level of the overlapping ends, were in use for many years prior to the patent, in the plant of F. C. Linde Company, New York City. A drawing of the bars in use, as well as physical exhibits, were produced in which the downwardly beveled or cut-off ends, as exemplified in the defendant's grate bar, clearly appear. The prior use of other instances of somewhat similar bars, having rounded or cut-off ends, which when assembled in a grate necessarily produce a transverse depression in the surface, have been proven. Though I had not been persuaded to the conclusion reached, I am of the opinion that cutting off the surplus material, as may be regarded the sharp overlapping and extending edges or corners of these fuel supports, does not constitute patentable invention. It is undoubtedly the result of mere mechanical skill, and not invention. The cutting off or rounding of projections would be most natural to suggest itself to even a fireman, so as to avoid the catching of his hoe or slice bar. Any foundryman familiar with the art would know how to do it. In this respect the case resembles *Facer v. Midvale Steel Works Co.* (C. C.) 38 Fed. 231; *Johnson Co. v. Penna Steel Co.* (C. C.) 62 Fed. 156; *Capital Sheet-Metal Co. v. Kinnear et al.*, 87 Fed. 333, 31 C. A. 3; *Parsons Mfg. Co. v. Coe*, 185 Fed. 522, 107 C. C. A. 628.

In view of the conclusion reached, the question of jurisdiction raised by the plea of the Treadwell Company does not require notice.

The bill is dismissed, at the cost of the complainant, and an exception is noted for the complainant.

WITZEL et al. v. BERMAN.

(District Court, S. D. New York. June 23, 1913.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—WIRE MATTRESS.

The Witzel reissue patent, No. 13,125 (original No. 921,494), for an improvement in spring or woven wire mattresses, consisting of a side guard to prevent the slipping or spreading of the upper mattress, was not anticipated, and discloses patentable invention, as well as utility as evidenced by the commercial success of the invention; also, *held* infringed.

In Equity. Suit by Charles J. Witzel and the Englander Spring Bed Company against Barnet Berman. On final hearing. Decree for complainants.

Decree affirmed in 212 Fed. 734.

Chester A. Weed, of New York City, for complainants.
Samuel Brand, of New York City, for defendant.

MAYER, District Judge. This is one of those simple inventions in which a correct determination depends partly upon a close analysis of the prior art and partly upon acquiring now the mind and eyes of the artisan as he looked upon the problem before it was solved.

The suit is for infringement of reissued letters patent No. 13,125 granted to Charles J. Witzel, June 28, 1910; the original patent having been granted May 11, 1909, and reissue applied for on June 12, 1909. Complainants charge the infringement of ten claims (7, 10, 13, 14, 19, 20, 21, 22, 23, and 24).

The subject-matter is an improvement in spring and woven wire mattresses by which the hair or other mattresses that are supported on the same are held in position thereon and prevented from shifting to one side or the other.

In the specification it is stated that one of the objections to the metallic bedsteads in general use is that the mattresses which are placed on the wire mattresses shift on the same from one side to the other or so spread that an unsightly appearance is the result.

The object of the invention is:

"To obviate the shifting or spreading of the hair or other mattresses on the wire mattresses by holding the same securely in position on the wire mattress and prevent, in a reliable manner, the unsightly shifting or spreading of the hair mattress on the same; and for this purpose the invention consists of a wire mattress which is provided at both sides in the preferred form, with bent up longitudinal guards which are reinforced by heavier strands along the side edges of the wire mattress and at the upper edges of the bent up guards, said bent up guards being attached to bent up lugs on the transverse end straps of the wire mattress, and the bent up lugs connected by coiled springs with auxiliary lugs which are attached to the metallic cross or transverse bars or irons at the ends of the wire mattress by which the same is supported on the bedstead."

The claims are set forth in technical phraseology substantially similar in import to the stated object of invention.

To one not a housewife nor an hotel keeper, the improvement might seem of small consequence, but the record shows a commercial suc-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cess so substantial as to lead to the conclusion that the invention dealt with a subject of considerable importance in this branch of business.

The defenses are: (1) That the claims are functional; (2) non-invention because of the simplicity of the mechanical construction; (3) that the prior art shows that Witzel's claims cover an aggregation of certain good elements in previously existing structures; and (4) that in view of the prior art the claims are at best only for the specific mechanism described, and, so treated, defendant's structure does not infringe.

No time need be spent on the question of infringement, because, even under a close and narrow construction of the Witzel claims, defendant's structure clearly infringes, and it is significant in this connection that defendant has adopted the Witzel form rather than his own (letters patent to Berman, No. 580,565, dated February 21, 1911).

In this record, it is established that for many years the slipping, flattening, and spreading of soft or stuffed mattresses was the occasion of frequent complaint—as testified to by a number of apparently reliable and (in some instances) disinterested witnesses. The dealers in mattresses and bedsteads recognized that, if this defect could be overcome, greater comfort and neatness could be attained and wear and tear lessened.

Mr. Kreuzkamp, an experienced manufacturer in this line and the secretary and treasurer of Englander Spring Bed Company, one of these complainants, recognized the utility of the Witzel patent and secured the exclusive license from Witzel at a substantial figure. From the fall of 1909 until January 1, 1913, the Englander Company had sold, over a large territory, about 109,000 of these patented side guard springs at an aggregate price of nearly half a million dollars.

As prior to the Witzel there was not on the market a similar structure, it is obvious that the invention in question filled a genuine need in this line of business. Probably capable business methods contributed to success, but the evidence is convincing that the controlling reasons for success were the merit and practical usefulness of the article.

The nearest approach to the Witzel is the Hoey patent (No. 671,068, April 2, 1901). The result sought to be attained by Hoey was in substance the same as that sought by Witzel—thus showing that the subject was one which had attracted attention in this art.

It is obvious to the untrained eye that Hoey failed to accomplish the desired result, and there is no evidence that the Hoey was ever made or placed on the market.¹

It sometimes happens that a valuable idea disclosed in a difficult or highly technical art is not availed of at the time, because of lack of funds or reluctance to experiment financially with a novel structure ahead of the times, but this art deals with mechanically simple articles of necessity and widespread use, and, if Hoey had conquered the difficulties, it is fair to assume that his patented structure would have found its way to the commercial world.

Later (letters patent No. 231,699, January 2, 1906), Gillette sought

¹ Note.—Any one interested in a technical description of its shortcomings may read Expert Bentley's testimony, C. R., page 169 et seq.

to solve this alleged easy problem, but an examination of his specifications and complainants' exhibit photograph will show to the layman's eye the impracticability also of this device, and here, likewise, there is no evidence of manufacture or use.

The other patents in evidence (Billington and Palmer) need not be discussed, for they are even further removed from prior art suggestion than Hoey and Gillette.

Much emphasis is laid by defendant on the Owen Secret Bed manufactured by the D. T. Owen Company of Cleveland, Ohio, a large concern of high repute. Mr. Clark, who has been connected with the D. T. Owen Company since 1903 and manager of its New York branch for eight years, testified, in effect, that the Owen Secret Bed did not accomplish the Witzel result, and that because it was unsalable its manufacture was discontinued after the loss of a "great many thousands of dollars." (See particularly X. Q. 49, C. R. 154.)

I regard Mr. Clark's testimony of more weight and assistance than that of experts. He is familiar with the art and its requirements and has given his testimony in the understandable language of a business man. In view of his testimony and the fact that the file wrapper disclosed the Billington, Palmer, and Hoey patents, the presumption of patentable novelty is not easy to overcome in this case.

The characteristics of the Witzel may be briefly summarized as follows: (a) The side guard is under tension so that it will automatically return to its initial position and take up the slack; (b) the guard is of less height than the stuffed mattress; (c) the guard is a part of the spring mattress structure and is removable therewith, while it does not interfere with the use of the spring mattress and the stuffed mattress in the ordinary manner; (d) the guard is flexible and soft, and, although the ends to which it is attached are unyieldable, the guard itself is yieldable with the bottom.

These characteristics have produced a new result, namely, a practical side guard of demonstrated utility.

It is, of course, easy to point out at this time what might be done to make the Hoey and the Gillette practical; but it may here be observed in the words of Judge Coxe in *Rajah Auto Supply Co. v. Emil Grossman Co.*, 188 Fed. 73, 110 C. C. A. 143:

"The invention is, of course, a narrow one, but it belongs to that large class where the courts have sustained improvements over the prior art, which produce a new and beneficial result that materially advances the art to which they belong."

Complainants may have a decree with costs for injunction and accounting.

Settle decree on five days' notice.

DUAL TIRED WHEEL CO. v. AMERICAN LOCOMOTIVE CO.

(District Court, D. Rhode Island. March 19, 1914.)

No. 24.

PATENTS (§ 328*)—INFRINGEMENT—WHEEL TIRES.

The Stillman patent, No. 666,571, for an improvement in wheel tires, *held* not infringed by a tire involving an annular metal ring between two rubber tires, not intended for use on a rail.

In Equity. Bill by the Dual Tired Wheel Company against the American Locomotive Company. Decree for defendant.

Horatio E. Bellows, of Providence, R. I., for complainant.

J. Snowden Bell, of New York City, and Edwards & Angell, of Providence, R. I., for defendant.

BROWN, District Judge. The bill charges infringement of letters patent No. 666,571, January 22, 1901, to Herbert L. Stillman, for improvement in wheel for vehicles. The single claim of the patent is:

"A car or carriage wheel having a pair of parallel rubber tires separated by a central metal tread."

The specification states that the improvement is intended more particularly for the automobile coaches operated on light rails. In describing the drawings it is said:

"*a* show rubber tires; *b* shows central steel tire; *c* shows center bearing rail."

The specification also says:

"In operation I place on the wheel a steel tire having a central steel tread with a channel on each side for the reception of the rubber tires. Said rubber tires are intended to run on the trams of the rail, and with light loads the rubber tires only come in contact with the rail. With heavier loads these flatten, so as to bring in contact the central steel tire on the head of the rail, limiting the weight on the rubber tires. It will thus be seen that the advantages of the rubber in adhesion to the tracks, preventing wear of the rails, and avoiding concussions, are secured, and that heavy loads may be carried, and that these wheels may be run on ordinary highways, the concavity in the face of the wheel tending to prevent settling in soft roads."

The defendant's wheel contains a pair of parallel rubber tires between which is an annular metal member which is three-quarters of an inch wide, and which assists in retaining the parts in place and in maintaining the two tires, between which it is interposed, at a determined and proper distance apart. This annular metal member or ring is at a considerable distance below the bearing surfaces of the rubber tires.

Upon the face of the drawing this annular metal member does not seem adapted to serve the function of a central metal tread, and there is no evidence that in actual operation the material of the rubber tires would be likely to be so compressed as to bring this annular metal member in contact with a rail or other surface.

It is not claimed that the defendant's wheel is used in conjunction with a rail, or serves as a central steel tire running upon a rail.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The complainant relies upon the statement in the specification that these wheels may be run on ordinary highways, the concavity in the face of the wheel tending to prevent settling in soft roads.

Upon the face of the exhibit there is doubt whether the defendant's wheel, if sunk into a soft road to such depth as to bring the metal ring in contact with the surface of the road, would, by reason of a metal surface of some three-quarters of an inch, have any practical or useful tendency to prevent settling.

The prior art, however, discloses wheels having two parallel tires separated by an annular tire which would afford a bearing surface in case the two parallel tires should sink into a soft road. The British patent, No. 2,500, of 1871, to Sellars, shows in figure 11 wheels formed with grooves and made of considerable width of tire, so that they can be used on rails or drawn over soft roads. British patent, No. 1,189, of 1880, to Wedekind, is for "a combination of rail and wheel for railways and common roads alternately." The wheel is made with a groove having a flange on each side, made sufficiently wide to permit the use of the wheel on roads not provided with rails. United States letters patent to Krajewski, No. 289,421, relates particularly to vehicles adapted for travelling the ground or along rails. The wheels have wide treads, circumferential grooves and flanges, the grooves being sufficiently wide to fit upon ordinary railway rails. In these patents rubber was not used; but the prior art shows also wheels having two rubber tires separated by a metal ring not used as a tread. United States letters patent to Libbey, No. 560,509, Carmont, No. 597,313, Esty, No. 662,594; also British patent to Lloyd, No. 14,885, of 1891, which shows a bicycle tire having three grooves of semicircular section, the middle groove empty, but the grooves on each side of the center groove are provided with rubber. This central groove seems fully as well adapted to serve as a bearing surface in case the rubber tires should sink into soft ground as the narrow metal part of defendant's wheel.

Upon a fair construction of the patent in suit the element known as a central metal tread must be adapted to use upon a rail. The defendant's wheel is not adapted for such use, and is not so used.

The use of parallel tires with an intermediate surface tending to prevent settling in soft roads did not, in view of the prior art, constitute a patentable novelty at the date of the patent in suit. Unless the claim be limited to a wheel with parallel rubber tires having a central tread adapted for use upon a rail, the claim is, in my opinion, invalid. Whether, in view of its broad language, it can be so limited and whether, when so limited, it is valid, we need not decide.

The complainant has failed, in my opinion, to show infringement.

The bill will be dismissed, and a draft decree may be presented accordingly.

KLAUDER-WELDON DYEING MACHINE CO. v. GILES et al.

(District Court, D. Massachusetts. March 3, 1914.)

No. 499, Equity.

PATENTS (§ 283*)—SUIT FOR INFRINGEMENT—COUNTERCLAIM.

New equity rule 30 (33 Sup. Ct. xxvi) does not authorize the defendant in an infringement suit to plead in his answer as a counterclaim a cause of action for infringement of another unrelated patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 448-450, 452; Dec. Dig. § 283.*]

In Equity. Suit by the Klauder-Weldon Dyeing Machine Company against John H. Giles and others. On motion to strike out parts of answer. Sustained in part.

Duell, Warfield & Duell, of New York City, for complainant.

Alfred Wilkinson, of New York City, and Samuel C. Bennett, of Boston, Mass., for defendants.

DODGE, Circuit Judge. 1. If the defendants John H. Giles and John H. Giles Dyeing Machine Company are estopped to deny the validity of the patents sued on because of the assignment of those patents to the plaintiff by the defendant John H. Giles, I do not think that enough appears from the pleadings to warrant the conclusion that the defendant Mason Machine Works was associated with them in the alleged infringing manufacture in such manner or to such extent as to affect it with the same estoppel. The arrangements made by Giles with the Machine Works to build dyeing machines for the Giles Company may or may not have been sufficient for such a conclusion, but merely upon the bill and answer, I cannot say that they were. The motion to strike out the eleventh paragraph of the answer is therefore denied.

2. I am unable to regard the so-called counterclaim set up in paragraph 14 of the answer as within Supreme Court rule 30 (33 Sup. Ct. xxvi). Terry, etc., Co. v. Sturtevant, etc., Co. (D. C.) 204 Fed. 103; Adamson v. Shaler (D. C.) 208 Fed. 566. The motion to strike out so much of the answer as relates to it is therefore granted.

In re MONTAGUE & GILLET, Inc.

(District Court, S. D. New York. March 18, 1914.)

1. BANKRUPTCY (§ 318*)—CLAIMS—FUTURE INSTALLMENT OF WAGES.

A claim of an officer of a bankrupt corporation for future installments of wages under a contract of employment for a fixed term at an annual salary is not provable in bankruptcy, because dependent on performance of the services to be rendered.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 481, 482; Dec. Dig. § 318.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. BANKRUPTCY (§ 318*)—CLAIMS—WRONGFUL DISCHARGE OF EMPLOYÉ.

Though voluntary bankruptcy of a corporation which had contracted for the services of an officer for a specified term at an annual salary were a discharge of the officer (a point not decided), his claim for a wrongful discharge is contingent and is not provable in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 481, 482; Dec. Dig. § 318.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Montague & Gillet, Incorporated, bankrupts. Petition to review order of referee expunging a claim. Order affirmed. Petition dismissed.

Petition to review the order of a referee expunging a claim. The petitioner had a written contract as vice president of the bankrupt coporation at the rate of \$1,800 per year for five years. He presented a claim for his future salary to the end of the term, which the referee expunged. The only point raised is whether a claim upon a written contract for future services is provable in bankruptcy.

Albert Francis Hagar, of New York City, for claimant.

Olcott, Gruber, Bonyng & McManus, of New York City, for trustee.

HAND, District Judge. [1] On principle I can see no reason to doubt that as future installments of wages are conditional in their nature, being dependent upon performance of the services to be rendered, so no claim for such installments is provable in bankruptcy. Upon authority the same result follows from the rule regarding rent (*Re Roth & Apfel*, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. [N. S.] 270 [2d Cir.]), and so it has been decided as to personal services in the District Court (*Re Inman & Co.*, 171 Fed. 185; *Re American Vacuum Cleaner Co.*, 192 Fed. 939). *Re James Dunlap Carpet Co.* (D. C.) 163 Fed. 541, recognizes that such claims are contingent, but depends upon the ruling in *Moch v. Market Steel National Bank*, 107 Fed. 897, 47 C. C. A. 49, that under section 63a(4) (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]) contingent claims are provable, a ruling expressly disapproved in *Re Roth & Apfel*, *supra*. Therefore in so far as the claim is for future installments it is not valid under the act.

[2] Nevertheless, an employé has, if he chooses, an immediate right of action for wrongful discharge, in which he may recover for future services, making allowance for the reasonable value of his prospective earnings elsewhere. *Pierce v. Tennessee, etc., Co.*, 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591. The question is whether he may treat bankruptcy as a discharge which gives him such immediate right of action. The subject is akin in principle to the question whether bankruptcy is an anticipatory breach of a commercial contract under the rule in *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953. Bankruptcy seems to be regarded as the equivalent of an anticipatory breach in *Re Swift*, 112 Fed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

315, 50 C. C. A. 264, and *Re Neff*, 157 Fed. 57, 84 C. C. A. 561, 28 L. R. A. (N. S.) 349, and there are dicta to the same effect in *Re Pettingill* (D. C.) 137 Fed. 143, *Re Spittler* (D. C.) 151 Fed. 942, and *Re National Wire Corp.* (D. C.) 166 Fed. 631. *Re Imperial Brewing Co.* (D. C.) 143 Fed. 579, stands alone to the contrary so far as I have found. *Re Silverman* (D. C.) 101 Fed. 219, has nothing to do with the point. It seems to me rather strange that the courts should not at least have distinguished between voluntary and involuntary cases, and with due deference I find it quite impossible to see how the mere filing of an involuntary petition against a man can be an anticipatory breach, whatever may be said for the adjudication. Yet the filing day is always the test. However, this is a voluntary case, and that question does not arise. If free to decide, I should not hold that even voluntary bankruptcy was either the equivalent of a wrongful discharge as here, or an anticipatory breach. Compositions take place, the bankrupt gets backers, and creditors are held off, even in the case of a corporation; bankruptcy is by no means always the equivalent to a final repudiation of the contract. *Phenix Nat. Bank v. Waterbury*, 197 N. Y. 161, 90 N. E. 435. Moreover, though the consideration does not perhaps apply in the case of personal services, which are not assignable, I am quite unable to reconcile the doctrine of anticipatory breach with the right of the trustee in bankruptcy to assume the contract cum onere. *Lovell v. St. Louis Mut. Life Ins. Co.*, 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423, sometimes cited, does not control, for an insurance company's contract certainly involves the retention of its assets pending the maturing of the policy. However, in view of the authority to the contrary, I shall not decide that bankruptcy does not give the servant the right to treat himself as discharged, but shall for the sake of argument treat it as such.

Yet even treating the bankruptcy as a discharge I think that the claim remained contingent, for a wrongful discharge, like all other wrongful attempts to terminate a contract, while it gives the other party himself the right to terminate, imposes upon him no obligation. *Phenix National Bank v. Waterbury*, 197 N. Y. 161, 90 N. E. 435. The servant may sue at once by hypothesis for all his wages, but he may also wait until they become due and then sue. It is true that by waiting he subjects himself to the risk of having taken by way of set-off the estimated value of his services, rather than his actual earnings, but that is all he assumes. It is by no means impossible that a servant might prefer to wait over a period of adjustment and tender his services to the old master who had composed with his creditors, or got his discharge, rather than to prove against his estate. Therefore the case seems to me throughout analogous to *Re Roth & Apfel*, *supra*, where the lessor's claim was disallowed upon a covenant to pay the loss if the lessor re-entered and relet after bankruptcy. In that case Judge Noyes relied upon the fact that the lessor might not choose to relet, if he preferred to wait, and that his option prevented the claim from being absolutely fixed at the moment of bankruptcy.

It seems to me that this claim also was not "absolutely fixed" at the time when the petition is filed, and that the subsequent election to file is not enough. I agree that in principle the cases involving anticipatory breach apply also in this respect, since the other party to the contract has the option not to treat the contract as finally ruptured. However, I regard *Roth & Apfel, supra*, as controlling, and *Phenix National Bank v. Waterbury, supra*, is quite on all fours. It is true that on the facts *Re Roth & Apfel, supra*, is distinguishable, being involuntary; but, as I have said, no one seems to have considered that fact as important in this connection. Certainly, the court did not intend to rest upon it. *Re Sweetser, Pembroke & Co., 142 Fed. 131, 73 C. C. A. 349*, has, of course, nothing to do with the point at issue.

Order affirmed; petition dismissed.

THE DAUNTLESS.

THE HERCULES.

(District Court, N. D. California, First Division. January 10, 1914.)

No. 15,234.

1. TOWAGE (§ 11*)—LIABILITY FOR LOSS OF TOW—TUGS EMPLOYED IN COMMON VENTURE.

Where the owner of two tugs employed both in the execution of a contract for towing a raft of logs, which was lost while being towed by the tugs tandem, both are equally liable, if there is any liability for the loss, although but one was directly attached to the raft.

[Ed. Note.—For other cases, see *Towage*, Cent. Dig. §§ 11-23; Dec. Dig. § 11.*]

2. SHIPPING (§ 209*)—PROCEEDING FOR LIMITATION OF LIABILITY—GROUNDS FOR DISMISSAL.

Where, in a proceeding for limitation of liability, it appears that there is but a single damage claimant, which is plaintiff in a pending suit against the petitioner in a state court in which the amount claimed is much less than the appraised value of the vessels offered to be surrendered, the court may properly dismiss the proceeding as to such claimant and dissolve the order restraining it from presenting its action at law.

[Ed. Note.—For other cases, see *Shipping*, Cent. Dig. §§ 646-655, 659, 661, 662; Dec. Dig. § 209.*]

In Admiralty. In the matter of the petition of the Shipowners' & Merchants' Tugboat Company, as owner of the steamtugs *Dauntless* and *Hercules*, for limitation of liability. On motion for dismissal as to the *Hammond Lumber Company*, damage claimant. Motion granted.

Ira A. Campbell and McCutchen, Olney & Willard, all of San Francisco, Cal., for petitioner.

Denman & Arnold, of San Francisco, Cal., for claimant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

DOOLING, District Judge. The undisputed facts appearing thus far in this proceeding to limit liability are, briefly stated, as follows:

In August 1911, the Hammond Lumber Company (hereinafter designated "claimant") and the Shipowners' & Merchants' Tugboat Company (hereinafter designated "petitioner"), entered into a contract wherein the latter agreed, in consideration of the sum of \$2,250, to tow for the former a large raft of piling and spars from Astoria to San Francisco. Pursuant to this contract, claimant delivered to petitioner in September, 1911, such raft at Flavel in the port of Astoria to be by petitioner towed to San Francisco. Petitioner, for the purpose of towing said raft out of the Columbia river and across the bar thereof, made use of two of its tugs, the Dauntless and the Hercules, in the following manner: The tug Dauntless was fastened to the raft with a long towing cable, one end of which was wound around the drum of the towing machinery on said Dauntless, and the other end of which was fastened to the raft, and the tug Hercules was fastened to the tug Dauntless with a long towing cable leading through the forward bitts of the Dauntless to the towing machine of the Hercules. The two tugs thus in tandem started to sea with the raft, but whether because of the negligence of petitioner as alleged by claimant or because of the perils of the sea, as claimed by petitioner, the line from the Dauntless to the raft parted and the raft became a total loss. Claimant in November, 1911, commenced an action against petitioner in the circuit court of the state of Oregon for Clatsop county for \$71,249.90 for the loss of said raft, alleging that such loss was due to the negligence of petitioner. This action is now, and was, before the filing of the stipulation hereinafter mentioned, at issue upon the amended complaint of claimant and petitioner's answer thereto.

On February 27, 1912, petitioner filed in this court its petition for limitation of liability because of the loss of said raft, denying its liability, but praying that if such liability be found to exist it be limited to the value of the tug Dauntless, yet also offering to deliver the tug Hercules in case it be found that this tug also is liable, and praying further that all claims arising against petitioner by reason of said voyage be heard and determined in this court, and that all other proceedings be stayed. Appraisement having been duly made of the two tugs, the value of the Dauntless was fixed at \$45,000, and of the Hercules at \$70,000, for which values a stipulation was filed by petitioner. No person other than claimant having made any claim herein, in due time, and on July 12, 1912, an interlocutory decree of default against all persons other than claimant was duly entered. Claimant now moves the court to dismiss the petition for limitation of liability as to it, and for leave to prosecute its action in the Oregon state court, upon the grounds: (1) That there is only one claim made herein, and (2) that that claim is for much less than the appraised value of the tugs Dauntless and Hercules, and that for these reasons there is no occasion for limitation of liability, and no reason for depriving claimant of its common-law remedy of a trial by jury. Petitioner resists the motion, insisting that, as this court has rightly acquired jurisdiction of this proceeding and of claimant, it should retain it until the whole matter is

disposed of, and insisting further that in no event can the tug Hercules be held liable; that as the value of the Dauntless is only \$45,000, while claimant seeks to recover \$71,249.90, petitioners' liability should be limited to said sum of \$45,000, and therefore this court must retain and dispose of the whole question.

The statute providing for limitation of liability is designed for the protection of the shipowner, and the object of proceedings thereunder is to afford such protection by preventing recoveries in excess of the value of the vessel and freight pending, and distributing such value in proper proportions where there are more claimants than one. Where there is but one claimant, however, and his claim is for much less than the amount to which the liability of the shipowner may properly be limited, there is neither danger of recovery above such amount, nor necessity for distribution among a number of claimants. If the tug Hercules is equally liable with the tug Dauntless for the loss of the raft in question, we have the case here of a single claimant for an amount much less than that to which petitioner's liability may in any event be limited.

[1] Both tugs being engaged in the same venture, at the time of the disaster, are equally liable, if there be liability at all, though the tug Dauntless was the only one attached directly to the raft. The Columbia, 73 Fed. 237, 19 C. C. A. 436; Thompson Towing Co. v. McGregor, 207 Fed. 212, 124 C. C. A. 479.

[2] Under the peculiar circumstances of the present proceedings, I am of the opinion that petitioners' protection does not require that this court should further restrain claimant from prosecuting its action in the state court, and that as to said claimant the proceedings should be dismissed. The same result might perhaps be attained by dissolving the restraining order in so far as it applies to claimant; but I am satisfied that as claimant has moved to dismiss, instead of for a dissolution of the restraining order, its motion should be granted.

The proceeding as to claimant is therefore dismissed. The court, however, will retain jurisdiction of the proceedings for the protection of petitioner against any other possible claims.

In re OCTAVE MINING CO.

(District Court, D. Arizona. March 31, 1914.)

No. B—41.

1. BANKRUPTCY (§ 228*)—DECISIONS OF REFEREE—REVIEW.

The mode prescribed by General Order in Bankruptcy 27 (89 Fed. xi, 32 C. C. A. xxvii) for review by the judge of the orders of the referee on the filing of a petition with the referee setting out the error complained of is the exclusive mode for review, and an attempted appeal from an order of the referee rejecting a claim as a secured claim and allowing it as an unsecured claim confers no power on the court to review the order.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 228.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. BANKRUPTCY (§ 228*)—ORDERS OF REFEREE—REVIEW—TIME OF FILING PETITION.

A petition to review an order of the referee in bankruptcy, rejecting a claim as a secured claim and allowing it as an unsecured claim, comes too late when filed nearly 11 months after the decision, and the action of the referee in refusing to certify his findings for review will be affirmed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 228.*]

3. BANKRUPTCY (§ 345*)—SECURED CLAIMS—WHAT ARE.

A creditor who obtained a judgment against the debtor after the filing of a petition in bankruptcy by other creditors against the debtor, but nearly a year before the adjudication of bankruptcy, and who filed and recorded the judgment over four months before the adjudication, did not thereby obtain a preferred claim under the bankruptcy law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. § 345.*]

In Bankruptcy. In the matter of the Octave Mining Company, a bankrupt. Petition by I. E. Huffman for a review of a decision of the referee rejecting a claim as a secured claim and allowing it as an unsecured claim. Affirmed.

E. S. Clark, of Prescott, Ariz., for creditors.

Kibbey, Bennett & Bennett, of Phoenix, Ariz., for I. E. Huffman, a creditor claiming a lien.

SAWTELLE, District Judge. On October 8, 1910, a creditors' petition was filed against the Octave Mining Company, and on November 9, 1910, answer was filed by the company, by its attorney, J. E. Russell. On November 17, 1910, order was made requiring bond of petitioning creditors. The record is silent as to the giving of the bond. On January 6, 1912, bankruptcy was confessed by said J. E. Russell as attorney for said company, and an adjudication of bankruptcy followed on the same day. On January 21, 1911, after the filing of the petition, I. E. Huffman obtained a judgment against the bankrupt in the district court of Maricopa county, Ariz., and on August 23, 1911, he filed and recorded the same in Yavapai county, Ariz. On September 5, 1912, I. E. Huffman filed his claim with the referee as a secured claim. On December 12, 1912, the referee rejected the claim as a secured claim and allowed it as an unsecured claim.

Notice of the action of the referee was given to Huffman's counsel and they filed in court an attempted appeal on December 18, 1912, but did not apply to the referee under General Order 27 (89 Fed. xi, 32 C. C. A. xxvii) for a petition to review his decision, nor did they request him to certify his action and the evidence on which he acted to the District Judge. On October 22, 1913, Huffman filed with the referee a petition for review of his order.

The trustee having filed objections to the allowance of the petition by the referee, that officer refused to certify the facts and findings without instructions from the court, and asked for instructions in the matter.

[1] It is manifest that the mode prescribed by General Order 27 is the only manner in which the decisions of the referee may be reviewed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & *Ran*'s *In/Am*

by the judge, and that the paper filed in the court on December 18, 1912, confers no power on the court to do so.

[2] This being so, the only matter which the court now has before it is the request of the referee as to whether he shall certify the facts and his findings for review. It is true that no definite period is fixed by General Order 27 as to the time within which an appeal must be taken from the orders of the referee, and that consequently it must be taken within a reasonable time.

What is a reasonable time in such a matter has been usually fixed by standing order in the various courts, running from 10 days to 30 days, and the question of what is a reasonable time in the absence of a stated rule has been considered in several cases, among others in the following:

In *re Grant* (D. C.) 143 Fed. 661, was very similar in its facts to this case. In that case the appeal was taken February 12, 1906, from an order entered October 25, 1905, and the court declined to instruct the referee to send up the facts and findings for review. The lapse of 30 days between the order and the appeal was held not unreasonable in *Re Foss* (C. C.) 147 Fed. 790, but the judge rendering the opinion in that case stated that no delay had been caused, and said if the matter were before him for the making of a rule he would probably fix a limit of 10 days.

In *re Nichols* (D. C.) 166 Fed. 603, is an instructive case. In that case the court says that the decision of the referee was clearly erroneous. The order allowing the preference was made July 7, 1907, and a copy of the order was sent to creditors, who sought for review not later than September 11, 1907. On May 13, 1908, a petition for review was filed with the referee. Objection was filed, and on July 31, 1908, the referee denied the petition on the ground that it had not been made within a reasonable time. Thereupon the objecting creditor filed in the District Court a motion for an order reversing the order allowing the claim, as well as the order refusing the petition for review. On hearing the motion the court decided that, though the decision of the referee on the facts was erroneous, the petition to the referee for review was too late, and that the proceeding for review in the District Court should be dismissed.

No case has been pointed out wherein a delay of more than 6 months has been held to be a reasonable time, and a strong argument by analogy could be made for a limitation of 10 days. The Bankrupt Act provides that appeals from the allowance or disallowance of claims from the District Court to the Circuit Court of Appeals must be taken within 10 days from the rendition of judgment by the District Court. No good reason has been shown why a longer time should be allowed for appeals from the referee to the District Court.

The only question before the court being whether or not the referee shall be instructed to send up his finding and the evidence, and the time elapsing between the rendition of his order and the petition for review being greater than the time allowed by any of the cases, the court feels compelled to hold that the petition for review came too late, and the action of the referee in refusing to certify his findings for re-

view is affirmed, and the estate of the bankrupt should be distributed without further delay.

[3] I am likewise of the opinion that petitioner's claim is not a preferred claim under the law and that the referee properly disallowed it as such.

In re NACHMAN.

Ex parte F. B. Q. CLOTHING CO.

(District Court, E. D. South Carolina. March 12, 1914.)

BAILEMENT (§ 21*)—RIGHTS OF THIRD PERSONS—NECESSITY OF RECORDING CONTRACT.

Under Civ. Code S. C. 1912, § 3740, making agreements between bailors and bailees of personal property, whereby an interest is reserved by the bailor, void as to subsequent creditors or purchasers unless recorded, but providing that this shall not apply to persons letting or hiring property for temporary use, where ends of cloth were delivered to a merchant to be used only for display or advertisement to procure orders and to be returned immediately on order, there was a letting or hiring of property for temporary use, and the agreement, though not recorded, was not invalid so as to render the cloth subject to the claim of the trustee in bankruptcy of the bailee, although the merchant was to pay for such samples, if he failed to return them; there being no claim of fraud or intended fraudulent evasion of the statute.

[Ed. Note.—For other cases, see *Bailment*, Cent. Dig. §§ 91-102; Dec. Dig. § 21.*]

In the matter of L. Nachman, bankrupt. On petition to review an order of the Referee denying the petition of the F. B. Q. Clothing Company. Reversed, and trustee ordered to deliver certain property to the petitioner.

McNeill & Oliver, of Florence, S. C., for F. B. Q. Clothing Co.
F. L. Willcox, of Florence, S. C., for trustee.

SMITH, District Judge. This matter has come on to be heard upon a petition to review an order of the referee in bankruptcy made February 10, 1914, refusing the petition of the above-named petitioners.

The facts are not disputed. The petitioners shipped and delivered to the bankrupt whilst he was in business the articles claimed in the petition. The testimony is not very clear, but it appears that the petitioner shipped the bankrupt certain "ends of cloth" for the purposes of "display," i. e., of exhibition to solicited customers to induce orders for suits corresponding to the "ends" or samples displayed. These "ends" were by the agreement not to be sold, but were shipped on consignment only, to remain the property of the petitioner, subject to immediate return upon order, and to be used only for display or advertisement to procure orders. Whenever orders were procured on these samples, the bankrupt would send the orders in and they would be filled by the petitioner; the bankrupt receiving for his services 33 $\frac{1}{3}$ per cent. of the charge. In addition to this, the bankrupt seems to have ordered other goods and suits for which he was billed, but that was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

independent of these "ends," which he was to use for display only, and for orders based on which he was to receive the 33 $\frac{1}{3}$ per cent. The written agreement affecting these "ends" was never recorded, and the question now made is that by reason of the failure to record this agreement under the terms of section 3740, Code of Laws of S. C. 1912, the "ends" so consigned became in the hands of the trustee in bankruptcy the property of the bankrupt estate applicable to the claims of the general creditors of the bankrupt.

The language of that section is as follows:

"Every agreement between the vendor and vendee, bailor or bailee of personal property, whereby the vendor or bailor shall reserve to himself any interest in the same, shall be null and void as to subsequent creditors (whether lien creditors or simple contract creditors) or purchasers for valuable consideration without notice, unless the same be reduced to writing and recorded in the manner now provided by law for the recording of mortgages; but nothing herein contained shall apply to livery stable keepers, inn keepers, or any other person letting or hiring property for temporary use or for agricultural purposes, or depositing such property for the purpose of repairs or work or labour done thereon, or as a pledge or collateral to a loan."

Under the general wording of the statute, the contention would appear to be resolved against the petitioner unless the present case comes within the exception in the section.

To hold that every bailment of the character in question must be reduced to writing and recorded, and that the petitioners' claim is not covered by the exception, would have very far-reaching results. It would practically put an end to the shipment of personal property for sale under consignment. No farmer could ship his crops to a factor or commission merchant for sale, no breeder of horses, mules, or live stock generally could ship to a commission merchant or stableman for sale, no manufacturer could ship his wares, no miner his products to a third person for sale, with any safety without an agreement being made in writing and recorded, unless such shipments be held to be the letting or hiring property for temporary use as excepted by the statute. Such a result would break up the rules and methods of such commercial transactions as established since time immemorial, and the court does not feel justified in holding that the language of the statute intends any such result.

Under the testimony in the case the court holds the petitioners' claim within the statutory exception.

Were there any charge here of fraud or intended fraudulent evasion of the statute, the result might be otherwise. The court is not bound to permit the fraudulent or pretensive use of the exception to escape the prohibition of the statute. But there is no such charge nor any evidence to support it. The evidence does show that if the bailee, the temporary holder and exhibitor of the samples or "ends," failed to account for and return them, he was bound to pay the value. But a common carrier who does not produce the consignment of which it is the bailee is bound to pay its value, and can also, if it sees fit, insure the bailment while in possession, and if destroyed collect the insurance therefor. The difference, of course, between the case of a carrier and the present case may be that, the possession of the carrier being only for transportation, no one can be thereby misled into giving credit,

while the possession of a merchant can operate that result; but if the character of the bailee were to affect the interpretation of the statute it would still exclude all consignments to merchants for the purposes only of sale.

So far as can be gathered from the testimony, the case is one of the deposit in the hands of a third person of samples or "ends" to be used only for the purposes of display to procure orders for the purchase of goods similar to the samples, which "orders" were then to be filled by the principal.

It is, accordingly, ordered that the order of the referee made February 10, 1914, be reversed, and that the trustee in bankruptcy do deliver to the petitioner the ends of cloth referred to in the said order of the referee.

In re RADLEY STEEL CONST. CO.

(District Court, E. D. New York. March 20, 1914.)

1. BANKRUPTCY (§ 288*)—POSSESSION OF ASSETS—ADVERSE CLAIMS.

On a hearing to determine whether a party in possession of property claimed to belong to the bankrupt is an adverse holder, a claim of title or right to possession based on such fraud as to vitiate the rights asserted may be tested by the court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

2. BANKRUPTCY (§ 288*)—DEPOSITS IN BANK—RIGHTS OF TRUSTEE.

The right to draw checks against an account in a bank distinguishes the possession of the bank from that of an ordinary debtor, and gives the bankruptcy court the right to order payment to the trustee of such deposits as are not claimed by the bank on some other ground than its holding as a depository.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

3. BANKRUPTCY (§ 288*)—DEPOSITS IN BANK—ADVERSE CLAIMS.

An alleged lien against a sum on deposit in a bank is an adverse claim, and cannot be determined on motion.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

4. BANKRUPTCY (§§ 165, 288*)—DEPOSITS—APPLICATION TO CLAIMS OF BANK.

The application of deposits to payment of claims held by the bank is not a preference, but the use of the deposits for such application can only be tested by action.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266, 447; Dec. Dig. §§ 165, 288.*]

5. BANKRUPTCY (§ 326*)—DEPOSIT WITH BANK—TRANSFER.

A deposit with a bank before the beginning of bankruptcy proceedings would not be such a transfer as would be unavailable as a set-off, unless it were fraudulent as against creditors and not valid as the basis of any legal claims.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. § 326.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. BANKRUPTCY (§ 288*)—MONEYS OF BANKRUPT—APPLICATION ON CONTINGENT LIABILITY.

The claim of a right to apply moneys of a bankrupt for the purpose of indemnity on some contingent liability carries the right to possession, and is such a claim of title that it cannot be disposed of summarily upon motion.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

7. BANKRUPTCY (§ 326*)—DEPOSIT WITH BANK—RIGHT OF SET-OFF.

Where, on motion of the receiver to compel a bank to turn over a deposit by the bankrupt, the bank claims a right to hold the deposit by way of set-off on claims not yet matured, its right to refuse a check of the depositor or the order of the court as to disposition of the deposit depends on whether a claim of the nature of the one set up is provable against the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. § 326.*]

8. BANKRUPTCY (§ 288*)—JURISDICTION—DEPOSITS IN BANK.

A bank has a right to refuse to consent to the determination of its rights to apply deposits in its hands to notes apparently provable in bankruptcy, though not due, on a motion in the bankruptcy proceedings, and the court in the face of objection has no jurisdiction to determine such right, though it has jurisdiction to see if such an issue can legally exist.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

In Bankruptcy. Bankruptcy proceedings of the Radley Steel Construction Company. On motion to direct the Mutual Bank to pay over a deposit to the credit of the bankrupt. Denied.

Rushmore, Bisbee & Stern, of New York City (Abraham Freedman, of New York City, of counsel), for Mutual Bank.

Edwin L. Garvin, of New York City, receiver, in pro. per.

CHATFIELD, District Judge. The receiver has made a motion to direct the Mutual Bank to pay over a certain sum which was on deposit to the credit of the bankrupt on the day when the petition in bankruptcy was filed. The bank has resisted this motion, appearing specially, and contests the jurisdiction of the court. It claims that it is retaining, and has a right to retain, the money in its possession, for a purpose alleged to be within its rights, and that its refusal to pay the same over to the receiver can be tested only in an action brought in a court having plenary jurisdiction to hear the issues which might arise therein if suit were brought against the bank because of its retention or application of the money. The bank urged this proposition upon the facts shown in the *petition*, viz., that it has refused to surrender the funds in question, claiming a right to retain these funds and to set them off against certain notes of the bankrupt, not yet due and not yet taken up or paid by the indorser.

This court has the power to determine whether a party in possession of property or funds, claimed to belong to the bankrupt, is an adverse holder. *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; *First National Bank v. Hopkins*, 199 Fed. 873, 118 C. C. A. 321.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] Upon such a hearing, a claim of title or of right to possession, based upon such fraud as to vitiate and render absolutely void the rights asserted, may be tested by this court. *Mueller v. Nugent*, *supra*. If the issues of fact or law are properly alleged, and furnish the basis for a valid claim of title, a hearing thereof, "no matter how ill supported it may appear to be," constitutes the determination of an adverse claim. A colorable title arises only when no legal basis for a claim of title is shown, or when the court must hold the title fraudulent. *In re Bacon*, 210 Fed. 129, 126 C. C. A. 643.

A deposit with a bank is a mere debt owed by that bank, with the right to draw checks against it. *Davis v. Elmira Savings Bank*, 161 U. S. 275, 16 Sup. Ct. 502, 40 L. Ed. 700.

[2] The right to draw checks against the account (or to use the funds on deposit by order) distinguishes the possession of the bank from that of the ordinary debtor of a bankrupt estate, and gives the bankruptcy court the right to order payment to the receiver or trustee of such deposits as are not claimed by the bank upon some other ground than merely its holding as a depository.

[3] This is a further reason why the bankruptcy court has jurisdiction to determine whether the bank should be ordered to pay over the fund. But such jurisdiction must not be confused with the right of the bank to have any valid defense or claim to the fund litigated in an action. An alleged lien against a sum on deposit has been held to be an adverse claim, and cannot be determined on motion. *First National Bank of Chicago v. Chicago Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051; *In re Farrell*, 201 Fed. 338, 119 C. C. A. 576.

[4] The application of deposits to payment of claims held by the bank is not a preference, but nevertheless the use of the deposits for such application can only be tested by action. *New York County National Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380; *Studley v. Boylston Bank*, 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313; *In re Wright-Dana Hardware Co.* (C. C. A., Second Circuit, February 17, 1914) 212 Fed. 397, 129 C. C. A. 73. In this latter case, the deposit of funds after insolvency of the depositor became known, and after action to prevent loss thereunder had been taken, was held to be a "transfer" within the provisions of section 60b of the act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended by Act June 25, 1910, c. 412, § 11 [U. S. Comp. St. Supp. 1911, p. 1506]) following certain language in the case of *Studley v. Boylston Bank*, *supra*. The decision of the *Boylston Bank Case* is, however, that (229 U. S., page 527, 33 Sup. Ct., page 808, 57 L. Ed. 1313):

"We find nothing in the record to indicate that the deposits were made for the purpose of enabling the bank to secure a preference by the exercise of the right of set-off"

—while the use of a deposit as a set-off is upheld under the *Massey Case*, *supra*.

[5] In the case at bar there is nothing to justify a finding of preferential transfer, nor of any act which could be held a "transfer" such as

was the basis for the finding referred to in the Wright-Dana Case, *supra*; and, in any event, a deposit with a bank prior to the beginning of bankruptcy proceedings would not be such a "transfer" as would be unavailable as a set-off, unless it were "fraudulent" as against creditors, and hence not valid as the basis of any legal claim.

Opposition to a motion to turn over such funds upon the ground that the bank intends to use the funds, or has used the funds in payment of a claim or notes held by it, is such a claim of adverse title as can be tested only in a court having jurisdiction to determine the validity of the bank's right to payment on the notes. *In re Gill*, 190 Fed. 726, 111 C. C. A. 454.

[6] The claim of a right to apply moneys of a bankrupt to the purpose of indemnity on some contingent liability or application has been held to carry right to possession, and to be such a claim of title that it cannot be disposed of summarily upon motion. *In re Horgan et al.*, 158 Fed. 774, 86 C. C. A. 130; *Jaquith v. Rowley*, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620; *In re Squier* (D. C.) 165 Fed. 515.

Certain deposits claimed to have been created for a specific purpose, but held by the bank generally in the name of the bankrupt, and, without any indication of the alleged trust character of the deposit, have been set off or used to pay notes due the bank and the claim of such a right held to be adverse, and not to be disposed of summarily. *First National Bank of Thomasville v. Hopkins*, 199 Fed. 873, 118 C. C. A. 321.

It will thus be seen that the preliminary objection of the Mutual Bank in the present case that the court has no jurisdiction to entertain the motion must be overruled in so far as this court must determine whether or not a claim of adverse possession or of right to the deposit is set forth, which, if valid, would be good as a matter of law, or as to which the validity in fact or law of the claim should be tried only in an action.

But when we consider the objection of the Mutual Bank to the exercise of any jurisdiction over the deposit, that is, when we consider the objection that this court has not jurisdiction to compel by motion the payment of these funds by the bank to the receiver, or jurisdiction to determine upon motion the validity of the bank's claim, another situation is presented.

[7] If the bank had applied the funds to the payment of past-due notes, or claimed title to the money for any purpose other than future use, an adverse claim would be presented immediately. When, however, the bank takes the position upon the facts shown by the motion papers that it has a right to hold the deposit for use by the way of set-off against claims or notes not yet matured, then its right to refuse to respect the check of its depositor, or the order of the court as to disposition of its depositor's funds, must depend upon whether or not a claim of the nature of the one set up in the present instance is provable against the estate.

In *Frank v. Mercantile National Bank*, 182 N. Y. 264, 74 N. E. 841, 108 Am. St. Rep. 805, it has been held that any provable debt, even if the obligation to pay had not yet become matured, could be urged

by a bank as a defense to an action by the trustee of the bankrupt estate. In *Re Philip Semmer Glass Co.*, 135 Fed. 77, 67 C. C. A. 551, the Court of Appeals of this circuit held that notes not yet due, but payable out of the bankrupt estate, were provable claims, and could be set off against moneys on deposit.

In the case of *Germania Savings Bank & Trust Co. v. Loeb*, 188 Fed. 285, 110 C. C. A. 263, it was held that deposits could be retained and used for the purpose of set-off where the bank was in the possession of certain obligations provable in the bankruptcy proceeding, but not yet due at the time of filing the petition or of adjudication.

The test of the right to set off such claims, or as to the validity of the debts represented thereby, cannot be determined in a summary manner upon motion, and a claim by the bank that it holds money on deposit for the purpose of application to the payment of another obligation, the validity of which can only be determined in some suit against the bank, must be disposed of in an action in a court having plenary jurisdiction, unless the bank comes into the bankruptcy court to prove some claim involving the amount of these payments.

[8] The Mutual Bank must be upheld in its refusal to consent to a determination of its right to apply the deposits in its hands to payments of the notes apparently provable in bankruptcy, but not yet due, on a motion in the bankruptcy proceeding. In that sense issues are urged which the court in the face of objection has not the jurisdiction to determine, even though it have the jurisdiction to see if such issues are raised or can legally exist.

The motion to compel the Mutual Bank to pay over the funds must be denied.

UNITED STATES v. WHITING et al.

(District Court, D. Massachusetts. March 23, 1914.)

Nos. 453 and 454.

1. MONOPOLIES (§ 31*)—INDICTMENT—RESTRAINT OF TRADE—PRICE AGREEMENT.

An indictment alleging that the defendants, who bought 86 per cent. of the milk sold in specified country districts by the producers there for shipment to Boston and vicinity and Worcester, engaged in an unlawful combination in undue restraint of trade by agreeing upon the prices which they would pay for milk at the country points, thereby eliminating competition as to price between the defendants, *held* to show a combination which was *prima facie* unreasonably extensive and therefore illegal.

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 20; Dec. Dig. § 31.*]

2. MONOPOLIES (§ 31*)—COMBINATION IN RESTRAINT OF INTERSTATE TRADE—INDICTMENT.

An indictment, which charges a combination in restraint of interstate trade in milk, and which alleges that defendants combined to eliminate competition between themselves as to the price of milk purchased for resale in Boston and Worcester, and that the milk purchased by them was purchased in Maine, Vermont, New Hampshire, Connecticut, and Massachusetts, is not defective for failing to allege a restraint of interstate trade

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in milk, merely because it does not allege what proportion of the milk purchased under the combination came from outside Massachusetts, since the milk purchased in Massachusetts was purchased for the purpose of adding it to milk forming a part of interstate commerce.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.*]

3. MONOPOLIES (§ 29*)—ANTI-TRUST ACT—REASONABLE RESTRAINT OF COMPETITION DEFINED.

Under the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), there must be not only a restraint of trade, but an undue restraint to support a conviction for combining in restraint of trade, and, to make a restraint unreasonable, it must appear either that the normal volume of interstate trade has been interfered with by artificial agencies affecting to a substantial degree, and to the disadvantage of the public, the price or supply of the commodity, which is the subject of the restraint, or that by means of a combination the price or supply of the commodity is or may be affected to a substantial extent to the disadvantage of producers or purchasers thereby operating to a material degree to the injury of the public, or that there has been a direct and intentional interference with the transportation of commodities in interstate commerce.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 19; Dec. Dig. § 29.*]

4. MONOPOLIES (§ 31*)—ANTI-TRUST ACT—CRIMINAL OFFENSES—LIMITATIONS ON RIGHT OF COLLECTIVE BARGAINING.

Three classes of persons consisting of different individuals were under the control of the individual members of each class. They formed a combination by agreeing to offer and pay no more than a specified price for milk for resale in interstate commerce. The several persons were not guilty of any illegal purpose or of any oppressive methods, and, except as to price, they were free to compete with each other. The price of milk to the producers was lowered by reason of the combination, but to what extent was not shown. Eighty-six per cent. of the business of buying milk sold in designated localities for resale elsewhere after interstate transportation was in their hands. *Held*, that whether the combination was an unreasonable restraint of interstate trade, in violation of the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), was for the jury.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.*]

5. MONOPOLIES (§ 29*)—ACTS CONSTITUTING "MONOPOLY."

A "monopoly" at common law, and under the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), implies a control of goods or service which the public desires, and an attempt to monopolize is an attempt to obtain control of an industry by means which prevent others from engaging in fair competition.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 19; Dec. Dig. § 29.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4570-4574.]

6. MONOPOLIES (§ 8*)—"RESTRAINT OF TRADE."

While there can be no monopoly which is not an unreasonable restraint of trade, there may be unreasonable restraints of trade which are not monopolies.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 8.*]

7. MONOPOLIES (§ 29*)—ACTS CONSTITUTING MONOPOLY.

Persons engaged in the business of buying milk and selling it at retail in designated localities formed a combination whereby they agreed not to offer or pay more than a specified price for milk purchased by them for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

resale. It did not appear that the combination in any way enlarged their control of the business, either by forcing down the price at which they bought, so that they could undersell competitors in the selling market or otherwise. The agreement was made with the intent to wrong the public and to oppress and limit the rights of milk producers by depriving them of the higher price of milk which would have resulted from free competition. They did not dominate or control the markets in which they sold their milk purchased pursuant to the combination. *Held*, that they were not guilty of attempting to monopolize trade in milk in violation of the Sherman Anti-Trust Act.

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 19; Dec. Dig. § 29.*]

8. MONOPOLIES (§ 31*)—CONSPIRACY IN RESTRAINT OF TRADE—ELEMENTS.

An indictment charging a conspiracy in restraint of trade in violation of the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) must allege facts warranting a finding that the restraint was unreasonable, and an indictment charging a conspiracy in restraint of trade in milk, which does not show the percentage of milk bought by defendants for shipment and sale in designated markets, nor allege facts from which it could be inferred that defendants either controlled or were dominating factors in any branch of the milk business, was demurrable for failing to allege an unreasonable restraint of trade.

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 20; Dec. Dig. § 31.*]

Isaac Whiting and others were indicted for violating the Sherman Anti-Trust Law (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). Demurrers to indictments sustained in part and overruled in part.

William S. Gregg, Sp. Asst. Atty. Gen., of Washington, D. C., for the United States.

Samuel J. Elder, of Boston, Mass., and John F. Cusick, of Boston, Mass., for defendants Whiting

Whipple, Sears & Ogden, of Boston, Mass., for defendants Hood.

Sughrue & Chase, of Boston, Mass., for defendant Graustein.

George W. Anderson, of Boston, Mass., for defendant Hunter.

MORTON, District Judge. These are two indictments against the same defendants for violating the Sherman Anti-Trust Law (26 Stats. 209). Indictment numbered 454 will be first considered. It is in two counts; the first charging a combination in restraint of trade, the second an attempt to monopolize trade and commerce in milk.

The allegations of the first count are, in substance, as follows:

The defendants Isaac Whiting, George Whiting, John K. Whiting, Charles H. Hood, Edward J. Hood, and William Graustein were, between May 26, 1905, and May 26, 1911 (when the indictment was found), continuously, willfully, knowingly, and unlawfully engaged in a combination in undue restraint of trade and commerce among the several states of the United States, by consulting, planning, and agreeing together in the combination hereinafter described in undue restraint of trade, which combination has restrained interstate trade in the manner set forth, and has been with unlawful intent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The combination is described as follows:

Throughout the period specified, "a very extensive industry" has been carried on in and from the states of Maine, Vermont, New Hampshire, Massachusetts, and Connecticut, involving the *purchase* at divers places in said states of milk from the producers there, and the *shipment* of the milk so purchased to Boston and vicinity and to Worcester, and the *sale* thereof to various persons; 86 per cent. of all the milk purchased in the states above named, and so shipped to, and sold in, Boston and vicinity and in Worcester, has been purchased, shipped, and sold by three classes of persons, namely, the Whiting class (consisting of the above-named defendants by the name of Whiting), the Hood class (consisting of the above-named defendants by the name of Hood), and the Graustein class (consisting of the above-named defendant Graustein). These classes were under the control of the individual members thereof. In carrying on said industry the defendants shipped from the states named, to the points named, the milk so purchased by them. The Whiting class made purchases from producers at about 128 places throughout said states and shipped the milk so purchased to Boston and vicinity; the Hood class, at 142 places throughout said states, and shipped the milk so purchased to Charlestown, Forest Hills, and Lynn; and the Graustein class, at 92 places, and shipped the milk so purchased to Charlestown. The defendants, as a necessary feature of said industry, have respectively been carrying on interstate trade and commerce. Each class, had it not been for the unlawful combination between them in restraint of trade, would have been affected by the competition of the two other classes in the purchase of milk, and the producers who sold to the defendants would have benefited by such competition. No one class of the defendants had or controlled a majority of said interstate trade in milk, but all of the classes working together did have a majority of that trade, namely, 86 per cent. thereof. Of this 86 per cent., the Whiting class controlled 48 per cent., the Hood class 44 per cent., the Graustein class 8 per cent. The defendants directed and controlled this 86 per cent. of the milk trade by and through certain copartnerships and corporations of which they were the actual and real managers. The purpose of this unlawful combination was to eliminate competition between the defendants in the purchase of milk from the producers.

The methods by which the defendants accomplished the objects of their unlawful combination and, by agreement between them, knowingly and unlawfully restrained interstate trade, is described as follows:

The different classes of defendants have, in pursuance of said agreement and combination between them to that end, refrained from competing with each other in the purchase of milk at the places named throughout the states aforesaid, and have conferred and agreed upon uniform prices to be paid by them each six months to the producers of milk for milk so purchased. The defendants, being extensive purchasers of milk, have been able, by reason of said unlawful agreement and combination, to purchase, and in fact have purchased, their milk at prices, in the making of which competition has been greatly restricted, and which have been much lower than would have been the case had said

agreement and combination not existed and had there been competition among the said classes of defendants with each other. The defendants entered into and carried out the agreement and combination described "with the intent to wrong the public and oppress and limit the rights of the milk producers in the states aforesaid by depriving said producers of the higher prices for milk which would have resulted from free and open competition among said defendants, all as aforesaid."

Second count:

The second count is against the same defendants. It incorporates by reference the circumstances and conditions set forth in the first count, and charges that the defendants, by engaging in the unlawful combination described in the first count, "did knowingly attempt to monopolize part of the trade and commerce" among said states, "with the intent to wrong the public and to oppress and limit the rights of the milk producers in the states aforesaid by depriving said producers of the higher prices for milk which would have resulted from free and open competition among said defendants, all as aforesaid."

The gravamen of both counts is a combination among the buyers of milk to eliminate competition inter se as to price only, and thereby to injure persons who had milk for sale.

It will be noticed that the scope of this indictment is narrower than in any previous case under the Sherman Act. Its omissions are significant. It does not undertake to describe conditions in the milk business generally, either in the country or the city districts. It relates only to milk which is (a) bought at specified places in country districts, (b) for shipment to and sale in the vicinity of Boston or Worcester. It does not allege the total amount of milk produced and sold at the country places named, nor the total amount shipped therefrom, nor that sale for shipment to Boston or Worcester is the principal, or even an important, market for producers of milk at said places; nor is it alleged that the prices paid there for Boston or Worcester milk established or influenced other prices in the country markets. For example, if at any given place 1,000 gallons of milk were produced, 500 gallons of it might be sent to Springfield, 400 delivered to local creameries or consumers, and 100 sold for shipment to Boston or vicinity. The alleged combination affected only this last amount of 100 gallons. According to the indictment, only 86 gallons out of the 1,000 in the case supposed were bought and shipped by the defendants, i. e., an unimportant portion of the whole amount. The same may be true as to every place mentioned in the indictment; the Boston and Worcester trade, though "very extensive," may take but a small portion of the entire amount produced, and the price of the Boston and Worcester milk may not affect prices generally in the country markets.

It is not alleged that the defendants dominated or controlled the markets where they sold their milk; for aught that appears, they may have been unimportant factors therein. The indictment thus entirely fails to allege a domination or control of prices by the defendants, either in the buying trade in the country, considered as a whole, or in the selling trade in the cities. It does, however, show such domination of

the buying trade in what is large enough to constitute a "very extensive industry."

No acts are alleged on the part of the defendants calculated to suppress competition from other purchasers, and no unfair or dishonest practices towards producers or consumers, unless the agreement in question be so regarded. It is not alleged that the prices agreed upon or paid were unreasonably low, but only that they were less than would have been the case had said restrictive agreement not been made. In this respect the present case is very different from the Nash Case (*Nash v. U. S.*, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232), the Swift Case (*Swift v. U. S.*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518), and the Patterson Case (*U. S. v. Patterson* [D. C.] 201 Fed. 697).

As to most, if not all, of the places named at which milk was bought, the indictment shows that only one of the classes of purchasing defendants bought there, and it is not alleged that at such points there ever was competition in purchasing by the other two classes of defendants, though it is alleged that there would have been such competition had the agreement covering prices never been made, and that the prices paid at such points were affected by the agreement and were less than would otherwise have been paid. For aught that appears to the contrary, the different classes of defendants may always have operated in distinct and separate districts, without competition among themselves, and have continued so to operate.

It may be true that, in the country places mentioned in the indictment, the most advantageous way to dispose of milk is to sell it for the Boston and Worcester market; that it is impracticable for individual producers to ship milk to Boston or Worcester; and that the three classes of defendants, by establishing prices which they would pay, practically dominated the country market. But that is not the situation described in this indictment.

[1] Each of the defendants has demurred and each has assigned many grounds of demurrer. So far as they are merely formal or technical, they seem to me not well founded. I regard the indictment as sufficient in its technical and formal aspects, and as sufficiently informing the defendants of the offenses with which they are charged.

The defendants contended that the Sherman Act is so indefinite and uncertain as to be unconstitutional as a criminal statute. But this point has been settled otherwise since the arguments, by the decision of the Supreme Court in *Nash et al. v. U. S.*, *supra*.

[2] The defendants also contended that the alleged agreement, dealing as it does only with the purchase of milk at the places named, did not directly affect or restrict interstate commerce. It was pointed out by them that the indictment nowhere alleges what proportion of the milk purchased under said agreement comes from outside Massachusetts. These objections seem to me unsound. The indictment charges a combination with respect to a well-defined trade in milk between Boston and vicinity and Worcester, and several different states; Massachusetts being one of them. It alleges a general agreement with respect to prices in the states of Maine, New Hampshire, Vermont, Massachusetts, and Connecticut. The milk was purchased for the purpose

of adding it to an existing current of interstate trade. The purchases in Massachusetts were made in accordance with a broad plan extending beyond the borders of that state. A similar objection was raised by the defendants in *U. S. v. Reading Co. et al.*, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243, and was there held unsound.

"Much of the coal so bought," it is said, "was sold in Pennsylvania, and all of the contracts were made in that state, and the coal was also there delivered to the buying defendants. * * * The mere fact that the sales and deliveries took place in Pennsylvania is not controlling when, as here, the expectation was that the coal would, for the most part, fall into and become a part of the well-known current of commerce between the mines and the general consuming markets of other states." *Lurton, J., U. S. v. Reading Co., supra.*

See, also, *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; *Montague v. Lowry*, 193 U. S. 38, 45, 46, 24 Sup. Ct. 307, 48 L. Ed. 608.

Various other minor objections were made to the indictment; but upon the construction which I have given it, none of them is, in my opinion, well founded, or of sufficient importance to require discussion.

[3, 4] The crucial question, as it seems to me, is whether what the defendants are charged with having done constitutes a crime. Does the Sherman Act forbid an agreement among a substantial portion of the buyers in a certain interstate industry as to the price which they will offer or pay for a specified commodity? To reverse the question, is an agreement between a substantial proportion of the farmers in a given district, as to the price which they will charge middlemen engaged in interstate commerce for their milk, an unlawful combination, in the entire absence of any illegal purpose, or of any oppressive methods, or of any unreasonably high price? To what extent have competitors in interstate business the right to agree upon prices and eliminate competition inter se in respect thereto for their common advantage or protection?

It will be noticed that the indictment discloses no community of interest among the defendants, no general combination between them, no joint action for the purpose of coercing or injuring outsiders, but merely an agreement as to the price which they will offer and pay for milk; and that, except as to price, the defendants are free to compete with each other. It is not alleged that the exact prices agreed upon by the defendants became effective or were accepted by the sellers. The statements in the indictment as to the effect of the alleged combination are very guarded, and aver only that the price of milk to the producers was in fact lowered by reason of it. To what extent it was lowered is not alleged, nor, as before said, is it charged that the price agreed upon and paid by the defendants to the producers was unfair or oppressive; and it is nowhere explicitly stated that the sellers were under any sort of compulsion to deal with the defendants. Such compulsion is to be inferred, if at all, from the character and natural results of the alleged combination.

It may be said at once that the case is an exceedingly difficult one; and that the principles upon which it should be decided are by no means clearly settled. Change of opinion concerning the law involved

led the United States Supreme Court greatly to modify, if not to overrule, two of its comparatively recent decisions. See comment on Freight Association & Joint Traffic Cases by White, C. J., *Standard Oil Co. v. U. S.*, 221 U. S. 64, 67, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. And differences of opinion concerning it have occasioned vigorous dissents by members of that court and irreconcilable decisions among other courts. *U. S. v. Trans-Missouri Freight Association*, 166 U. S. 290, 343, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Northern Security Co. v. U. S.*, 193 U. S. 364, 24 Sup. Ct. 436, 48 L. Ed. 679; *Continental Wall Paper Co. v. Voight*, 212 U. S. 267, 29 Sup. Ct. 280, 53 L. Ed. 486; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629 (compare *Blount Mfg. Co. v. Yale & Towne Mfg. Co.* [C. C.] 166 Fed. 555); *People v. Sheldon*, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690 (compare *Skrainka v. Scharringhausen*, 8 Mo. App. 522); *Nester v. Continental Brewing Co.*, 161 Pa. 473, 29 Atl. 102, 24 L. R. A. 247, 41 Am. St. Rep. 894 (compare *Anheuser-Busch Brewing Ass'n v. Houck*, 27 S. W. 692).

Whether an agreement restrains trade is a matter of law for the court to determine. *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64, 22 L. Ed. 315; *Joyce on Monopolies*, § 103 (collecting authorities).

That the alleged agreement not only restrained competition, but also restrained trade, seems clear. *Northern Securities Co. v. U. S.*, 193 U. S. 338 et seq., 24 Sup. Ct. 436, 48 L. Ed. 679; *Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502; *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 238, 20 Sup. Ct. 96, 44 L. Ed. 136; *More v. Bennett*, 140 Ill. 69, 29 N. E. 888, 15 L. R. A. 361, 33 Am. St. Rep. 216; *People v. Milk Exchange*, 145 N. Y. 267, 39 N. E. 1062, 27 L. R. A. 437, 45 Am. St. Rep. 609; *The Legal Aspect of Monopoly*, 20 Harv. Law Rev. p. 176 et seq. But that of itself, whatever may be the case at common law (as to which see *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; s. c., 175 U. S. 211, 238, 20 Sup. Ct. 96, 44 L. Ed. 136; *Joyce on Monopolies*, § 89; and *Harding v. Am. Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189, elaborate notes collecting authorities), is not sufficient to warrant a conviction under the Sherman Act. Under this statute there must be not only a restraint of trade, but an undue restraint. In the *Standard Oil Case*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, it was held, in substance and effect, that the restraint prohibited by the act must be an unreasonable one.

"The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint. * * * Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the

measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided." White, C. J., *Standard Oil Case*, 221 U. S. at page 60, 31 Sup. Ct. at page 515, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. See, also, Harlan, J., dissenting, at page 102 et seq. of 221 U. S., page 532 of 31 Sup. Ct., 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734.

In passing upon the question of unreasonable restraint, all the circumstances surrounding the alleged agreement or combination are to be taken into account, and, while the standard of conduct "in its nature and theory is a question of law" (Holmes, J., *Le Roy Fibre Co. v. Chicago, Milwaukee & St. Paul Railway Co.*, 232 U. S. 340, 34 Sup. Ct. 415, 58 L. Ed. — [February 24, 1914]), where the facts are in dispute the question will ordinarily be one for the jury to decide under suitable instructions.

The case therefore comes down to this: Whether upon the facts alleged in the indictment, which upon this demurrer must be taken to be true, a jury would be warranted in finding that there was an unreasonable restraint of trade by the defendants.

It is not possible to determine whether or not such a restraint of trade as is disclosed in this indictment is unreasonable, without having definitely in mind what constitutes a reasonable restraint of trade. See *Stephen's Digest of Evidence* (2d Am. Ed. by Chase) Introduction, pp. xvi and xvii. There is as yet no standard clearly established by statute or otherwise, applicable to a case of this character by which to determine the reasonableness or unreasonableness of the restraint in question. To say that an agreement is illegal if it is unreasonable does not, in the absence of a clearly understood standard, greatly advance the discussion. The presence or absence of competition and the manner in which it is or may be affected necessarily enter into the question.

At common law, the reasonableness of the restraint of competition in cases in which such restraint was permitted was measured by the character and extent of the business sold, and by what was fairly required for its protection. *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 28 Atl. 973, 23 L. R. A. 639, 49 Am. St. Rep. 784. The facts were determined and compared, both as to the business sold and as to the extent of, and necessity for, the restraint.

"But the greater question is whether this is reasonable restraint of trade. And we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive; and, if oppressive, it is, in the eye of the law, unreasonable." *Tindal, C. J., Horner v. Graves*, 7 Binghams Reports, 743; *Joyce on Monopolies*, § 109, collecting cases.

Like principles would seem to be applicable to the case before us. That prices were affected by the alleged agreement seems by itself not enough to render the agreement unreasonable. 23 Harv. Law Rev. 541, citing many cases. The very object of agreements as to price and of most business combinations is to affect prices; if that alone in-

validates them, all such agreements and most combinations are either nugatory or unlawful. The only combination permitted would be one which was of advantage to its members simply by reducing the cost of the goods sold; but this seems a shadowy and impractical distinction; it has never, so far as I am aware, been adopted by any court.

"If the object of the contract had been merely to provide in good faith a uniformity of prices among the parties thereto to avoid unhealthy fluctuations in the market, or if the contract had contemplated a joint and mutual association between the parties for the common benefit in the nature of a partnership, and had simply fixed the prices at what they considered the business would bear, instead of combination between independent manufacturers and dealers for the purpose of at least destroying all competition between themselves, then there might have been nothing in such an arrangement which the courts could denounce as pernicious and forbidden by law." *Marr, J., Texas Standard Cotton Oil Co. v. Adoue*, 83 Tex. 650, 657, 19 S. W. 274, 276 (15 L. R. A. 598, 29 Am. St. Rep. 690).

The public has no right to unrestricted competition among all the persons engaged in any given business, nor to the benefit of prices produced by such competition. *Meredith v. Zinc & Iron Co.*, 55 N. J. Eq. 211, 221, 37 Atl. 539, per Pitney, V. C.; *Joyce, Monopolies*, § 101. The manner in which the restriction is effected—assuming no illegal intent to have existed—is not material, whether by a combination, by the appointment of a joint agent, or, as in this case, by mere agreement. Courts have not hesitated to disregard the form under which a restraint was effected if an illegal purpose or result was shown. By parity of reasoning, if the purpose or result are lawful, it is immaterial in what manner they are accomplished. *Joyce on Monopolies*, § 106. Each case is to be decided on its own facts. *Joyce on Monopolies*, § 102. What restriction of competition is permissible will differ widely according to the business situation in which the contracting parties find themselves. An agreement between persons engaged in quasi public employments, monopolistic in character, might be held unreasonable on much slighter grounds than an agreement between persons having no public franchises and no natural monopoly, and against whom ordinary competition might be expected to be effective.

In order to make a restraint unreasonable, it must, it seems to me, appear either (1) that the normal volume of interstate trade has been interfered with by artificial agencies affecting to a substantial degree to the disadvantage of the public, the prices or supply of the product, commodity, or business which is the subject of the alleged restraint, and going beyond what is fairly required for the proper protection of the parties accused; or (2) that by means of a combination or agreement between the parties concerned, either by themselves alone or in connection with others, the price or supply of the product, commodity, or business, which is alleged to be the subject of undue restraint, is or may be affected to a substantial extent to the disadvantage of producers or purchasers, so as thereby to operate in a material degree to the injury of the public, and beyond what can fairly be said to constitute a proper protection for the parties to the alleged combination or agreement; or (3) that there has been direct and intentional interference with the transportation of commodities between the states.

Considering, on the one hand, the situation of the parties to the agreement, the possibilities of loss to them which unrestricted competition involved, and their right to protect themselves fairly against it, and, on the other hand, the public needs and the advantages to the public from unrestricted competition, it must appear that the defendants have done more than was fairly justified by reasonable self-protection, and have thereby obtained an unfair advantage in the trade in question. In the absence of unlawful intent and actual oppression a restraint of competition would hardly be deemed unreasonable, unless so wide and far-reaching as substantially to alter the general conditions under which persons engaged in that trade in that district did business. A limited market and one nicely balanced as between buyers and sellers might be greatly disturbed by an agreement between only a few buyers or sellers, while a broader market might not be unfairly affected by a combination involving many persons and large amounts of goods.

"The application of the rule does not depend upon the number of those who may be implicated, or the extent of space included, in the combination, but upon the existence of injury to the public. One combination, consisting" in a number "of those engaged in a given branch of trade, may amount to a practical monopoly, while another, less extensive in scope, may, as well, bring disaster in its train." *Starrett, C. J., Nester v. Continental Brewing Co.*, 161 Pa. 473, 29 Atl. 102, 24 L. R. A. 247, 41 Am. St. Rep. 894.

What has been said so far applies to cases in which there was no unlawful intent, i. e., no intent to do more than protect the business of the contracting parties.

"Of course, if the necessary result is materially to restrain trade between the states, the intent with which the thing was done is of no consequence. But when there is only a probability, the intent to produce the consequences may become important." *Lurton, J., U. S. v. Reading Co. et al.*, *supra*.

The intent charged in the indictment is:

"To wrong the public and to oppress and limit the rights of milk producers in the states aforesaid by depriving said producers of the higher price for milk which would have resulted from free and open competition among said defendants, all as aforesaid."

While I do not think it necessary to decide whether this allegation of intent adds anything to the indictment, it seems to me at least doubtful whether it does so. If the defendants had a right to agree to refrain from competition in price, their intent to deprive the public of the advantages of competition *inter se* would not be an unlawful one. It is perhaps true that an agreement which might be valid if made by the defendants for their own advantage would be illegal if made for the purpose of oppressing the public; in other words, if it was a purely malicious, and not a selfish, affair—but the combination alleged is plainly not of that character. The great doubt about the case is whether any combination can be found to be an unreasonable restraint of trade in the absence of coercive methods, of monopolistic control over some commodity or service, and of intent to exclude others from the industry in question—matters which have been to some extent relied on by the Supreme Court in decisions under this statute. *Standard Oil Case*, 221 U. S. 1, 75, 76, 77, 31 Sup. Ct. 502, 55 L. Ed.

619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; U. S. v. St. Louis Terminal Co., 224 U. S. 383, 395, 32 Sup. Ct. 507, 56 L. Ed. 810; U. S. v. Winslow, 227 U. S. 202, 217, 33 Sup. Ct. 253, 57 L. Ed. 481. It seems to me, however, that the elements referred to, while usually present in such cases, are not essential.

Applying these views of the law to the case at bar: Here is a well-defined and extensive industry consisting on the one side of producing milk and selling it, and on the other side of buying it and shipping it to Boston and vicinity and Worcester. Eighty-six per cent. of the buying side of this industry was in the hands of these defendants. For them to agree upon prices which they would pay, and thereby to eliminate practically all competition as to price among buyers, may be found to have so seriously affected the conditions under which all persons engaged in that industry did business as to be an unreasonable restraint of trade. It is true that the milk produced might have been sold through other channels; but it is also true, as a matter of common knowledge, that it takes time to divert business from one channel into another. The sellers ought not to be compelled either to find other outlets for their product, or to await the re-establishment of competition among buyers, being obliged meanwhile to sell their output at prices affected, if not established, by the combination of buyers, and in the making of which competition had been practically eliminated.

On the day after this agreement went into effect, what was the producer of milk to do with his product? His choice was either to take the uncompetitive price obtainable, or, with a perishable product, to start in to hunt up other markets for it. He ought not to be put into that position. He was not entitled to a continuance of all the competition that had existed the day before, in the channel through which he was accustomed to dispose of his goods; but, as one of the public, he was entitled not to have all effective competition as to prices in that channel suddenly suppressed by agreement between 86 per cent. of the buyers therein. The fact that the alleged agreement does not appear to have been used oppressively is not sufficient to save it. In cases of restraint of trade or monopoly not arising under the Sherman Act, the prevailing view (although there has been some difference of opinion on this point) is that the potential evils of a monopoly or dominating control in any trade are sufficient to invalidate agreements having that purpose or result without proof of actual injury or evil result. *People v. Sheldon*, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690. The reasoning of these cases seems applicable to present conditions; and where the purpose or result of an agreement is to give the parties thereto a monopoly of any commodity, or a dominating control in any trade, the agreement would seem, *prima facie* at least, to be unreasonably extensive and therefore illegal.

It may be that the trade in milk for the Boston and Worcester markets was so closely interwoven with the general business of producing and selling milk that the agreement alleged may, upon a trial of this indictment, be found not to have substantially and unfairly limited the rights of the producers, because they still had other sufficient markets for their product which were not affected by the combination between

these defendants, nor to have conferred upon the parties to it any real domination or control of prices, and to have been only a fair limitation as between themselves of what would otherwise have been destructive competition. But there are limits to the right of collective bargaining, and, upon the facts stated in the indictment, it seems to me that the alleged combination might be found to have been unreasonably extensive and an unreasonable restraint of trade.

[6, 7] As to the second count of this indictment:

This count charges, as has been said, an attempt to monopolize trade. In all such cases which have heretofore come before the courts under the Sherman Act, there was on the part of the defendants ownership or control of the commodity. Upon such facts, there was no necessity for a sharp distinction between a combination in restraint of trade and a monopoly. No case has been found under that act in which a charge of attempted monopoly was based on an agreement among buyers only, without regard to the market in which they resold. As has been pointed out, there is no allegation, express or implied, in this indictment that these defendants dominated or controlled the markets in which they sold their milk. A "monopoly," both at common law and under this statute, implies, I think, the control of goods or service which the public desires to obtain. An attempt to monopolize means an attempt to get control of the industry in which the defendant is engaged "by means which prevent other men from engaging in fair competition with him." *Re Greene* (C. C.) 52 Fed. 116; *Joyce on Monopolies*, §§ 65-69. There may be, I think, an unreasonable restraint of trade which does not constitute a monopoly; though there can be no monopoly which does not constitute an unreasonable restraint of trade.

The business of these defendants was buying milk from the producers and selling it again to the public. The only way in which the combination alleged could in any way tend to enlarge their control of that business was by forcing down the price at which they bought, so that they would be able to undersell their competitors in the selling market. No facts are alleged from which any such purpose or intent can be inferred. It is not apparent how the alleged agreement as to buying prices would tend in any way to enlarge the defendants' control of their buying market, or to exclude competitors therefrom. Its natural effect would seem to be just the reverse. The indictment alleges that the agreement was made "with the intent to wrong the public and to oppress and limit the rights of milk producers * * * by depriving said producers of the higher prices for milk which would have resulted from free and open competition among said defendants." There can be no monopoly unless there is something which is monopolized. These defendants combined no tangible property, nor any control of tangible property. What they had was the ability and willingness to buy milk. It is not unlike a combination not to bid, or to bid only an excessive price, for public work, which has been held illegal, but which is certainly not a monopoly. *Gibbs v. Smith*, 115 Mass. 592 (but compare *Marshalltown Stone Co. v. Des Moines Brick Mfg. Co.*, 114 Iowa, 574, 87 N. W. 496). The manifest purpose of the agreement set out was to eliminate competition as to price in buying be-

tween the defendants; and, upon the facts alleged, no other intent or purpose can be discovered.

This count therefore seems to me not to charge a crime.

[8] As to indictment No. 453:

This indictment charges a conspiracy in restraint of trade. It does not contain the allegations of indictment No. 454 as to the percentage of milk sold in the country districts for shipment to the Boston and Worcester markets, which was bought by the defendants, nor any allegations from which it can be inferred that the defendants either controlled or were dominating factors in the buying market in the country or selling markets in those cities. For aught that appears, they may have been unimportant factors in each one. This indictment would have been good if no question of reasonableness were open. *U. S. v. Addyston Pipe Co.*, supra. But under the Sherman Act that question is open, and the indictment must, as above explained, allege facts warranting a finding by the jury that the restraint was unreasonable. The facts alleged do not justify such a conclusion, and no crime is therefore charged. Everything which this indictment sets out may be true, and still the combination or conspiracy may not have extended beyond what was reasonable, nor have unduly affected the conditions under which other persons engaged in that industry, either buying or selling, did business.

In *State v. Eastern Coal Co.*, 29 R. I. 254, 70 Atl. 1, 132 Am. St. Rep. 817, 17 Ann. Cas. 96, the indictment charged, in substance, that the five defendants did—

"combine, confederate and conspire together by divers unlawful and fraudulent devices, contrivances, and acts, unlawfully to regulate the price at which coal should be sold in the said city of Providence, * * * which said coal was then and there an article of prime necessity to the public and the consumers thereof."

The defendants demurred, and the court sustained the demurrer, holding that monopoly was the gist of the common-law offense, and that, as it did not appear from the indictment that the defendants had any power of control over the coal trade, they could not create a monopoly. The case raised the question whether every agreement to regulate the price of a prime necessity of life was criminal at common law; and the court, in sustaining the demurrer, decided that this was not so. The decision implies that under some circumstances such agreements may lawfully be made.

At the arguments on these demurrers it was said that the trial of the cases before a jury would take not less than six weeks and might take double that time. It is deplorable that the government and the defendants should be compelled to go to the trouble and expense which such a trial involves upon the opinion of a single judge on a doubtful question of law. But there is no way under the federal practice by which the lower court can present such questions as are raised by these demurrers to the first count of indictment No. 454 to an appellate court until after verdict and judgment. The case shows the need of legislation giving the District Courts of the United States the right, now possessed by trial courts in many of the states, to report important and

doubtful questions of law to the appellate court for determination before trial upon the facts.

The result is:

That indictment No. 453 is adjudged insufficient in law, the demurrers thereto are severally sustained, and the defendants go therefrom without day.

That indictment No. 454 is adjudged sufficient in law as to the first count thereof, that the demurrers to said count are severally overruled, and that the defendants are given leave to plead to said count on or before April 1, 1914.

That indictment No. 454 is adjudged insufficient in law as to the second count thereof, that the demurrers to this count are severally sustained, and that the defendants go therefrom without day.

COBBAN v. HYDE.

(District Court, N. D. California, Second Division. November 17, 1913.)

No. 15,456.

1. PUBLIC LANDS (§ 52*)—SCHOOL LANDS—EFFECT OF GRANT TO STATE.

Under Act Cong. Feb. 14, 1859, c. 33, 11 Stat. 383, admitting Oregon into the Union, which provided that sections 16 and 36 in every township of public lands, and, where either of such sections or any part thereof had been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as might be, should be granted to the state for the use of schools, where a sixteenth section was, by executive proclamation, included in a forest reserve prior to the survey of the township, title thereto never passed to the state, and its patent to a purchaser was void, since there was no present grant or promise to grant the particular sections, and, until surveyed, they were subject to other sale or disposition by the United States.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 139-142, 146, 147; Dec. Dig. § 52.*]

2. GUARANTY (§ 36*)—GUARANTY OF TITLE—OPERATION AND EFFECT.

Where a land attorney, upon the sale of the selection right of a purchaser of a sixteenth section which was included in a forest reserve, executed a guaranty that the land was within such forest reservation and had been duly and properly surrendered to the United States, that a lieu selection had been made and rejected, that no other selection in lieu of the surrendered land had been made, and that the vendor's right remained and was good and valid and would be recognized by the Commissioner of the General Land Office, and a selection by the vendee was thereafter canceled on the ground that title to the sixteenth section did not pass to the state, and that the vendor's purchase was void, the guaranty amounted to a guaranty of the validity of the vendor's title and not merely a warranty of the regularity of the various steps therein recited; and hence notes given by him in fulfillment of the guaranty were not unenforceable for want of consideration.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 38-45; Dec. § 36.*]

At Law. Action by R. M. Cobban against F. A. Hyde. Judgment for plaintiff.

This is an action to recover on two promissory notes executed by defendant to plaintiff, dated December 31, 1909, one for \$2,500, payable one year after date, and the other for \$5,100, payable two years after date, with provision in each for attorney's fees for collection in the event of action being necessary. The execution and delivery of the notes is admitted; but the defense is a want of consideration. The circumstances under which the notes were given are these: The act of Congress of February 14, 1859 (chapter 33, 11 Stat. 383), providing for the admission of Oregon into the Union, declares that "sections 16 and 36 in every township of public lands in said state, and where either of said sections or any part thereof has been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to the state for the use of schools." The provisions of this act were accepted by the Legislature of Oregon on June 3, 1859. On June 28, 1889, the state of Oregon issued patents to section 16, township 9 south, range 5 east, Willamette Meridian, to A. S. Baldwin before survey of the townships, the survey of township 9 south, range 6 east, being completed August 5, 1893, and that of township 9 south, range 5 east, August 26, 1893, but not approved by the Secretary of the Interior until April 23, 1894. Prior to such approval, the three sections were included in the Cascade Forest Reserve by executive proclamation of September 28, 1893 (28 Stats. at L. 1240).

By the act of Congress of June 4, 1897 (chapter 2, 30 Stat. 36), an owner of title to land within a forest reserve was granted the right to relinquish the same to the United States and to select in lieu thereof vacant land of the United States, open to settlement, outside of said reserve and equal in area to that relinquished. The selection right consequent upon such relinquishment was commonly termed by land dealers "Forest Reserve Scrip"; such right being saleable, the sale being evidenced by a power of attorney to make selection in a land office, an abstract of title, and a power of attorney to sell the selected land. On June 28, 1899, proceeding under that act, Baldwin, with his wife (joined with him to carry her dower right under the laws of Oregon), executed a deed of relinquishment of the three sections to the United States, which deed was duly recorded and filed with the Commissioner of the General Land Office. Thereupon Baldwin made a lieu selection, based on such relinquished sections, in a Washington Land Office, and filed it with the deed and an abstract of title. This selection was rejected by the Secretary of the Interior and canceled on grounds which are not disclosed but which it is conceded were other than because of any claimed defect of title to the base land. After such cancellation, Baldwin granted to defendant herein, a land attorney, authority to sell his further selection right based on said relinquished sections. On February 25, 1901, defendant, in consideration of \$7,680, sold the selection right to this plaintiff, and caused Baldwin and wife to execute and deliver to plaintiff a power of attorney to make a lieu selection, and also a power of attorney to sell the selected land. As part of the same transaction defendant executed to plaintiff a covenant and guaranty embodying these terms: "First. That the said land is within the Cascade Range Forest reservation in the state of Oregon. Second. That the said land has been duly and properly surrendered to the United States. Third. That the original deed to the United States of said land is now on file in the office of the Commissioner of the General Land Office, with the selection by said Baldwin of the southeast quarter of section thirty-one (31), the northwest quarter of section thirty-two (32), the northwest quarter, the south half of the northeast quarter, and the north half of the southeast quarter of section thirty-four (34), the north half and the southwest quarter of section thirty-five (35), the northeast quarter of section twenty-seven (27), the southwest quarter of section twenty-three (23), the south half of section fourteen (14), and the southwest quarter of section thirteen (13), in township three (3) north of range five (5) east, Willamette Meridian. Fourth. That the said selection has been rejected by the Secretary of the Interior. Fifth. That the said Baldwin has made no other selection in lieu of said surrendered land, and his right remains and is good and valid, and will be recognized by the Commissioner of the General Land Office."

On April 10, 1901, plaintiff, acting under the power of attorney to select, filed with the register and receiver of the United States Land Office at Boise,

Idaho, an application to select, under the act of June 4, 1897, certain lands in townships 11 and 12 north, range 3 east, Boise Meridian. The Commissioner of the General Land Office, on March 16, 1909, held the selection for cancellation, upon the ground that, as the survey of the Oregon base lands had not been approved until after the executive proclamation creating the Cascade Forest Reserve and including them therein, this action reserved them from the category of public lands, and that title thereto never passed from the United States to the state of Oregon; and therefore that the patent from that state to Baldwin was void and of no effect to carry title to the latter. On appeal to the Secretary of the Interior the decision of the Commissioner was affirmed, and on October 8 1909, the Commissioner made a final order canceling the Boise selection.

Thereafter plaintiff, treating the decision of the Secretary as final, requested defendant to fulfill his guaranty and on December 31, 1909, after some negotiation, defendant, conceding his obligation to reimburse plaintiff, but not having the ready money, executed the promissory notes in suit. Subsequently defendant co-operated with plaintiff in recovering from the state of Oregon the amount of purchase price which had been paid that state for the land, and the sum recovered, \$2,045.35, was credited on the note for \$2,500, in accordance with the agreement of the parties. Nothing further having been paid on the notes, this suit was brought.

Cushing & Cushing, of San Francisco, Cal., for plaintiff.

M. W. McIntosh, of San Francisco, Cal., and Robert F. Bell, of Oakland, Cal., for defendant.

VAN FLEET, District Judge (after stating the facts as above). [1] The theory of the defense, which is quite urgently presented, is, in substance, that the terms of the Oregon enabling act operated as a grant in praesenti, and, upon the acceptance by the state of its provisions, the state became clothed with an indefeasible right to all the public lands within its borders which should thereafter be ascertained by actual survey to be embraced within the sixteenth and thirty-sixth sections; that, although title to the particular sections did not formally vest until the survey thereof was approved, the state was potentially clothed with the title for the reason that by the force of its terms the sixteenth and thirty-sixth sections were irrevocably appropriated to the use of the state, subject only to be thereafter identified by survey, and were thereby withdrawn from other sale or disposition by the United States; that it was thereafter not within the power of the Congress, or the president acting under subsequent legislation, to reserve or appropriate such lands or any part thereof to any other use; that the state had a perfect right to sell such lands in anticipation of the survey, and, upon such survey being made and approved, it inured to the benefit of the state and its grantees and operated to vest absolute title in fee thereto.

From this premise it is argued that, notwithstanding the decision of the Land Department to the contrary, a perfect title to the lands involved had vested in Baldwin at the time of the sale by defendant to plaintiff and the giving of the guaranty above set out; that the latter paper is therefore not to be construed as guaranteeing in Baldwin a valid title, which he already had, but as warranting only the regularity of the various steps therein recited as vesting such title; that, so construed, the guaranty affords no consideration for the notes sued on, but they must be held to have been given under a misapprehension by defendant of his legal obligation thereunder. From this statement it

will be observed that the essential question upon which the defense rests is whether the language of the enabling act is susceptible of the construction which defendant thus seeks to place upon it.

In reaching his conclusion that title to the lands involved never vested in the state of Oregon, the Secretary of the Interior said in his opinion:

"It is a well-established principle that the title of the state to the granted sections does not vest until they have been designated by an approved survey, and that, until the survey of the lands and the vesting of title, Congress has absolute power and control over the granted sections, and may dispose of them in any manner it may deem proper, leaving the state to its right to indemnity therefor. That has been so frequently determined by the Supreme Court as to be no longer a subject of controversy *Heydenfeldt v. Daney Gold Mining Co.*, 93 U. S. 634 [23 L. Ed. 995]. Furthermore, the question was directly decided in *Minnesota v. Hitchcock*, 185 U. S. 373-400 [22 Sup. Ct. 650, 46 L. Ed. 954]; the school grant to the state of Minnesota being totidem verbis the same as the grant to the state of Oregon. In that case the court said that 'the act of admission with its clause in respect to school lands was not a promise by Congress that under all circumstances, either then or in the future, these specific school sections were or should become the property of the state. The possibility of other disposition was contemplated, the right of Congress to make it was recognized, and provision made for the selection of other lands in lieu thereof.' See, also, *Wisconsin v. Hitchcock*, 201 U. S. 202 [26 Sup. Ct. 498, 50 L. Ed. 727]."

These views of the Honorable Secretary would seem to be fully sustained by the authorities referred to by him.

Thus in *Heydenfeldt v. Daney G. M. Co.*, there cited, involving a construction of the Nevada enabling act, which, unlike the one under consideration, contained express terms of present grant of the sixteenth and thirty-sixth sections, the court, in a controversy arising between the plaintiff, a patentee of the state of a part of a sixteenth section, and the defendant holding a subsequent mineral patent from the United States based on an entry made after the admission of the state, but prior to the survey of the land, after a careful review of the provisions of the act and a consideration of the sense in which it should be construed, reached the conclusion that the title to the land involved had never vested in the state, and that the mineral title should prevail. It is there said:

"This interpretation, although seemingly contrary to the letter of the statute, is really within its reason and spirit. It accords with a wise public policy, gives to Nevada all she could reasonably ask, and acquits Congress of passing a law which in its effects would be unjust to the people of the territory. Besides, no other construction is consistent with the statute as a whole, and answers the evident intention of its makers to grant to the state in present a quantity of lands equal in amount to the sixteenth and thirty-sixth sections in each township. Until the status of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them; and if, in exercising it, the whole or any part of a sixteenth or thirty-sixth section had been disposed of, the state was to be compensated by other lands equal in quantity, and as near as may be in quality. By this means the state was fully indemnified, the settlers ran no risk of losing the labor of years, and Congress was left free to legislate touching the national domain in any way it saw fit, to promote the public interests."

So in *Minnesota v. Hitchcock*, 185 U. S. 373, 22 Sup. Ct. 650, 46 L. Ed. 954, involving the granting clause of school lands in the Minnesota

enabling act, which, as suggested by the Secretary of the Interior, is in the precise terms of the grant to Oregon, in a controversy over lands found upon survey to be embraced within sixteenth and thirty-sixth sections, but where, at the time of the admission of the state and the date of the survey, the lands were within an Indian reservation, it was held, after an exhaustive examination of the question, that the lands, being thus reserved at the date of survey, were not "public lands," within the meaning of the grant, and the title of the state had not attached. To quote one or two of the more pertinent passages from that case, after referring to the school land clause it is said:

"It will be perceived that this grant was of 'public lands.' It was held in *Newhall v. Sanger*, 92 U. S. 761, 763 [23 L. Ed. 769] that: 'The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.' * * * 'We agree that, until the survey of the township and the designation of the specific section, the right of the state rests in compact, binding, it is true, the public faith, and dependent for execution upon the political authorities.' * * * But, while this is true, it is also true that Congress does not, by the section making the school land grant, either in letter or spirit, bind itself to remove all burdens which may rest upon lands belonging to the government within the state, or to transform all from their existing status to that of public lands, strictly so called, in order that the school grant may operate upon the sections named. It is, of course, to be presumed that Congress will act in good faith; that it will not attempt to impair the scope of the school grant; that it intends that the state shall receive the particular sections or their equivalent in aid of its public school system. But considerations may arise which will justify an appropriation of a body of lands within the state to other purposes, and, if those lands have never become public lands, the power of Congress to deal with them is not restricted by the school grant, and the state must seek relief in the clause which gives it equivalent sections. If, for instance, Congress in its judgment believes that, within the limits of an Indian reservation or unceded Indian country (that is, within a tract which is not strictly public lands), certain lands should be set apart for a public park, or as a reservation for military purposes, or for any other public uses, it has the power, notwithstanding the provisions of the school grant section."

And finally it is said:

"In other words, the act of admission with its clause in respect to school lands was not a promise by Congress that under all circumstances, either then or in the future, these specific school sections were or should become the property of the state. The possibility of other disposition was contemplated, the right of Congress to make it was recognized, and provision made for a selection of other lands in lieu thereof."

The case of *Wisconsin v. Hitchcock*, 201 U. S. 202, 26 Sup. Ct. 498, 50 L. Ed. 727, involves the same principles.

These authorities would seem to be conclusive of the present question unless this case is excepted from the principles thus announced by the decision in *Beecher v. Wetherby*, 95 U. S. 523, 24 L. Ed. 440, the sole reliance of defendant to sustain the contentions advanced in support of his defense. In that case, considering the act for the admission of Wisconsin and the effect of the clause granting the sixteenth sections for school purposes, it is said by the court, speaking through Mr. Justice Field:

"It matters not whether the words of the compact be considered as merely promissory on the United States, and constituting only a pledge of a grant in future, or as operating to transfer the title to the state upon her acceptance

of the propositions as soon as the sections could be afterwards identified by the public surveys. In either case, the lands which might be embraced within those sections were appropriated to the state. They were withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted. All that afterwards remained for the United States to do with respect to them, and all that could be legally done under the compact, was to identify the sections by appropriate surveys. * * * They could not be diverted from their appropriation to the state. * * * With this identification (by survey) of the sections, the title of the state, upon the authority cited, became complete, unless there had been a sale or other disposition of the property * * * previous to the compact with the state. No subsequent sale or other disposition, as already stated, could defeat the appropriation."

Defendant contends that this language had the effect to overrule *Heydenfeldt v. Daney* and to create a rule of property which must be read into the contract between the parties here and which could not be thereafter affected by the case of *Minnesota v. Hitchcock*, decided subsequently to the making of that contract. While, considered apart from the facts with reference to which it was used, this language might be regarded at first glance to be somewhat at variance with the principles announced in the cases referred to, when read with reference to the case before the court, that seeming inconsistency fades out, and the case is found not to be out of harmony with either *Heydenfeldt v. Daney* or the subsequent case of *Minnesota v. Hitchcock*. The court was there considering a case where, at the time of the survey of the land in controversy (a sixteenth section), the only obstacle standing in the way of the vesting of title in the state under its school grant was the Indian title covering it, but which latter the government had thereafter removed by treaty with the Indians; and the question before the court was whether a patent issued by the state after the Indian title had been wiped out should prevail to carry title over a patent from the United States issued under an act of Congress subsequently passed providing for a sale of the Indian lands. The court held, in substance, that when the Indian title was disposed of under the treaty, and, there having been no other disposition of the land by the United States up to that time, the title to the school lands within the reservation, they having been previously identified by survey, immediately vested in the state, and that it was not thereafter in the power of Congress to make other disposition of such lands; that the act providing for the sale of the Indian lands must therefore be construed as not intended to apply to the school sections embraced within the limits of the larger tract directed to be sold.

Addressed to such a case, the language quoted is strictly applicable; but that it has no proper application to a case like this, where, before the definition of the land by survey, the government had seen fit to reserve it for other use and thereby interpose a bar to the vesting of title in the state, is quite as obvious. The distinction between that case and the present is aptly stated in *Minnesota v. Hitchcock*, where the case is cited and the language relied upon by defendant is quoted and fully considered, and where, referring to the question there decided, the court say:

"But this case stands on entirely different grounds. Before any survey of the lands, before the state right had attached to any particular sections, the United States made a treaty or agreement with the Indians, by which they accepted a cession of the entire tract under a trust for its disposition in a particular way. The question is not as to the construction of two separate statutes, but as to the scope and effect to be given to a treaty or agreement with the Indians, and whether it is to be narrowed in its scope by any rules applicable to the construction of statutes, rules with which it is not to be supposed the Indians were familiar."

That *Beecher v. Wetherby* is to be given no such effect as that contended for here is thus fully disclosed by the discussion in the *Minnesota* case; and that it was not regarded as in any way infringing upon the principles announced in *Heydenfeldt v. Daney* is made manifest by the fact that the latter case is therein cited and approved.

[2] From these considerations it must be held, in accordance with the ruling of the Secretary of the Interior, that title to the lands in question never vested in the state of Oregon, and that consequently it did not pass to Baldwin under his patent. It follows that the effect of defendant's guaranty cannot be limited as claimed, but must be construed in accordance with the fair implication of its terms, and, as defendant himself has heretofore construed it, as guaranteeing the validity of Baldwin's title. So construed, the defense of want of consideration cannot prevail. This conclusion renders it unnecessary to notice the further ground of recovery urged by plaintiff.

Let judgment be entered for the plaintiff for the amount due on the notes, with interest as prayed, together with an attorney's fee of \$400.

UNITED STATES ex rel. ATTORNEY GENERAL v. LOUISVILLE
& N. R. CO.

(District Court, W. D. Kentucky. March 25, 1914.)

1. COMMERCE (§ 87*)—MANDAMUS—PERFORMANCE OF DUTY BY CARRIERS ENGAGED IN INTERSTATE COMMERCE—STATUTORY PROVISIONS.

Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169]) § 20, authorizing the court on application to compel by mandamus a carrier within the Interstate Commerce Act to comply with the provisions thereof, does not confer on the court power to compel by mandamus, in aid of an investigation by the Interstate Commerce Commission pursuant to a resolution of the Senate requiring the investigation, a railroad to disclose the amount of stocks and bonds of another railroad company it owns or controls, and whether the two railroads serve the same territory in whole or in part, and whether, under separate ownership, they will be competitors, and other facts showing further relations between the two railroads, and showing whether such relations restrict competition and maintain fixed rates; since the investigation does not relate to interstate commerce as regulated by the Interstate Commerce Act, but relates perhaps to other legislation, such as the anti-trust act.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 139; Dec. Dig. § 87.*]

2. COMMERCE (§ 87*)—MANDAMUS—PRIVILEGED COMMUNICATIONS.

Mandamus will not lie under Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169]) § 20, to compel

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a disclosure of privileged communications between an individual and his counsel.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 139; Dec. Dig. § 87.*]

3. STATUTES (§ 263*)—CONSTRUCTION—RETROSPECTIVE EFFECT.

Statutes are presumptively prospective in operation, and courts will refuse to give them a retrospective effect, unless the intention to the contrary is so clear and positive as by no reasonable possibility to admit of any other construction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 344, 349; Dec. Dig. § 263.*]

4. COMMERCE (§ 87*)—MANDAMUS—PRODUCTION OF PAPERS—DISCRETION OF COURT—STATUTORY PROVISIONS.

Where the petition for mandamus under the Hepburn Act (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1911, p. 1284]), authorizing the Interstate Commerce Commission to require the production of accounts, records, and memoranda, demands the production of papers which had their origin before the act, and the allegations of the petition are vague with respect to what papers should be produced, so that the court may not see what portions of the papers may be privileged communications between attorney and client and what not, or what part of them may be within the Interstate Commerce Act and what not, the court in its discretion will refuse the writ.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 139; Dec. Dig. § 87*]

Mandamus by the United States, by its Attorney General, against the Louisville & Nashville Railroad Company. Dismissed, without prejudice.

George Du Relle, Dist. Atty., of Louisville, Ky., and P. J. Farrell, of Washington, D. C., for the United States.

Henry L. Stone, Helm Bruce, and E. S. Jouett, all of Louisville, Ky., for Louisville & N. R. Co.

EVANS, District Judge. The act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), after providing (section 1) that it shall apply to any common carrier or carriers engaged in the transportation of passengers or property from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or to any adjacent foreign country, but that its provisions should not apply to the transportation of passengers or property wholly within any state, provides that all charges for such transportation shall be reasonable and just, that all classifications of property for transportation shall be just and reasonable, and (sections 2 and 3) that unjust discrimination shall be unlawful, and that no undue or unreasonable preference shall be given to any shipper, and (section 5) that it shall be unlawful to pool freights, and the Interstate Commerce Commission is given authority to determine questions of competition or possible competition. By section 6 it is provided that certain schedules of rates, fares, and charges shall be filed and established, and that due notice thereof shall be given. Section 6 also provides that every common carrier subject to the act shall file with the Interstate Commerce Commission copies

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of all contracts, agreements, or arrangements with other common carriers of any arrangements affected by the act, and also provides that no common carrier shall engage in such transportation unless it files and publishes such schedules of rates. The Interstate Commerce Commission established by the act is given wide and extensive powers, among which (section 12) is the authority to inquire into the management of the business of all common carriers subject to the provisions of the act, and the commission is required to keep itself informed as to the manner and method in which such business is conducted, with the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created, and upon the request of the commission it is made the duty of the district attorney of the United States to whom it may apply to institute in the proper court necessary proceedings for the enforcement of all the provisions of this act for the punishment of all violations thereof. By section 20 the commission is authorized to require from all carriers subject to the act annual reports, and it may prescribe the method of making them, and such annual reports are required to show in detail its capital stock and many other items specified in that section. This section further provides that the commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of the act including the accounts, records, and memoranda of the movement of traffic as well as receipts and expenditures of money. The commission is authorized at all times to have access to all accounts, records, and memoranda kept by carriers subject to the act, and it is provided that it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the commission, and the commission is authorized to employ special agents or examiners who shall have authority under the order of the commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. The section prescribes penalties for the failure on the part of the carrier to keep such accounts, records, and memoranda on such books as may be prescribed by the commission or for a refusal to submit such accounts, records, or memoranda as are kept to the inspection of the commission or any of its authorized agents or examiners. This section contains a clause which reads thus:

"That the Circuit and District Courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the commission, alleging a failure to comply with or a violation of any of the provisions of said act to regulate commerce or of any act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said acts or any of them."

On February 7, 1914, the United States by its Attorney General filed in this court a petition in which, among other things, it is alleged:

"That by section 12 of said act, as amended, said commission is authorized and required: To inquire into the management of the business of all common carriers subject to the provisions of said act, to keep itself informed as to the manner and method in which said business is conducted; to obtain from such common carriers full and complete information necessary to enable

said commission to perform the duties and carry out the objects for which it was created; and to execute and enforce the provisions of said act.

"That by said section 12 it is provided that, upon the request of said commission, it shall be the duty of any district attorney of the United States to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of said act and for the punishment of all violations thereof.

"That on the 6th day of November, 1913, a resolution was considered by unanimous consent in the Senate of the United States and agreed to by said Senate, in words and figures as follows, to wit:

"Resolution.

"Resolved, that the Interstate Commerce Commission be, and the same is hereby, directed to investigate, taking proof and employing counsel if necessary, and report to the Senate as soon as practicable:

"First. What amount of stock, bonds, and other securities of the Nashville, Chattanooga & St. Louis Railway is owned or controlled by the Louisville & Nashville Railroad.

"Second. What other railroad or railroads in the territory served by the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway have been purchased, leased, controlled, or arrangements entered into with, for the purpose of controlling by either the Louisville & Nashville Railroad or the Nashville, Chattanooga & St. Louis Railway.

"Third. Whether the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway serve the same territory in whole or in part, and whether, under separate ownership, they would be competitive to the various points in their territories.

"Fourth. Any other fact or facts showing or tending to show the further relations between the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway, and any fact or facts showing or tending to show whether these relations restrict competition and maintain fixed rates.

"Fifth. The terms of the lease of the Nashville & Decatur Railroad by the Louisville & Nashville Railroad, and what amount, if any, of stock, bonds, and other securities of the Nashville & Decatur Railroad and of the Lewisburg & Northern Railroad are owned by the Louisville & Nashville Railroad or any of its subsidiaries or holding companies.

"Sixth. Whether the Nashville & Decatur Railroad, the Lewisburg & Northern Railroad, and the Louisville & Nashville Railroad serve the same territory in whole or in part, and whether, under separate ownership, these railroads would be competitive between various points in their territories.

"Seventh. Any other fact or facts showing or tending to show the further relations between the Louisville & Nashville, the Nashville & Decatur Railroad, and the Lewisburg & Northern Railroad, and any fact or facts showing or tending to show whether these relations restrict competition and maintain and fix rates.

"Eighth. Any fact or facts showing or tending to show: (a) The relations between the Louisville & Nashville Railroad, the Nashville, Chattanooga & St. Louis Railway, the Tennessee Midland Railroad, the Tennessee, Paducah & Alabama Railroad, and any other railroads that have been purchased or leased by either or both of said railroad companies, and whether such relations restrict competition and maintain and fix rates; and (b) whether the lease of the Western & Atlantic Railroad by the Nashville, Chattanooga & St. Louis Railway from the state of Georgia, and the arrangement made between the Louisville & Nashville and the Nashville, Chattanooga & St. Louis Railroad, by which the former uses the tracks of the said Western & Atlantic Railway, restrict competition, restrain trade, and determine and fix rates.

"Ninth. Any fact or facts showing or tending to show whether the ownership of the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway of any railroad terminals or terminal companies, steamboats and steamboat lines upon the Cumberland and Tennessee rivers, and any dock or dockyards at Pensacola, New Orleans, Mobile, or other seaport,

establishes a monopoly and restricts competition and determines and fixes rates.

"Tenth. Any fact or facts showing or tending to show whether an agreement or arrangement has been entered into between the Louisville & Nashville and other railroad companies for the purpose of preventing competition from entering into any of the territory served by the Louisville & Nashville Railroad, in consideration of the Louisville & Nashville Railroad agreeing not to enter into certain other territory, or in consideration of any other agreement or arrangement.

"Eleventh. What amount of stock, if any, the Atlantic Coast Line, or Atlantic Coast Holding Company owns in the Louisville & Nashville Railroad, and in the Atlantic Coast Line, and whether the ownership by such holding company of a majority of stock in both of the aforesaid railroads tends to restrict competition and maintain and fix rates.

"Twelfth. What amount, if any, the Louisville & Nashville Railroad, the Nashville, Chattanooga & St. Louis Railway, the Nashville & Decatur Railroad, and the Lewisburg & Northern Railroad, all or any of them, have subscribed, expended, or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads. And

"Thirteenth. (a) The number of free annual passes; (b) the number of free-trip passes; (c) the number of every kind of free passes issued by each of said railroads each year since January first, nineteen hundred and eleven, to members of legislative bodies and other public officials; (d) the total mileage traveled upon free passes issued under each of the above classifications; and (e) the amount in money the free passes issued under each of the above-mentioned classifications would equal at the regular rates for such service of each of the above-named railroads.

"That prior to the times hereinafter mentioned said commission, for the purpose of enabling it to perform the duties imposed upon it by said act as aforesaid, duly appointed two special agents and examiners, namely, Will H. Carleton and Paul H. Lawrence, and duly authorized them to inspect and examine the accounts, records, and memoranda of said defendant, and said Carleton and Lawrence continuously since said appointment have been and still are duly appointed and authorized agents and examiners of said commission with authority as aforesaid.

"That heretofore, to wit, on the 4th day of February, 1914, the said commission by and through said Carleton, agent and examiner as aforesaid, applied to and made demand of said defendant and to and of its first vice president, W. L. Mapother, the officer of said defendant in charge and control of the accounts, records, and memoranda of said defendant, and to and of other officers and agents of said defendant for access to and opportunity to examine the accounts, records, and memoranda kept by said defendant prior to August 28, 1906, and the said defendant and said Mapother, vice president as aforesaid, and said other officers and agents of defendant failed and refused to comply with the provisions of said act to regulate commerce and violated the provisions of said act, and failed and refused to give either to said commission or to said Carleton, agent and examiner as aforesaid, access to or opportunity to examine said accounts, records, and memoranda of said defendant made prior to said August 28, 1906.

"And that heretofore, to wit, on February 4, 1914, said commission, by and through said Carleton, agent and examiner as aforesaid, applied to and made demand of said defendant and to and of its first vice president, W. L. Mapother, the officer of said defendant in charge and control of the accounts, records, and memoranda of said defendant, and to and of other officers and agents of said defendant for access to and opportunity to examine the accounts, records, and memoranda kept by said defendant on and subsequent to said August 28, 1906, including the correspondence received by said defendant on and subsequent to said date and copies of the correspondence sent out by said defendant on and subsequent to said date, and also the indexes pertaining to said correspondence and copies of correspondence, and that

said defendant and said Mapother, vice president as aforesaid, and said other officers of said defendant, failed and refused to comply with the provisions of said act to regulate commerce and violated the provisions of said act, and failed and refused to give either to said commission or to said Carleton, agent and examiner as aforesaid, access to or opportunity to examine said accounts, records, and memoranda of said defendant, that is to say, that said defendant and its said officers and agents failed and refused to give either to said commission or to said Carleton, agent and examiner as aforesaid, access to or opportunity to examine said correspondence received by said defendant on and subsequent to said August 28, 1906, or the copies of correspondence sent out by said defendant on and subsequent to said date, or the indexes kept with respect to said outgoing and incoming correspondence by said defendant, and said defendant and its said officers and agents failed and refused to give either to said commission or to said Carleton, agent and examiner as aforesaid, access to or opportunity to examine other accounts, records, and memoranda of said defendant made on and subsequent to said August 28, 1906.

"That in pursuance of said commission's duty under the law and in obedience to said resolution of the Senate hereinbefore set out, and to enable said commission to perform the functions for which it was created, it became and was the duty of said commission to obtain access to and to examine, by and through its special agents and examiners as aforesaid, all of said accounts, records and memoranda, including said correspondence, copies of correspondence, and indexes thereto, and it became and was the duty of said defendant and its officers and agents to give access to said commission and its agents and examiners to said accounts, records, memoranda, correspondence, copies of correspondence, and indexes, and to give to said commission and said agents and examiners opportunity to examine and inspect said accounts, records, memoranda, correspondence, copies, and indexes.

"Wherefore plaintiff prays the court to issue a writ of mandamus commanding said Louisville & Nashville Railroad Company, common carrier as aforesaid, to comply with said provisions of said acts of Congress, and to give access to the accounts, records, and memoranda of said defendant and the said correspondence, copies of correspondence, and indexes thereto, and to afford opportunity to examine the same to said commission and its said agents and examiners, and to give such access to and opportunity to examine the said accounts, records, and memoranda made and kept by and for said defendant both before, on, and subsequent to August 28, 1906, including correspondence, copies of correspondence, and indexes thereto, and other indexes to said accounts, records, and memoranda, and plaintiff prays for all proper relief."

The defendant's answer contains four separate paragraphs, each of which states a separate matter of defense. Their substance may, we think, be succinctly, and for the present purpose sufficiently, stated as follows:

First. The first paragraph, after certain denials, states facts upon which the defendant insists that it had exhibited to the agent of the Interstate Commerce Commission all the accounts, records, and memoranda and other papers which the law required it to show, and had withheld none which it was its duty to exhibit. It avers that it was not required to do so, and for that and other reasons it did not exhibit various papers described in general terms which the law did not require it to show the examiner, many of which were privileged communications between the various departments of its official work, including those between the defendant and its attorneys, but which had no relation to anything coming within the act.

Second. The defendant, in paragraph 2 of its answer, pleads exemption under the fourth of the articles of amendments to the Constitution of the United States from the searches sought to be made by the examiner upon the ground that those searches are unreasonable.

Third. The third paragraph sets up the order of the Interstate Commerce Commission made on November 10, 1913, and which was served on defendant on November 13th, and which order directed certain steps to be taken in order to carry into effect the resolution passed by the Senate and set forth in plaintiff's petition. This order, it is claimed, has not been followed by the examiner in this instance.

Fourth. The answer endeavors to show that the defendant had fully complied with the demand of the commission and its examiner in respect to the free passes it had issued since January 1, 1911, by giving to the examiner a full exhibition of all the facts in respect thereto.

In the view we feel compelled to take of the case we think it unnecessary to dwell upon the defense set up in paragraph 2 of the answer in respect to the fourth amendment to the Constitution.

With equal brevity may we dispose of the fourth defense because it is admitted at the bar that, so far as the inquiry respecting the free passes is concerned, full and satisfactory information has been given to the examiner by the defendant.

[1] This leaves for consideration only the defense set up in the first and that set up in third paragraphs of the answer. We shall state with brevity our views upon each of these defenses, circumstances not favoring an elaborate discussion of them, even if that were necessary or desirable. Indeed, the third paragraph may be easily disposed of.

In the case of *Hein v. Levee Com'rs*, 19 Wall. at page 660, 22 L. Ed. 223, the Supreme Court, speaking through Mr. Justice Miller, said:

"Mandamus is essentially and exclusively a common law remedy and is unknown to the equity practice. But if this were otherwise it is the well settled doctrine of this court that the Circuit Courts can not use the writ of mandamus as an original and independent remedy, but are limited to its use as a process in the enforcement of rights when jurisdiction has been already acquired for other purposes."

This is the general rule, but the act to regulate commerce gives the court jurisdiction and power to issue writs of mandamus in certain cases for the enforcement of the act, but in no way can it be construed to confer upon the court power to enforce by that writ a resolution of the Senate alone; such resolution being no part of the act and not being a law of the United States. This was so obvious that the learned district attorney frankly admitted that the Senate resolution could not be enforced in that manner, and in open court disclaimed any purpose to seek relief upon that ground.

In these circumstances we may lay to one side the Senate resolution as such, though, if there can be found in it anything which also comes

within the provisions of the act to regulate commerce, the relief sought in this case might be grantable, even if the Senate resolution also contained it. A careful examination of the plaintiff's petition, the act to regulate commerce, and the Senate resolution has resulted in the conclusion that except in the thirteenth clause of the Senate resolution, which relates to the inquiry as to free passes issued, that resolution, under no admissible interpretation, relates to interstate commerce as regulated by the act. It relates possibly to other legislation, such as the Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), but not to the act regulating commerce between the states. This being so, that clause of the act to regulate commerce which gives the court power to issue writs of mandamus does not embrace a case outside the latter act.

As in the *Harriman Case*, 211 U. S. 417 et seq., 29 Sup. Ct. 115, 53 L. Ed. 253, it is claimed here that the general language of the act confers unlimited authority upon the Interstate Commerce Commission and its agents, whether or not the court can see how what is demanded affects interstate commerce. In the opinion in that case Mr. Justice Holmes gave a graphic description of the broad construction insisted upon by the commission, and indeed it must be confessed that much support to these claims has been given by the Supreme Court in other cases and by Congress. We think it not unlikely that there are few limits which can safely be fixed by the lower federal courts upon the operation of the clause of the act bestowing power upon the commission. Nevertheless, we think it clear that the Senate resolution, not being a law, cannot bring this case within section 20 of the act to regulate commerce in respect to the writ of mandamus. Whatever the Senate itself might do in other directions in order to obtain the information it desires, the courts have no authority to aid its resolution by issuing a writ of mandamus. This being so, we shall confine our examination to the question whether, when all that relates to the Senate resolution is taken out of the plaintiff's petition, anything sufficiently appears to entitle it to the relief it seeks. Several propositions may be considered as bearing upon the general result, and each will be briefly noticed.

[2] (a) The principle that communications between an individual and his counsel are privileged has been so often and so long held that it will take a court higher than this to upset so old, so necessary, and so wise a principle. That this principle is imbedded in our jurisprudence is clear from cases like *Connecticut Mutual Life Ins. Co. v. Schaefer*, 94 U. S. 458, 24 L. Ed. 251, and many others which might be cited. We need not further elaborate this proposition, but conclude that the fourth amendment to the Constitution and general principles of sound jurisprudence should prevent the issuing of any writ of mandamus which would require the production of papers or statements within the purview of the rule we have stated. The intention of Congress to abrogate the rule has not been made manifest and will not be presumed.

[3] (b) The question whether the provisions of the so-called *Hepburn Act* (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St.

Supp. 1911, p. 1284]), which authorizes the commission to require the production of accounts, records, and memoranda, should so far have a retrospective effect as to authorize the commission to enforce such production if the accounts, records, and memoranda were made previous to August 28, 1906, when the Hepburn Act went into effect, was argued with great ability. The general rule is that statutes are presumed to be prospective in operation, and the courts will refuse to give a retrospective effect to them unless the intention to the contrary is so clear and positive as by no reasonable possibility to admit of any other construction. But whether this general principle should be applied here admits of enough doubt to incline us to pass the question by, inasmuch as its definite settlement is not essential to the decision of the case.

[4] (c) But granting a writ of mandamus is always matter of sound discretion. To say the least, there certainly is grave doubt whether the court can compel the defendant to exhibit those papers to the commission which are ordinarily held to be privileged, such as communications between client and attorney.

There is grave doubt also whether a proper interpretation of the Hepburn Act should so far give it a retrospective operation at this late day as to authorize the court to compel the defendant to produce papers which had their origin before that act went into effect in August, 1906, and with all the allegations of plaintiff's petition in reference to the Senate's resolution eliminated, as we think should be and has been done, we have concluded that the writ of mandamus cannot be properly or discreetly based upon the extremely vague allegations which will then alone remain in the plaintiff's petition and which insist upon the production of all the papers as to which we have indicated the doubts just expressed.

It is difficult in these circumstances to see how there could be any such definite and distinct directions to the defendant as would guard its rights, while at the same time enforcing the performance of its duties. We think the court, in its discretion, should not grant the writ unless it can clearly and definitely define the duty it imposes upon the person it commands. This the court cannot do under the vague and general allegations of the petition. All these reasons combined have led us to the conclusion that the motion of the plaintiff should be denied.

We think, also, that the action should be dismissed. As already indicated, the allegations of plaintiff's petition are too meager and too vague, after everything in the case respecting the Senate resolution has been eliminated, to fairly afford a basis of any specific relief. If that pleading had stated with clearness, though necessarily in general terms, the exact records or papers of the defendant, an examination of which had been demanded and refused and so that the court might see from plaintiff's pleading or from the testimony what portions of them might (if the descriptions were accurate) be privileged and what not, or what part of them might be within the act and what not, we might be able to direct in a writ of mandamus what parts of such records should be exhibited to the examiner and

what not. But the meager, vague, and extremely general statements now remaining in the pleading, even when considered in connection with the testimony, do not disclose in adequate form information sufficient to enable the court to act in determining the questions of importance to which it is asked to respond. To grant the writ in the broad and general, not to say unlimited, terms asked for might indeed uphold plaintiff's contention as to the powers of the Interstate Commerce Commission, but might be perilously near the unreasonable search forbidden by the Constitution. If the plaintiff had propounded claims to relief in such separately stated propositions as were based upon a general but exact description of the class of records which had been demanded but which the examiner had failed to obtain, we might then be able to discriminate and grant such parts of the relief sought as appeared to be proper while denying the rest. But where the plaintiff asks an unlimited roving commission for the examiners without making such specific averments as will enable the court to discriminate in its judgment between what may be properly granted and what not, we think no title to any relief is made clear by the plaintiff, who must adequately and sufficiently show its claim to be well founded at least in part. Here such confusion exists between what might be good and what bad that the court does not think it discreet to grant the writ prayed for as the case is now presented.

Upon reasons such as we have indicated, while the action must be dismissed, it should be without prejudice, and the judgment will so provide. One may be prepared accordingly.

In re MUIR.

(District Court, M. D. Pennsylvania. February, 1914.)

1. BANKRUPTCY (§ 60*)—INVOLUNTARY PROCEEDINGS—APPLICATION FOR RECEIVER.

In involuntary bankruptcy proceedings, findings by the master that the alleged bankrupt, knowing he was in financial distress, prepared a bill for the appointment of a receiver, procured its execution by his largest creditor, had it filed by his own attorney, and, without subpoena, filed an answer admitting the allegations of the bill and joining in the prayer, and that, while the creditor was nominally plaintiff, the application was really made by the debtor, support a conclusion of law that the debtor applied for the appointment of the receiver.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*]

2. BANKRUPTCY (§ 91*)—INVOLUNTARY PROCEEDINGS—INSOLVENCY OF DEBTOR—DETERMINATION.

In such a case, the bill and answer alleging solvency of the debtor, who was insolvent as a matter of fact, amounted to fraud upon the court, and, in an application to have the debtor adjudged bankrupt, the bankrupt court can look beyond the bill and answer to determine whether the debtor was insolvent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 137-139; Dec. Dig. § 91.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. BANKRUPTCY (§ 91*)—INVOLUNTARY PROCEEDINGS—INSOLVENCY OF DEBTOR—DETERMINATION.

Where the decree of the court appointing a receiver is silent as to the reason for the appointment, the other papers in the case may be consulted or evidence aliunde produced in involuntary bankruptcy proceedings to determine the reason for the appointment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 137-139; Dec. Dig. § 91.*]

4. BANKRUPTCY (§ 60*)—INVOLUNTARY PROCEEDINGS—INSOLVENCY OF DEBTOR—DETERMINATION.

Under Bankr. Act July 1, 1898, c. 541, § 3a (4), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), as amended by Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 (U. S. Comp. St. Supp. 1911, p. 1493), providing that one who, being insolvent, applied for a receiver for his property, is a bankrupt, the charge of insolvency is one to be determined by the bankruptcy court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*]

5. BANKRUPTCY (§ 60*)—INVOLUNTARY PROCEEDINGS—INSOLVENCY OF DEBTOR—DETERMINATION.

Where the defendant in proceedings for the appointment of a receiver was the real plaintiff also, hiding behind the nominal plaintiff, there was no cause before the court, and the proceedings did not prevent the bankruptcy court from determining the issue of insolvency at the time the application for the receiver was made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*]

6. BANKRUPTCY (§ 57*)—INVOLUNTARY PROCEEDINGS—ACTS OF BANKRUPTCY—INTENT OF BANKRUPT.

Under Bankr. Act July 1, 1898, c. 541, § 3, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), as amended by Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 (U. S. Comp. St. Supp. 1911, p. 1493), defining acts of bankruptcy, it is not necessary that the intent be to hinder, delay, and defraud creditors; it being sufficient if there be either intent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 57, 66, 69-79; Dec. Dig. § 57.*]

7. BANKRUPTCY (§ 57*)—INVOLUNTARY PROCEEDINGS—"TRANSFER."

One who, being insolvent, applies to the court for the appointment of a receiver for personal property, transfers his property within the meaning of Bankr. Act July 1, 1898, c. 541, § 1 (25), 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420), defining "transfer" to include the sale and every other and different mode of disposing of or parting with property or the possession of property absolutely or conditionally.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 57, 66, 69-79; Dec. Dig. § 57.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7064-7070, 7819.]

8. BANKRUPTCY (§ 91*)—INVOLUNTARY PROCEEDINGS—SUFFICIENCY OF EVIDENCE—INTENT TO DELAY CREDITORS.

Upon an application for involuntary bankruptcy, evidence held to show that the debtor procured the appointment of a receiver with intent to delay his creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 137-139; Dec. Dig. § 91.*]

9. BANKRUPTCY (§ 60*)—INVOLUNTARY PROCEEDINGS—ACTS OF BANKRUPTCY—ASSIGNMENT FOR BENEFIT OF CREDITORS.

Where an application for a receiver, which was nominally filed by a creditor, was really the application of the debtor, who by his answer

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

joined in the prayer that the property be sold and, after payment of the costs, the proceeds be divided among the creditors, the surplus, if any, to be paid to the creditor, such application amounted to an assignment by the debtor for the benefit of creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*]

In Bankruptcy. Petition for the involuntary bankruptcy of George H. Muir. On exceptions to the report of the special master, the said George H. Muir was adjudicated a bankrupt. Exceptions overruled.

Seth T. McCormick and C. L. Peaslee, both of Williamsport, Pa., for receiver.

Geo. E. Sands, of Williamsport, Pa., for bankrupt.

A. R. Jackson and M. C. Rhone, both of Williamsport, Pa., for creditors.

WITMER, District Judge. On the 8th day of July, 1913, eight of George H. Muir's creditors filed a petition in bankruptcy against him in this court asking for his adjudication. The petition charges: (1) That within four months preceding the filing of the petition, while insolvent, the alleged bankrupt applied to this court, in equity, for the appointment of a receiver to take charge of, hold, administer, and distribute Muir's property; (2) that within four months preceding the filing of the petition in bankruptcy a receiver was appointed on the equity side of this court, because of insolvency, who was put in charge of the property of the alleged bankrupt; (3) that within four months preceding the filing of the involuntary petition, Muir, while insolvent, made a transfer of his property with intent to hinder, delay, and defraud his creditors; (4) that within four months preceding the filing of the bankruptcy petition Muir conveyed and transferred to the Northern Central Trust Company, a creditor (also the receiver), all his property with intent to prefer the said trust company over his other creditors; (5) that within four months of the filing of the bankruptcy petition Muir made a general assignment for the benefit of his creditors.

To this petition the alleged bankrupt filed an answer denying the commission of any of the alleged acts of bankruptcy, averring that he ought not to be declared a bankrupt, and praying inquiry by the court. The issue thus raised was referred to Arthur A. Smith, Esq., referee in bankruptcy, as special master.

The special master found for the creditors on the first charge, for the bankrupt on the fourth charge, and submitted to this court whether the second, third, and fifth charges were established, under the facts found, should it become necessary to consider them. The report was excepted to and is now before us for consideration.

From the record in the equity case and the oral testimony taken before the master, the master reports the following findings of fact:

"1. That an involuntary petition in bankruptcy was filed against George H. Muir, on July 9, 1913, by eight creditors to whom he owed debts exceeding \$500. That for more than six months preceding the filing of the petition he resided, and had his principal place of business, in the city of Williamsport,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

said district, and that at said time he was neither a wage-earner, nor principally engaged in farming, or tilling the soil.

"2. That on the 25th day of July, 1913, Muir filed his answer to said petition, in which he denies 'that he has committed each and every act of bankruptcy set forth in said petition, or that he is insolvent.'

"3. The oral testimony taken before me clearly shows that on July 1, 1913, when the receiver was appointed in the equity case, Muir was insolvent, the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to have been concealed or removed, with intent to hinder, delay, and defraud his creditors, is not sufficient, at a fair valuation, in amount to pay his debts. His assets on that day consisted of stocks of merchandise and fixtures contained in three stores, located at Williamsport, Muncy, and Jersey Shore in said district, which were appraised by the receiver's appraisers, and who valued and appraised the same at \$21,177.53. Out of the sale of said stock and fixtures, the receiver has realized \$16,379.16. On July 1, 1913, Muir owed debts to the amount of \$26,768.11, made up as follows: For merchandise, \$16,651.05; notes in bank, \$8,000; miscellaneous debts, \$2,117.06.

"4. That for some time prior to July 1, 1913, Muir knew he was in financial distress and had frequently discussed the matter with his attorney. That finally they determined upon having a receiver appointed, and the Northern Central Trust Company, of Williamsport, was agreed upon by them.

"5. That upon June 28, 1913, Muir wrote a letter to Burton, Price & Co. of New York City, his largest creditor, for a conference, and not receiving a reply thereto, upon June 30th, he sent a telegram to T. N. Price of said firm to 'kindly wire answer to letter of the 28th.' That in response thereto, Mr. Price met Muir and one of his attorneys, Mr. Sands, who, on July 1, 1913, journeyed from Williamsport to New York City, a distance of 300 miles, taking with them the bill in this equity proceeding which had already been prepared by Muir's attorneys for execution by Burton, Price & Co.

"6. That at said interview, Muir and his counsel stated to T. N. Price of said firm that certain of Muir's creditors were pressing him for payment, and that unless a receiver were appointed bankruptcy would probably follow. That if a receivership could be had, 'time would be gained,' and that Muir 'might be able to pull through.' Whereupon, after solicitation and the urgent appeal and request of Muir and his counsel, Mr. Price, of Burton, Price & Co., signed and executed the bill in equity; after which Muir's attorney took it into his possession and at once returned with it to Williamsport.

"7. That upon July 1, 1913, as appears by the jurat thereto, Muir executed his answer to said bill without the issuing of a subpoena, which, with the bill, was presented to the court by Mr. Peaslee, and the Northern Central Trust Company was appointed receiver.

"8. That in his answer, Muir admitted all the allegations contained in the bill to be true, and joined 'in the prayer of the plaintiff and desires that suitable receiver or receivers for his property may be appointed by this honorable court, as prayed for in plaintiff's bill.'

"9. That Burton, Price & Co. would not have executed the bill of complainant filed in the equity case, had it not been for the statements made by Muir and his attorney to Mr. Price, and their appeal, request, and solicitation that he execute the same. That it was wholly due to the solicitation and statements of Muir and his attorney that Mr. Price executed the bill, and that they had no thought of instituting proceedings against Muir and would not have voluntarily presented the bill and had the receiver appointed.

"10. That when Muir stated in his answer to the bill that his assets exceeded his liabilities, he either intentionally misrepresented his true financial condition to the court, or else he wholly neglected his duty to ascertain the truth, which could easily have been done by an examination of his books.

"11. That the reason Muir solicited Burton, Price & Co. to execute the bill, as Muir and his attorney testified, was because of lack of cash to meet maturing obligations, threatened suits, inability to pay debts, prevent suits by creditors, and gain time.

"12. That while it appears from the records in the equity receivership that Burton, Price & Co. are the nominal plaintiffs in the bill, the application

for the receiver was really made by Muir, who, together with his attorneys, planned the whole proceedings.

"13. That the decree appointing the receiver, which was prepared by Muir's attorney, is silent as to the reason for the appointment; but the prayer of the bill is, in substance, that a receiver be appointed to take possession of the property and assets of Muir and administer the same under the order of the court; that the defendant (Muir) be enjoined from interfering in the business; that the receiver be authorized to continue the business and that the proceeds of the sale of the property, after payment of costs and the disbursements of the suit and of the receivership, be divided among the creditors of Muir, and the residue, if any, be paid to Muir."

No exceptions were filed by the petitioning creditors or the bankrupt to these findings of fact. However, the creditors filed exceptions, complaining that the master erred in not finding in their favor on the second, third, and fifth charges.

[1] 1. Upon findings of fact Nos. 4, 5, 6, 7, 8, 9, and 12, the master was justified in concluding that Muir did, upon the 1st day of July, 1913, apply to this court for a receiver in equity for his property. The findings upon which this conclusion is based are not excepted to, and the conclusion follows, irresistibly, as a logical deduction from the fact so found. The learned master well says:

"The records in the equity case would indicate that Burton, Price & Co. are the plaintiffs; but the reasons for, and the manner in which they were led into, signing the bill are of much value in determining the point at issue. It appears that on a number of occasions prior to July 1, 1913, Muir consulted his attorney, Mr. Peaslee, with reference to his financial condition, who advised him with respect thereto; and finally it was agreed that a receiver for his property should be secured, and they decided upon the Northern Central Trust Company; after which his largest creditor, plaintiffs in the equity case, was selected as the person to make application to the court for the appointment of the receiver. The machinery was then put into motion to reach this creditor and prevail upon them to execute the bill of complainant, Muir at once got busy, and on June 28, 1913, wrote a letter to Burton, Price & Co. of New York City, for an interview, and when no answer came in response to the letter, on June 30th, he telegraphed T. N. Price of that firm for an interview; which was granted, and on July 1, 1913, Muir, accompanied by his attorney, Mr. Sands, journeyed to New York City, where they met Mr. Price and after an interview of about two hours Mr. Price, on behalf of his firm, executed the bill. * * * After the execution of the bill, Muir and his attorney returned to Williamsport, bringing with them the bill, which together with Muir's answer was placed in the hands of Mr. Peaslee, who represented the papers to the court for the appointment of the receiver. Mr. Price had never met Muir nor Sands until the trip to New York City; and he states that he never employed Mr. Peaslee to file the bill, unless the signing of the bill was an employment; that he was told that there would be no costs to him; that he would not have signed it had it not been for the representations and solicitations of Muir and his attorney.

"Another fact in the case, the execution by Muir of his answer to the bill, its contents, and method of filing, throw much light on the question under consideration. The answer purports to have been signed and executed on July 1, 1913, when Muir was in New York City; the oath to the same having been taken that day in Williamsport. It was placed in the hands of one of Muir's attorneys, who now appears for Burton, Price & Co. and is filed in court on the same day as the bill. No subpoena is issued; but a rush is made to have the receiver appointed. In his answer he alleged that his assets are in excess of his liabilities to the exact amount as set forth in the bill, confesses the facts and allegations contained in the bill to be true, and joins in the prayer of the plaintiffs that a suitable receiver be appointed for his property. In addition, Mr. Sands, one of Muir's attorneys, throws more light on the reason the receiver was applied for, viz., for the purpose of

gaining time and to prevent other creditors from collecting their claims by suit."

This statement by the master is as fair to the alleged bankrupt as it is possible to make it. It justifies the conclusion that:

"The scheme here carried into effect was prearranged and worked out by Muir and his attorneys before the trip to New York City, and that they put the machinery in motion to carry out their scheme by having the plaintiff in the bill nominally apply for the receiver."

[2] The conclusion that Muir was the real actor and plaintiff cannot be avoided. There was no doubt in the mind of the master, nor is there any in the mind of the court, that Muir procured the appointment of the receiver. In doing this it is clear that he perpetrated a fraud upon the court. He concealed the fact of his insolvency, when he must have known such was his financial condition.

Having found that Muir was the actor and procured the appointment of this receiver in equity, it would be a travesty upon justice to say that this court in passing upon the question of insolvency must be confined to the bill and answer. They were fraudulent, and it would be strange indeed to say that the court cannot protect itself against fraud. Under the circumstances, Muir having been the real plaintiff and the actual defendant, this court may look beyond the bill and the answer to determine whether Muir was actually insolvent at the time he procured the appointment of the receiver. The master in his third finding of fact has ascertained that on the 1st day of July, 1913, Muir was insolvent. In the tenth finding of fact the master concludes that:

Muir "either intentionally misrepresented his true financial condition to the court, or else he wholly neglected his duty to ascertain the truth which could easily have been done by an examination of his books."

Upon careful consideration, I concur in this, and now hold that within four months preceding the filing of the petition, while insolvent, Muir applied to this court, in equity, for the appointment of a receiver to take charge of, hold, administer, and distribute his property.

[3] The decree of the court is silent as to the reason the receiver was appointed, and in such case the papers in the case may be consulted, or evidence aliunde may be produced. *Davis v. Brown*, 94 U. S. 429, 24 L. Ed. 204; *Russell v. Place*, 94 U. S. 608, 24 L. Ed. 214; *Hooks v. Aldridge* (C. C. A. 5th Cir.) 16 Am. Bankr. Rep. 662, 145 Fed. 865, 76 C. C. A. 409; *In re Kennedy Tailoring Co.* (D. C. Tenn.) 23 Am. Bankr. Rep. 656, 175 Fed. 871.

[4] It certainly cannot be the law that because Muir, both plaintiff and defendant, drawing both the bill and answer, had so skillfully drawn the papers as that we cannot point to the "insolvency" as apparent from the fact of the proceedings, we are bound thereby and cannot determine the question upon evidence aliunde. Under the second clause of section 3a(4) of the Bankruptcy Act, the charge of "insolvency" is an issue to be determined in the bankruptcy court.

[5] If Muir was the real plaintiff in the equity case, lurking in the shadow of Burton, Price & Co., the nominal plaintiff, and it also ap-

appears from the record in the equity case that Muir is the actual defendant, there was no real cause before the court in the equity case for adjudication. A party cannot be both plaintiff and defendant, yet such is the effect of the equity proceedings, under the facts. If there was no real cause depending before the court in the equity suit, there is surely nothing in the way of this court in determining "insolvency."

2. It is not necessary, and the court does not undertake, to decide whether the receiver in equity was actually appointed on the basis of "insolvency," upon the face of the pleadings therein.

3. Did Muir by procuring the appointment of the receiver in equity, within four months preceding the filing of the involuntary petition, while insolvent, make a transfer of his property with intent to hinder, delay, and defraud his creditors? This question the master has failed to answer. It has already been decided that Muir procured the appointment of the receiver and that he did so while insolvent.

It remains therefore for us to consider and determine: (a) Whether there was a transfer of Muir's property accomplished by the receivership; and (b) whether there was the intent to hinder, delay, and defraud creditors thereby.

[6] It is not necessary since the amendment of February 5, 1903, that it be to hinder, delay, and defraud. It is sufficient if it be with either intent.

[7] Section 1 (25) of the Bankruptcy Act defines the word "transfer" to "include the sale and every other and different mode of disposing of or parting with property or the possession of property, absolutely or conditionally." Said the Supreme Court of the United States in *Pirie, etc., v. Chicago Title & Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, 5 Am. Bankr. Rep. 814:

"'Transfer' is defined to be not only the sale of property, but 'every other mode of disposing or parting with property.' All technicality and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished."

We have already decided that Muir procured the receivership. In general, the effect of the appointment of a receiver is to remove the parties to the suit from the possession of the property, notwithstanding the right to the property is in no way affected, and he over whose property a receiver has been appointed has no authority thereafter to subject it to any legal liability in the hands of the receiver, or to deal with it in any manner which operates as an interference with the receiver's possession. 34 Cyc. 183, 184. The mere order appointing a receiver of property does not transfer the ownership of or legal title to the property over which he is appointed, without statutory provision to that effect, or where the appointment is pursuant to the general powers of the court and the usual practice in chancery as distinguished from an appointment under statutory provisions conferring special powers and rights. 34 Cyc. 184, 185, and cases cited. Without going into the question of where the title is, upon receivership, at law, the rule is laid down that:

"In equity, however, it is held that an order for a receiver, when his appointment is completed, vests in him all the property and effects subject to the order without an assignment, although as to the legal title to real estate a transfer has been held indispensable." 34 Cyc. 186.

There was no real estate affected by this receivership, and we are of the opinion that title to the personalty vested in the receiver. At any rate, the receiver acquired thereby the possession thereof.

"The general proposition is well established that, the receiver being the officer or agent of the court from which he derives his appointment, his possession is exclusively the possession of the court; the property being regarded as in the custody of the law, in gremio legis, for the benefit of whoever may be ultimately determined to be entitled thereto." High on Receivers (4th Ed.) § 134, p. 153.

There is no question but that this comes within the very language of section 1 (25) of the Bankruptcy Act above quoted. We conclude therefore that the receivership was a transfer.

[8] Was the intent present to "hinder, delay or defraud creditors"? The master quotes from the evidence of Muir, page 33 of the record:

"Q. Did you suggest the appointment of the Northern Central Trust Company as receiver, or was it suggested to you? A. I think it was talked over who we should get with Mr. Peaslee, and Mr. Sands and Mr. Muir.

"Q. And you picked on the Northern Central Trust Company? A. Yes, sir."

Page 58 of the record appears:

"Q. How long prior to July 1st had your financial condition been such that you could not pay your bills as they matured? A. We had bills coming due, and I talked the matter over with Mr. Peaslee and let him look it over, and I was in hopes to pull through, and he said: 'It looks better and you will pull through, but if the worst comes to the worst, we will have to do something, but I think it will pull through.' So I went back and took off my coat and went to work, and thought I would be able to pull through.

"Q. Had that been the condition for some time before the 1st of July? A. Yes, it had been."

Page 63 of the record, Mr. Sands, one of Muir's attorneys, testified as follows:

"Q. Of course, as a lawyer, you knew as soon as receivership was in charge of Muir's property, one appointed by the United States court under this equity proceeding, that no creditor could collect his claim by execution? A. Yes, sir; that was my understanding of the law."

Page 64 of record, Mr. Sands testifies:

"Q. Then you tell us what the purpose was (in filing this bill in equity) you have given us some of the details surrounding the transaction? A. Mr. Muir was being harassed by a number of small creditors he was unable to pay at the time—the purpose was to gain a little time. He thought in a short time he would be able to pay them, but they were pressing so hard he could not pay them at that time.

"Q. In other words, he would gain some time by the equity proceedings? A. Yes, that would be the result of it."

The master says, after quoting this evidence:

"It is equally clear that his (Muir's) purpose was to delay his creditors."

We agree with him. In re Bininger, Fed. Cas. No. 1,420, 3 Fed. Cas. at page 417, it is said:

"The design and purpose of the bankruptcy law is that the property of an insolvent shall be secured to their creditors in the very mode pointed out thereby, with all the facilities for its appropriation, all the security for its administration, all the safeguards against fraud, all the protection against devices to establish false claims, fictitious debts, and illegal or inequitable preferences, which that act provides, and in the summary manner in which the proceedings may be conducted. It is not, therefore, for the debtors or for the debtors and some of the creditors to say, we can devise a better or safer or more economical mode for reaching the same final result. If it were true, it would be only saying, we will resort to an expedient to defeat the bankruptcy law, and our reason therefor is that we think our plan is wiser and better than that which Congress has seen fit to prescribe. But the administration of the property under a receiver in such a suit does not necessarily accomplish the same result."

The court further says:

"It seems hardly necessary to add that the taking of the property by a receiver for administration delays the operation of the act. * * * A proceeding which must pass through all the ordinary forms of litigation, and which is susceptible of almost indefinite protraction, through orders, appeals, rehearings, etc., is substituted for the summary proceedings which the act of Congress provides."

This case was decided under the federal act of 1867 (chapter 176, 14 Stat. 517), but it applies to the act under consideration. The creditors of Muir, by this receivership, were deprived of all the securities of the Bankruptcy Act for the administration of his estate. They were deprived of all the safeguards of that act against fraud and devices to establish false claims, fictitious debts, and illegal and inequitable preference. They were deprived of the right to examine the election of a trustee. Whether Muir, at the time of the receiver's appointment, had the specific intent to hinder, delay, or defraud, can only be determined upon the facts of the case as developed by the evidence. He induced and procured the chancellor in equity to do that which he could not do himself without bringing himself within the purview of the Bankruptcy Act, and this he did by perpetrating a fraud upon the chancellor. He was the actor in the bill for receivership, hiding behind Burton, Price & Co. He prepared the facts alleged in the bill. He prepared his answer to his own bill, and in both bill and answer fails to give the chancellor his true financial status. The master well says in his tenth finding of fact:

"He either intentionally misrepresented his true financial condition to the court, or else he wholly neglected his duty to ascertain the truth, which he could easily have done by an examination of his books."

To our mind, this is sufficient to justify the conclusion that Muir intended to hinder, delay, and defraud his creditors. This result followed in the train of what he did and did not do. We are of opinion therefore that Muir did, by procuring the appointment of the receiver within four months preceding the filing of the petition in bankruptcy, while insolvent, make a transfer of his property with intent to hinder, delay, or defraud his creditors.

4. The fourth charge of bankruptcy contained in the petition, to wit, that within four months preceding the filing of the bankruptcy petition Muir conveyed and transferred to the Northern Central Trust Company, a creditor, all his property with intent to prefer the said trust company over his other creditors, was, as heretofore stated, found in favor of the bankrupt and needs no further consideration.

[9] 5. Did Muir, within four months of the filing of the bankruptcy petition, make a general assignment for the benefit of his creditors? The prayer in the bill in equity is as follows:

"A decree that the proceeds of any sale under the direction of this court after the payment of costs and disbursements of this suit and the lawful charges and expenses of the receiver or receivers appointed therein may be divided among the creditors of the said defendant in equity according to their respective rights and the residue, if any, to the said defendant as their respective interests may appear."

The creditors rely upon this prayer, in which Muir joined by his answer, as justifying a finding in their favor on the fifth charge. We have already found that Muir was the real actor in the appointment of the receiver, that it was his bill. It therefore follows that this prayer above quoted belongs to him. It is his in the bill, and he made it his by his answer. We have already found that Muir did make a transfer of all his property, by procuring the appointment of the receiver, under the facts of this case. Under the prayer above quoted, doubly that of Muir, all his property was to be disposed of by the receiver for the benefit of (1) Muir's creditors and (2) Muir's own benefit, if any was left after satisfying creditors.

"An assignment for the benefit of creditors is well defined to be a transfer by a debtor of some or all of his property to an assignee in trust, to apply the same, or the proceeds thereof, to the payment of some or all of his debts, and to return the surplus, if any, to the debtor." 4 Cyc. 120.

Having found that Muir procured the appointment of a receiver, thereby effecting a transfer of all his property to such receiver in trust, to apply the same, or the proceeds thereof, (1) to his creditors, and (2) to return the surplus, if any, to Muir, it is clear that the fifth charge of bankruptcy must be found for the petitioning creditors.

It follows therefore that, the said George H. Muir having committed several of the acts of bankruptcy charged, he is accordingly now adjudicated a bankrupt as provided by law.

SCHOFIELD v. BAKER et al.

(District Court, W. D. Washington, N. D. March, 1914.)

No. 1.

1. PUBLIC LANDS (§ 185*)—LANDS OF STATES—TIDELANDS OF WASHINGTON—PREFERENCE RIGHT TO PURCHASE.

The preference right granted by the law of Washington to riparian owners of uplands to purchase tidelands of the state is a vested right after the exercise of the option to purchase.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 598; Dec. Dig. § 185.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. BANKS AND BANKING (§ 287*)—NATIONAL BANK—RECEIVERS—POWERS.

Under Rev. St. § 5234 (U. S. Comp. St. 1901, p. 3507), authorizing the receiver of a national bank to take possession, under the direction of the Comptroller, of the assets of the bank, and on the order of court to sell the property of the bank, a receiver of a national bank cannot sell the real or personal property of the bank without an order of court, and a sale not authorized is void.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1089-1104, 1126, 1127; Dec. Dig. § 287.*]

3. BANKS AND BANKING (§ 287*)—NATIONAL BANKS—RECEIVERSHIPS—SALE BY RECEIVER—VALIDITY.

An order of court which authorized the receiver of a national bank to sell the bank assets, consisting of bills receivable, judgments, overdrafts, stocks, warrants, securities, assessments on stockholders, and "all other personal property and chattel property and evidences of indebtedness," entered on a petition which did not comprehend real estate, limited the receiver to sell personal and chattel property, and did not authorize a sale by him of real estate consisting of tidelands purchased by the receiver, with the approval of the Comptroller of the Currency, by exercising the preference right granted by law to the bank as a riparian owner of uplands to purchase on paying the price in installments and obtaining a deed on final payment.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1089-1104, 1126, 1127; Dec. Dig. § 287.*]

4. COURTS (§ 367*)—CONTROLLING DECISIONS—DECISIONS OF STATE COURT DEFINING THE NATURE OF PROPERTY.

Where property in a state has been defined by the highest court of the state as real property, the United States District Court sitting in the state should adopt that definition in determining whether such property is real or personal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. § 367.*]

5. BANKS AND BANKING (§ 259*)—NATIONAL BANKS—RIGHT TO ACQUIRE AND HOLD REAL ESTATE.

Under Rev. St. § 5137 (U. S. Comp. St. 1901, p. 3460), authorizing national banks to purchase and hold real estate for enumerated purposes, and sections 5234 and 5236 (U. S. Comp. St. 1901, pp. 3507, 3508), and Act Cong. March 29, 1886, defining the powers of the receiver of a national bank, a national bank lawfully owning uplands, and thereby having under state laws a preference right to purchase tidelands of the state, may purchase tidelands, and receiver acquiring tidelands with the approval of the Comptroller of the Currency may not challenge the right to acquire the same, and his holding can be questioned only by the government.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 980-982; Dec. Dig. § 259.*]

6. TRUSTS (§ 102*)—PURCHASE OF PROPERTY BY RECEIVER OF NATIONAL BANK—EVIDENCE.

A receiver of a national bank transferred privately to a third person land purchased with the approval of the Comptroller of the Currency. The third person merely paid the price which the receiver had paid to the state and a nominal profit. Subsequently the title was transferred to the receiver's attorney. The receiver thereafter promoted a corporation, and the land was conveyed to it in full payment of its capital stock. The third person made admissions that he purchased for the receiver and held the title to accommodate him. The value of the land greatly exceeded the price paid by the third person and by the receiver on the title being conveyed to his attorney. *Held*, that the property was chargeable

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

with a trust under the rule that a trustee may not directly nor indirectly purchase any of the trust property and acquire title as against the beneficiary.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 153; Dec. Dig. § 102.*]

7. TRUSTS (§ 365*)—ENFORCEMENT—LACHES.

An action by a receiver of a national bank against a prior receiver to charge with a trust property sold by the prior receiver for his benefits, and subsequently conveyed to a corporation promoted by him in payment of the capital stock of which he owned 95 per cent. is not barred by laches, though not brought until the expiration of many years after the sale, but brought shortly after the facts were brought home to the receiver, and it did not appear that he should have known the facts prior thereto.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568-573; Dec. Dig. § 365.*]

8. TRUSTS (§ 356*)—ENFORCEMENT—CONDITIONS.

Where property sold by the receiver of a national bank to a third person for his benefit was subsequently conveyed to a corporation in payment of the capital stock, he owning a large majority of the stock, persons subsequently acquiring the stock could not prevent a decree charging the property with a trust in favor of the bank on payment to such receiver or to the corporation of all money paid for the purchase and all taxes and assessments with interest from date of payment.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 529-538; Dec. Dig. § 356.*]

In Equity. Suit by John W. Schofield, as receiver of the Merchants' National Bank of Seattle, against Charles H. Baker and another. Decree for plaintiff.

In June, 1895, the defendant Baker was appointed receiver of the Merchants' National Bank of Seattle, in which capacity he served until April, 1899, when he was succeeded by A. W. Frater, who served until February, 1913, at which time the plaintiff was appointed as receiver. At the time of the failure of the Merchants' National Bank, it was the riparian owner of certain lands, and as such upland owner had the preference right under the laws of Washington to purchase certain tidelands, particularly the land in issue in this case, known as block 430. The receiver with the approval of the Comptroller of the Currency purchased from the state of Washington the said tidelands, and the usual contract was executed by the state and defendant Baker providing that the payment be made in ten equal installments payable annually, which contract provided upon payment in full of the consideration named in said contract the state of Washington would issue to the Merchants' National Bank of its assignees deeds in fee simple to said tidelands. The complaint alleges that Baker, while acting as receiver, purported to convey and assign the said contract to Sol G. Simpson on the 26th day of November, 1897; and alleges in substance that defendant Baker and Sol G. Simpson entered into a scheme to defraud the estate by turning blocks 429 and 430 over to Simpson, with a secret agreement that Simpson was to hold block 430 for the use and benefit of Baker; that the assignment to Simpson by Baker was to Baker's own use and benefit, and without authority of law, and was for the purpose of secretly defrauding the bank; and that at all the times that Simpson held the title to said block it was held in trust for Baker and subject to his control and direction; and that thereafter the said property was transferred by Simpson through mean conveyances at Baker's suggestion to the Seattle Water-Front Realty Company, a corporation, promoted by defendant Baker, and of which he is the owner of practically all of the stock; that at the time said block was transferred by Simpson in 1905 it was reasonably worth \$100,000 and is now

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

worth \$300,000. And the bill prays that the court determine what, if any, moneys have been expended upon the property involved in this suit, and that this be repaid to the defendant Baker, and the property held as property to the trust. The defendant denies all the allegations of fraud and all secret dealing, and also denies the right and power of the receiver to make the tideland purchase, and sets up the inability of the plaintiff to do equity, and the laches of the plaintiff.

Defendant further contends that on the 6th day of October, 1897, the defendant Baker obtained an order from the Circuit Court of the United States for the sale of all doubtful bills receivable, overdrafts, stocks, bonds, securities, etc., and that an order was entered by the court authorizing the sale at private sale of such assets; that thereafter he, as receiver, sold to Sol G. Simpson tideland blocks 429 and 430 for the sum of money which he had paid to the state and \$50 profit upon each block; that thereafter on or about March, 1899, he repurchased from Sol G. Simpson block 430, paying the amount of money which Simpson had advanced on account of said block together with taxes and interest, and requested Simpson to retain the title to the said property in his name for the reason that he (Baker) was involved and desired to hide the property from his creditors; that the title to the property was carried in Simpson's name until 1905, when it was transferred to Norton of New York, who held the title for defendant Baker until the organization of the defendant corporation, when it was transferred by defendant Norton to the defendant corporation. The other facts sufficiently appear in the opinion.

Bausman & Kelleher, of Seattle, Wash., for plaintiff.

B. S. Grosscup and W. C. Morrow, both of Tacoma, Wash., and Corwin S. Shank and H. C. Belt, both of Seattle, Wash., for defendants.

NETERER, District Judge (after stating the facts as above). [1] The defendants contend, first, that the preference right to purchase tidelands given to riparian owners is not a vested right nor a right which could be exercised by the receiver of a national bank. This contention, I think, is definitely disposed of by the state of Washington Supreme Court in the case of *Allen v. Forrest*, 8 Wash. 700, 36 Pac. 971, 24 L. R. A. 606, where the right granted by the Legislature is confirmed as against the world except the state prior to the exercise of the option, and becomes a vested right after the exercise of the option by the riparian owner as will be later shown.

It becomes important in determining the issue here whether the preference right thus given a riparian owner is personal and chattel property or real estate. In the order of court, under which it is claimed the land in issue was sold, the receiver was authorized and empowered to "compromise, compound or sell at private sale all assets of said insolvent bank consisting of bills receivable, judgments, overdrafts, stocks, warrants, securities, assessments upon the stockholders of said bank, all other personal property and chattel property and evidences of indebtedness." The order is concise, clear, and certain. If the interest of the bank's receiver in the tidelands is real estate, it would not be comprehended by the order, and the receiver could not under such an order make the sale.

[2] The powers of the Comptroller of the Currency and the receiver are defined by act of Congress (section 5234, Rev. St. [U. S. Comp. St. 1901, p. 3507]), which provides:

"Such receiver, under the direction of the Comptroller * * * of the Currency * * * upon the order of a court of record of competent jurisdiction * * * may sell all the real and personal property. * * *"

To make any sale of assets of a defunct bank, an order of a court of record of competent jurisdiction is essential. The receiver cannot sell the real or personal property of the bank without an order of the court, and a sale which is not authorized by an order of court of competent jurisdiction is void. *Ellis v. Lytle*, 27 Kan. 707, 41 Am. Rep. 434; *Richardson v. Turner*, 52 La. Ann. 1613, 28 South. 158; *Tourtelot v. Booker* (Tex.) 160 S. W. 293.

[3, 4] A reading of the order of sale is conclusive of the fact that the receiver was limited to a sale of personal and chattel property. No real estate is comprehended either in the petition for or order of sale. Personal and chattel property is a thing movable, which may be annexed to and is attendant on the person of the owner and carried about with him from one part of the world to another. 2 Bla. Com. 14. "Real property" has been defined as an interest which a man has in land. 32 Cyc. 662. It sometimes is difficult to determine what is personal and what real property; yet, where property has been defined as real property by the state court, such holding should be adopted by this court.

In *Washington Iron Works v. King County*, 20 Wash. 150, at page 153, 54 Pac. 1004, at page 1005, appellants had purchased under contract certain tidelands in the city of Seattle, paying one-tenth of the purchase price, and covenanted to pay the balance in ten equal annual payments pursuant to a similar contract as in evidence in this case. The assessor of King county assessed the land as real estate, and suit was brought to enjoin the collection of the taxes. The Supreme Court said:

"In equity, appellants are the owners, possessing a real and substantial interest, which they can assign, transfer, and dispose of as they choose; and the state cannot deprive them of this right. The term 'property,' as applied to land, comprehends every species of title, inchoate or complete."

In *State ex rel. Wilson v. Grays Harbor & Puget Sound R. Co.*, 60 Wash. 32, at page 34, 110 Pac. 676, at page 677, the Supreme Court of Washington says:

"There is a distinction between the granting of a privilege which may or may not be exercised, and the exercise of that privilege by the person upon whom it has been conferred. In the one case, the state merely confers a right the acceptance of which is optional. In the other, the option has been exercised, and the faith and credit of the state has become involved in its fulfillment."

It was there held that the preference right of a riparian owner to tidelands is an interest in land and subject to condemnation for railroad right of way. The Supreme Court of Washington, in *State ex rel. Trimble v. Superior Court*, 31 Wash. 445, at page 455, 72 Pac. 89, at page 92, 66 L. R. A. 897, speaking of tidelands purchased under similar contract, says:

"The interest of the relators is, to say the least, an interest in land, and as such may be taken for a public use by condemnation, upon payment of just compensation therefor."

In *State v. Frost*, 25 Wash. 134, 64 Pac. 902, speaking of state school lands held under a similar contract of purchase, the court held that to be such an interest in land that may be sold for taxes."

In *Hotchkiss v. Bussell*, 46 Wash. 7, 89 Pac. 183, the Supreme Court of Washington holds that tidelands held under contract under section 6750, Rem. & Bal. Code, descends directly to the heirs subject only to the debts of the deceased.

It appears as a conclusive fact, when the phraseology of the order is considered together with the action of the court and conduct of the receiver with relation to similar property in this trust, the holding of the Supreme Court of Washington that tideland held as was the land in issue was real estate after the exercise of the option to purchase by a riparian owner, and that the sale of land was not contemplated by the order entered.

[5] It is further contended by the defendants that the receiver acquired nothing by the contract of purchase from the state; that the receiver and Comptroller of the Currency acted without authority in the securing of the contract from the state; and that their act in so doing was *ultra vires*. Section 5137 (U. S. Comp. Stat. 1901, p. 3460) is cited in support of this contention. This section provides:

"A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others: First. Such as shall be necessary for its immediate accommodation in the transaction of its business. Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted. Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it. But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

The powers of the receiver of a national bank are defined by the following sections of the Revised Statutes:

"5234. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct."

"5236. From time to time, * * * the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated."

Act of March 29, 1886 (page 3514 of U. S. Comp. Stats. [U. S. Comp. St. 1901, pp. 3507, 3508]), provides:

"That whenever the receiver * * * shall find it in his opinion necessary, in order to fully protect and benefit his said trust, to the extent of any and all equities that such trust may have in any property, real or personal, by reason of any bond, mortgage, assignment, or other proper legal claim attaching thereto, and which said property is to be sold under any execution, decree of foreclosure, or proper order of any court of jurisdiction, he may certify the facts in the case, together with his opinion as to the value

of the property to be sold, and the value of the equity his said trust may have in the same, to the Comptroller of the Currency, together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale."

An examination of these sections of the statute appears to be conclusive of the fact that there is no merit in the contention of the defendant. It must be assumed, in the absence of a contrary showing, that the ownership of the upland by the bank was authorized. The ownership of the upland carried with it a valuable privilege which was a part of and appurtenant to the upland, which passed to the bank at the time it acquired the upland, of which privilege the receiver could avail himself by making certain payments assessed by the state, in the way of appraisals of the value of the land. These assessments or payments covered a period of ten years. Not only did the receiver have the power under these sections of the Revised Statutes to exercise this privilege, and protect the security for which the upland was held by the bank, but it was his duty to do so. Even though a doubt existed as to the right of the bank to acquire the tideland, the receiver could not be heard to challenge such right. This holding on the part of the receiver would be good as against the world except the government. *Union National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *McMichen v. Perin*, 59 U. S. (18 How.) 507, 15 L. Ed. 504; *National Bank v. Whitney*, 103 U. S. 99, 26 L. Ed. 443; *Cowin v. Hurst*, 124 Mich. 545, 83 N. W. 274, 83 Am. St. Rep. 344; *Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240, 13 Sup. Ct. 66, 36 L. Ed. 956.

[6] The tideland being lawfully obtained, and being rightfully in the possession of the receiver, it is contended on the part of the plaintiff that the attempted sale of the tideland to Simpson was without authority, and the repurchase of this land by the defendant Baker in March, 1899, as contended, reinvested the trust with this property, even though the prior sale had been made in good faith, and was duly authorized by order of court, and it is strongly urged that it is the duty of the trustee to exercise all of his powers and faculties in the interest of and for the benefit of the trust, and that he could not be a seller and a buyer at the same time, and, on becoming reinvested with the equitable title during his receivership, the policy of the law would not permit it to be other than a trust transaction.

It has always been the policy of the law, as it is administered in courts of equity, to remove as far as possible, from persons acting in a trust relation, all temptation with a view of not only having the trust administered justly, but also to have it administered in such a way that not only will justice be done, but that the public may know that justice is being done. Hence a person acting as a trustee has not been permitted to be interested in any transaction which in any way would be incompatible with his best services for the cestui que trust.

"Equity will not permit trust property to be reconveyed to the trustee before his duties as trustee are ended for the same consideration for which it was sold. Sound policy requires all the skill and effort of the trustee to be used for the benefit of the cestui que trust." *Boynton v. Brastow*, 53 Me. 362.

To the same effect is *Michoud v. Girod*, 4 How. 503, 11 L. Ed. 1076; *Creveling v. Fritz*, 34 N. J. Eq. 34; *Tourtlot v. Booker* (Tex.) 160 S. W. 293. Courts have held that where an administrator sold land, and while he was yet administrator became an owner of some of the property sold for the same consideration, this dissipates his defense of good faith. *Houlihan v. Fogarty*, 162 Mich. 492, 127 N. W. 793; *Guerrero v. Balerino*, 48 Cal. 118; *Winter v. Truax*, 87 Mich. 324, 49 N. W. 604, 24 Am. St. Rep. 160.

Much reliance is placed by defendant Baker on *Robertson v. Chapman*, 152 U. S. 673, at page 681, 14 Sup. Ct. 741, at page 744, 38 L. Ed. 592. The court says:

"He could not, directly or indirectly, become the purchaser and maintain any title thus acquired as against his principal; for, in so purchasing, his duty and his interest would come in conflict. If an agent to sell effects a sale to himself, under the cover of the name of another person, he becomes, in respect to the property a trustee for the principal, and, at the election of the latter, seasonably made, will be compelled to surrender it, or, if he has disposed of it to a bona fide purchaser, to account not only for its real value, but for any profit realized by him on such resale. And this will be done upon the demand of the principal, although it may not appear that the property, at the time the agent fraudulently acquired it, was worth more than he paid for it. The law will not, in such case, impose upon the principal the burden of proving that he was, in fact, injured, and will only inquire whether the agent has been unfaithful in the discharge of his duty. While his agency continues, he must act, in the matter of such agency, solely with reference to the interests of his principal. The law will not permit him, without the knowledge or assent of his principal, to occupy a position in which he will be tempted not to do the best he may for the principal."

In that case the agent did report the purchase. On page 683 of 152 U. S., on page 745 of 14 Sup. Ct. (38 L. Ed. 592), the court says:

"That the defendant Polk did not intend to conceal the fact of his purchase is made clear by his letter of May 1, 1886, in which he informed the plaintiff that he had 'traded O'Donohoe out of the property.'"

In the instant case the principal was never notified, and information was suppressed even from the general public.

The testimony in this case shows that the transfer of the contract to purchase blocks 429 and 430 from the defendant Baker as receiver to Mr. Simpson was a private transaction between the parties and was made in October, 1897. Baker's receivership ended in April, 1899. May 9, 1904, Baker wrote the following letter to Mr. Reed, the agent of Simpson:

"May 9, '04.

"Mr. Mark Reed, Seattle—Dear Sir: I had a talk with Mr. Simpson in S. F. about the tide land which he holds in trust for me. I asked him if he would take my note in settlement of the advances he has made, together with the interest accrued thereon. The first 2 or 3 payments I made myself. Mr. Simpson's books however will show the status of the account. There is one more payment due next March to complete the contract with the state. Mr. S. stated that you held his general power of attorney and would assign the certificate back to me or my order. I wish you would compile a statement of the account I owe to Mr. Simpson and send same to Chicago, and I will send you from there a form of assignment to execute, together with note for the account, due 1 year after date, which plan Mr. S. consented to and will doubtless advise you to that effect. I may be away several months, and I may have occasion to use the item, or to dispose

of it, and so I think it had better be put in the shape indicated. My address will be as below.

"Yours very truly,

Chas. H. Baker,
"Auditorium Annex,
"Chicago.

"I believe there is an item to my credit also of a certain sum for right of way across the tract sold to the N. P."

Baker subsequently paid to Simpson all moneys paid by Simpson on account of block 430. The title to this block was thereupon transferred to Baker's New York attorney in 1905. Baker subsequently promoted the Seattle Water-Front Realty Company, and block 430 was conveyed to it in full payment of its capital stock, \$250,000. Baker was not a party to the incorporation, nor was he at any time an officer or trustee. He has during all of the time owned 95 per cent. of the stock. The other 5 per cent. was held by friends. Baker at no time was known to the public as being in any way interested in said tidelands, nor was the plaintiff or his predecessor advised that defendant Baker claimed any interest in said lot. No one connected with the trust, so far as the evidence shows, knew anything about Baker's interest in this land until about the time of bringing this action. In March, 1899, about the time that Baker claims to have purchased from Simpson block 430 for the moneys actually expended by Simpson for said block, William Pickett on behalf of his company purchased block 431, which is less valuable than block 430, for \$1,750. In December, 1899, Pickett for his concern purchased blocks 441, 442, 443, 444, and part of blocks 429 and 432 for \$5,000 cash. He endeavored to purchase lot 430, and saw defendant Baker, who referred him to Simpson. He saw Simpson, who said there were others interested in the block, but finally made a price of \$30,000 for block 430. These negotiations covered a period of "about two or three years" commencing in March, 1899. The value of block 430, the land in issue, at the time the defendant Baker claims to have purchased from Simpson, was from \$5,000 to \$15,000. Simpson told Turner some time during the year of 1898-99 that "those lands belong to Charley Baker, that he was carrying the title for him to accommodate him"; and also made a statement to Mr. Roche, his private secretary, and to Mr. Reed, his son-in-law, who was acting as his attorney in fact, that he held the title to the lands for the defendant Baker. There is no doubt in my mind from the evidence presented here that there was a condition of mind between Baker and Simpson, express or otherwise, which was that Baker should have block 430. When the relation of the parties, the value of the land, and all of the circumstances as disclosed by the evidence is analyzed and applied, together with the suppression of the ownership of defendant Baker, the conclusion is inevitable.

[7] It is next contended that the plaintiff is guilty of laches and should not be permitted to prosecute this action. I do not think that this suggestion has any force under the evidence of this case. Lapse of time is no bar, and laches cannot be asserted until knowledge is brought home to the plaintiff, or such notorious condition or relation to the property in issue by the defendant, that the plaintiff should

have known, and such condition is not disclosed by the evidence. *Michoud v. Girod*, 4 How. 503, 11 L. Ed. 1076; *Russel v. Huntington*, 162 Fed. 868, 89 C. C. A. 558; *Prevost v. Gratz*, 6 Wheat. 481, 5 L. Ed. 311; *Townsend v. Vanderwerker*, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383.

[8] Finally, it is asserted that innocent purchasers for value are involved, and that the plaintiff cannot do equity, and the court must leave the parties where it found them.

The testimony shows that all of the stock was paid by transferring the tideland in issue. The parties who subsequently acquired stock stand in no better position than Baker through whose subscription and transfer of the land the stock was acquired. Equity will be fully compensated by paying to the defendant Baker or Seattle Water-Front Realty Company all moneys paid on account of the purchase of said land and all taxes and assessments, together with interest on such several amounts from the date of payment; such payment to be made within 90 days from date of entering of final decree.

Decree accordingly.

UNITED STATES v. RHODES et al.

(District Court, S. D. Alabama. December 13, 1913.)

No. 4229.

1. CONSPIRACY (§ 40*)—OFFENSES—CONCEALMENT OF PROPERTY OF BANKRUPT.

Although a bankrupt alone can be indicted for knowingly and fraudulently concealing property from his trustee in violation of Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), persons combining with him to commit such offense may be guilty of conspiracy, and hence an indictment of two members of a bankrupt firm, and a third person who was not a bankrupt, charging conspiracy to conceal property of the bankrupts from the trustee, was not fatally defective because one of defendants was not a bankrupt.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 73, 75–78; Dec. Dig. § 40.*]

2. BANKRUPTCY (§ 485*)—CONSPIRACY (§ 23*)—CONCEALMENT OF ASSETS.

Where a bankrupt conceals his property before the appointment of a trustee and continues to conceal it after such appointment, he violates Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), and a conspiracy that he shall do so violates the conspiracy statute.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 906, 908; Dec. Dig. § 485; * Conspiracy, Cent. Dig. §§ 40, 41; Dec. Dig. § 28.*]

3. CRIMINAL LAW (§ 365*)—EVIDENCE—RES GESTÆ—CONCEALMENT OF PROPERTY.

Where a bankrupt before bankruptcy concealed his property and continued the concealment after the appointment of his trustee, and was indicted for such offense, evidence of the prior concealment was admissible as *res gestæ*.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 807; Dec. Dig. § 365.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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4. BANKRUPTCY (§ 494*)—OFFENSES—CONCEALMENT OF ASSETS—INDICTMENT—"CONCEAL."

The word "conceal," when coupled in an indictment against a bankrupt for concealing assets from his trustee, with the words "unlawfully, knowingly, and fraudulently" excludes unintentional acts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 911; Dec. Dig. § 494.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1377-1384.]

5. INDICTMENT AND INFORMATION (§ 63*)—REQUISITES—CONCEALMENT OF ASSETS—MANNER OF CONCEALMENT.

An indictment against a bankrupt for conspiracy to conceal assets need not set out the manner of the concealment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 185; Dec. Dig. § 63.*]

6. BANKRUPTCY (§ 485*)—OFFENSES—CONCEALMENT OF ASSETS.

The essential elements of the offense of concealment of assets by a bankrupt are that the concealment must be by the bankrupt while a bankrupt, or after his discharge; that the concealment must be from his trustee of property belonging to his estate; and must be knowingly and fraudulently done.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 906, 908; Dec. Dig. § 485.*]

7. BANKRUPTCY (§ 485*)—OFFENSES—CONCEALMENT OF ASSETS—CONTINUING OFFENSE—"CONCEAL."

A criminal concealment of property by a bankrupt is a continuous concealment of the property from the trustee; the term "conceal" meaning the withholding of assets with a fraudulent intent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 906, 908; Dec. Dig. § 485.*]

8. INDICTMENT AND INFORMATION (§ 69*)—ALLEGATIONS—MATTER UNKNOWN TO GRAND JURY.

An allegation in an indictment that certain necessary facts are to the grand jury unknown is permissible only when the grand jury does not have and cannot obtain a knowledge of the facts.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 191; Dec. Dig. § 69.*]

9. INDICTMENT AND INFORMATION (§ 184*)—VARIANCE—MATTERS UNKNOWN TO GRAND JURY.

Where an indictment for conspiracy to conceal assets of a bankrupt charged that the property removed and concealed consisted of certain goods, wares, and merchandise belonging to the alleged bankrupt firm, and added that a further description as to the exact number, kind, and quality, etc., of the goods concealed was to the grand jury unknown, which charge was put in issue by a plea of not guilty, and the evidence showed that the character, kind, and description of the goods removed and concealed were known to the grand jury at least to a large extent, there was a fatal variance.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 574; Dec. Dig. § 184.*]

Prosecution by the United States against Joseph E. Rhodes and others for alleged conspiracy to conceal property of certain bankrupts. On demurrer to indictment. Sustained.

Jas. B. Sloan, U. S. Atty., and Alex. T. Howard, Asst. U. S. Atty., of Mobile, Ala.

C. E. Hamilton, of Evergreen, Ala., C. J. Torrey, of Mobile, Ala., and F. W. Hare and Barnett & Bugg, all of Monroeville, Ala., for defendants.

TOULMIN, District Judge. This is an indictment against the three above-named defendants for a conspiracy on their part to commit an offense against the Bankrupt Act, namely, that portion of section 29b, providing punishment upon conviction of the offense of having "knowingly and fraudulently concealed, while a bankrupt, * * * from his trustee any of the property belonging to his estate in bankruptcy." Joseph E. Rhodes and John J. Rhodes were the bankrupts, both individually, and as partners doing business under the name of Rhodes Bros. Calvin J. Rhodes was not a bankrupt; he was an outsider, and had no connection with the business of the bankrupts, so far as appears from the indictment. These three defendants were indicted, under section 37 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [U. S. Comp. St. Supp. 1911, p. 1600]; section 5440, Rev. St. [U. S. Comp. St. 1901, p. 3676]), for concealing the assets of Rhodes Bros., who conducted a general mercantile business at Excel, Ala., in anticipation of the bankruptcy of said firm, and of the appointment of a trustee; and the indictment alleges, in substance, that said concealment continued after the adjudication in bankruptcy and after the trustee took charge of the estate. One of the grounds of the demurrers is that the indictment does not allege or show that these three defendants conspired to aid the bankrupts to commit this offense, but charges, in effect, that all three were guilty of a conspiracy to commit the offense, and that Calvin J. Rhodes, not being a bankrupt, could not conspire to commit an offense which, under the bankrupt law, only a bankrupt could be guilty of committing.

[1] A person who conspires with another to commit an offense against the Bankruptcy Act is liable to prosecution. Section 29b of the act provides that a person shall be punished upon conviction of the offense of having knowingly and fraudulently concealed, while a bankrupt, from his trustee any of the property belonging to his estate in bankruptcy. If a bankrupt conceals his property before the appointment of a trustee and continues to conceal it after the appointment, he violates the Bankruptcy Act, and a conspiracy that he shall do so violates the conspiracy statute. Although the bankrupt alone can be indicted for violating the act, persons combining with him to violate it may be guilty of conspiracy. This indictment therefore is not insufficient because it appears that one of the defendants was not the bankrupt.

[2] The indictment charges the removal and concealment of certain property before the bankrupt proceedings were instituted, and the trustee was appointed; but it alleges that the trustee was subsequently appointed, and the property was never turned over to him but was concealed from him. The indictment charges that the property was concealed in anticipation of bankruptcy, and that the concealment was a continuing one after the trustee was appointed. If the bankrupt con-

cealed his property before the appointment of a trustee, and continued to conceal it after the appointment, he violates the Bankruptcy Act, and a conspiracy that he shall do so violates the conspiracy statute. *Cohen v. U. S.*, 157 Fed. 651, 85 C. C. A. 113.

[3] The Bankruptcy Act does not make any act of the bankrupt before the bankruptcy criminal. But if the bankrupt, before the bankruptcy, has concealed his property, and, after his trustee is appointed, continues to conceal it from his trustee, he is criminally liable under the statute, and, if indicted for such crime, evidence of his acts of concealment before the bankruptcy, as well as those subsequent thereto, would be admissible as part of the *res gestæ*.

[4, 5] The word "conceal," when coupled in an indictment with the words "unlawfully, knowingly, and fraudulently," clearly excludes unintentional acts. The manner of concealment need not be set out. *United States v. Comstock* (C. C.) 161 Fed. 644.

"An indictment under Rev. St. § 5440, for conspiracy to conceal property from the trustee in bankruptcy, in violation of the Bankrupt Act, is insufficient where it does not use the statutory words 'knowingly and fraudulently' in characterizing the offense to which the conspiracy related, or any equivalent words therefor. The words (quoted) are an essential part of the statute and describe an essential ingredient of the offense." *U. S. v. Comstock et al.* (C. C.) 162 Fed. 415.

The Waldman Case (C. C.) 188 Fed. 524, is not applicable here, because in that case the defendants were not the bankrupt and had no connection with the bankrupt (a corporation). They might conspire as much as they chose, but there was nothing to indicate that the bankrupt would conceal its property, or that the defendants could compel or induce it to do so. They were outside parties who conspired to have it done. One who is not a bankrupt cannot be guilty of the offense of concealing the bankrupt's property.

"The fact that the bankrupt's property was removed by persons having no connection with the bankrupt has no tendency to show a conspiracy to induce or have the bankrupt to conceal this property from the trustee. The circumstances of the transaction, if stated, might show some connection; but, unless stated, no connection is apparent."

The indictment we have before us states the connection, as two of those charged were bankrupts, and one an outsider.

[6, 7] Essential elements of concealment, etc., are that it must be by the bankrupt, while a bankrupt or after his discharge, and from his trustee, of property belonging to the estate in bankruptcy; and such concealment must be "knowingly and fraudulently" done. A criminal concealment of property by a bankrupt is a continuous concealment of the property from the trustee. "Conceal" is the withholding of assets, with fraudulent intent. *Jacobs v. United States*, 161 Fed. 694, 88 C. C. A. 554; *Johnson v. United States*, 163 Fed. 30, 89 C. C. A. 508, 18 L. R. A. (N. S.) 1194; *Johnson v. United States*, 170 Fed. 581, 95 C. C. A. 661.

In my opinion the indictment is sufficient, and the demurrers thereto are overruled.

(Orally, to the jury:) Each and all of the defendants plead not guilty to the indictment in this case. On the issue thus made the government

introduced evidence to sustain the allegations of the indictment. After the government has announced that it has closed its case on its direct evidence, and before any evidence is offered on the part of the defendants, their counsel moves the court to exclude the evidence of the government on the ground that there is a variance between the allegations in the indictment and the evidence submitted to prove them, in that the indictment charges that the property alleged to have been removed and concealed by the defendants consisted of goods, wares, and merchandise belonging to the bankrupt estate of Rhodes Bros., alleging that the exact quantity and the character, kind, and quality thereof were to the grand jury unknown, whereas the evidence of the government shows that the grand jury that found the indictment was informed by the witnesses who testified before it, and who have testified on this trial, of at least a large amount of the goods, their character and kind, setting out in detail what said goods consisted of, which facts the evidence, without contradiction, shows were made known to the grand jury.

The court overrules the motion to exclude the evidence in the case, whereupon the defendants' counsel moves the court, for each defendant separately and severally, to instruct the jury to render a verdict for the defendants. The court grants that motion.

[8] The law is well settled that a criminal charge must be made so certain that a defendant may be reasonably informed of just what he is charged with, that he may plead a conviction or acquittal of such charge to any subsequent indictment thereon. The indictment in this case, in reference to the property alleged to have been concealed by the defendants, contains the general allegation that it consisted of goods, wares, and merchandise, the character, kind, and particular description of which is to the grand jury unknown. These matters are important and are allegations put in issue by the plea of not guilty. They are allegations that must be sustained by evidence on the part of the government. Such allegations are permissible from necessity only, when the grand jury does not have and cannot obtain a knowledge of the facts.

[9] The evidence shows that the character, kind, and description of the goods removed and concealed were known to the grand jury—at least, a large part of such goods. As it appears from the proof that the character, kind, and description of the goods were actually known to the grand jury, there is a fatal variance between the allegations and proof. When this is the case, it is the duty of the trial court to direct a verdict for the defendant when so requested. *Duff v. United States*, 185 Fed. 101, 107 C. C. A. 319; *Hedderly v. United States*, 193 Fed. 571, 114 C. C. A. 227; *Wiborg v. United States*, 163 U. S. 632, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; *Crumpton v. United States*, 138 U. S. 361, 11 Sup. Ct. 355, 34 L. Ed. 958.

On the evidence submitted, I am free to say that I am not satisfied that the defendants are guilty of knowingly and *fraudulently* concealing the goods in question from the trustee. On the facts proven, I certainly have a reasonable doubt of their guilt. Hence I do not feel at all constrained to charge the jury, as requested by defendants' coun-

sel, on the question of variance between the allegations and the proof in the case.

Gentlemen of the jury: The court therefore charges you to find a verdict of not guilty. The form of your verdict should be, "We, the jury, find the defendants not guilty." The verdict should be signed by one of your members as foreman, to be selected by you.

UNITED STATES v. RHODES (two cases).

(District Court, S. D. Alabama. December 13, 1913.)

Nos. 4230, 4231.

1. **BANKRUPTCY (§ 242*)—PRIVILEGE OF WITNESS.**

The constitutional provision that no man shall be compelled to be a witness against himself is applicable to a bankrupt and entitles him to refuse not only to give oral testimony, but to produce books and papers which will tend to incriminate him.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 399-401; Dec. Dig. § 242.*]

2. **PERJURY (§ 25*)—INDICTMENT—REQUISITES.**

An indictment for perjury must allege that the false oath was made in evidence or testimony as to matters or facts material to the issue involved in the proceeding in which it was made, and, if the matters alleged as sworn to appear to the court not to be material, the indictment is insufficient, though it alleges that they are material.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 82-89; Dec. Dig. § 25.*]

3. **PERJURY (§ 6*)—BANKRUPTS—EX PARTE PROCEEDING.**

Defendants, who were bankrupts, were indicted for perjury alleged to have been committed on their examination before a referee as to matters concerning their bankruptcy, and as to their acts the commission of which they denied, and also concerning statements made in their examination relevant to one of their schedules. *Held* that, such proceeding being merely an *ex parte* examination on which there was no issue, perjury could not be assigned on the alleged falsity of the testimony so given.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 7-17; Dec. Dig. § 6.*]

Joseph E. Rhodes and John J. Rhodes were indicted for perjury in violation of Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1111 [U. S. Comp. St. Supp. 1911, p. 1625]) § 125. On demurrer to indictment. Sustained.

Jas. B. Sloan, U. S. Atty., and Alex. T. Howard, Asst. U. S. Atty., of Mobile, Ala.

C. E. Hamilton, of Evergreen, Ala., C. J. Torrey, of Mobile, Ala., and F. W. Hare and Barnett & Bugg, all of Monroeville, Ala., for defendants.

TOULMIN, District Judge. [1] 1. The law is well settled that the constitutional provision that no man shall be compelled to be a witness against himself enables a person, under ordinary circumstances, to refuse not only to give oral testimony, but to produce his books and pa-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pers, on the ground that they would tend to incriminate him. *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746. And it is held that a bankrupt, as well as any other person, is entitled to the protection of such constitutional provision. *In re Kanter & Cohen* (D. C.) 9 Am. Bankr. Rep. 104, 117 Fed. 356; *In re Dow's Estate* (D. C.) 105 Fed. 889.

The defendants (bankrupts) have been indicted for perjury, alleged to have been committed on their examinations before the referee as to matters concerning their bankruptcy and as to acts inquired about by the defendants, and denied to have been committed by them; and also as to statements made in their examinations relative to their Schedule B, etc. Such evidence as purposed to be used in these prosecutions is not permitted by law to be so used, under the constitutional provision referred to, as well as by that of the bankrupt law. *In re Harris* (D. C.) 164 Fed. 292.

[2] In all indictments for perjury it must be alleged that the false oath charged was made in evidence or testimony as to matters or facts material to the issue involved in the proceeding in which it was made. If the matter or facts stated in the indictment as sworn to appear to the court not to be material, notwithstanding they are alleged so to be in the indictment, they will not be sufficient to support it.

[3] It does not appear from the allegations of the indictments that the testimony given before the referee was material to the matter or proceeding then pending before him. An indictment for perjury is defective which fails to show that the alleged false testimony was material to the issue involved in the proceeding before the referee when given. There was no issue in the said proceeding. It related to matters which might be material in a bankruptcy proceeding on a hearing of objections to a discharge. The said proceeding was in the nature of an ex parte examination. *In re Chamberlain* (D. C.) 180 Fed. 304; *Roscoe's Crim. Ev.* p. 817.

There is an allegation in the indictment against J. E. Rhodes (No. 4230) that the testimony before the referee was material, but the facts alleged show it was not material. Demurrers are sustained to the indictment—not all those interposed, but sufficient to render it fatally defective.

The indictment against John J. Rhodes (No. 4231) fails to allege any materiality in the matters testified to, and, as stated above, it does not appear that the testimony was material; and the indictment is otherwise not maintainable. Demurrers thereto are sustained.

COY v. TITLE GUARANTEE & TRUST CO. et al.

(District Court, D. Oregon. March 23, 1914.)

No. 3209.

1. CORPORATIONS (§ 559*)—INSOLVENCY—RECEIVERS—APPOINTMENT—EFFECT.

The appointment of a receiver for a corporation does not destroy its entity as such, but it still retains its corporate power, at least, to wind up its business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2241–2252, 2259; Dec. Dig. § 559.*]

2. TAXATION (§ 124½*)—PROPERTY SUBJECT—PROPERTY IN HANDS OF RECEIVER.

Since a receiver appointed for the property of a corporation is but an arm of the court in the management of the corporation's property, whether as a going concern or in process of dissolution, the court holds the property subject to the burdens and limitations to which it was subject in the hands of the corporation, and hence the fact of receivership did not relieve the property from taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 224–226, 240–242, 260–263, 272; Dec. Dig. § 124½.*]

3. TAXATION (§ 337*)—ASSESSMENT—PROPERTY IN HANDS OF RECEIVER.

Where the property of a corporation was in the hands of a receiver, it was not material to the validity of the assessments thereon whether it was assessed to the corporation or to the receiver.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 571–578, 704–706; Dec. Dig. § 337.*]

4. TAXATION (§§ 508, 572*)—NATURE OF TAX—RECOVERY.

Under the Oregon system for the collection of taxes, a tax does not become a debt, and is not recoverable in an action at law, nor is it a lien on personal property until a warrant is levied.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 942, 1132–1137; Dec. Dig. §§ 508, 572.*]

5. TAXATION (§ 572*)—PROPERTY IN HANDS OF RECEIVER—ASSESSMENT—RECOVERY OF TAXES.

Where property of a corporation in the hands of a receiver is assessed, the taxes can be collected only by application of the proper officer to the court for an order requiring the receiver to pay the taxes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1132–1137; Dec. Dig. § 572.*]

6. TAXATION (§ 337*)—PROPERTY OF CORPORATION—RECEIVERSHIP—ASSESSMENT—CONSENT OF COURT.

Since the assessment of taxes on property in the hands of a receiver does not involve an invasion of the possession of the receiver, it may be made without leave of the court having jurisdiction of the proceedings.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 571–578, 704–706; Dec. Dig. § 337.*]

7. TAXATION (§ 840*)—PROPERTY IN HANDS OF RECEIVER—ASSESSMENT—RECOVERY OF TAXES—PENALTIES AND INTEREST.

L. O. L. Or. § 3682, provides that taxes shall be payable on the first Monday of April of each year, except that, if half are paid by March 15th, the remaining half may be paid on or before the first Monday in October; but that, if the remaining half is not then paid, the taxpayer shall be subject to a penalty of 10 per cent. on the amount of taxes remaining due, and also to the payment of 12 per cent. interest thereon from the first Monday in April until paid. Section 3683 makes it the duty of the collector on the first Monday of May in each year to collect

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

all taxes levied, whereof one-half was not paid on or before the first Monday in April, and also to collect all taxes that might remain unpaid by the first Monday in October, together with the penalty of 10 per cent. and the interest at 12 per cent. per annum. *Held*, that the 12 per cent. interest was in fact a penalty, and that, where taxes were assessed against the property of a corporation in the hands of a receiver, it was the duty of the collector to apply immediately after the first Monday in May of each year for an order requiring the receiver to pay the taxes, and, not having done so, he would not be permitted to recover against the receiver more than the taxes, the 10 per cent. penalty, and the interest at 12 per cent. which had accrued for the time intervening from the first Monday in April until the first Monday in May of each year.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1656; Dec. Dig. § 840.*]

In Equity. Suit by N. Coy against the Title Guarantee & Trust Company, a corporation, and others. Petitions in intervention by Multnomah County for an order requiring the receiver to pay state and municipal taxes assessed against the corporation on personal property for the years 1908 to 1911, inclusive, with penalties and interest. Petitions granted in part.

See, also, 198 Fed. 275.

W. C. Bristol, of Portland, Or., for receiver.

Walter H. Evans, Dist. Atty., of Portland, Or., for Multnomah County.

Emmons & Webster, of Portland, Or., for petitioners.

WOLVERTON, District Judge. Two petitions in intervention have been filed in the above matter by Multnomah county, praying that the receiver be required to pay the state, county, school, and municipal taxes assessed against the Title Guarantee & Trust Company, on certain personal property, for the years 1908 to 1911, inclusive, with penalties and interest.

A receiver was appointed for the Title Guarantee & Trust Company by this court on November 6, 1907, and the taxes which it is sought to have paid were assessed against the company a part of the time in its name alone and a part of the time in the name of the company, R. S. Howard, Jr., receiver. The receiver resists payment on several grounds. First, it is urged that the law has made no provision for the assessment of receivers, and, having made none, they are not taxable as such.

As it respects assessment and taxation, the statute of Oregon has made all property, whether real or personal, subject thereto. Section 3551, Lord's Oregon Laws. By section 3560 it is required that every person shall be assessed as to his personal property, whether owned by him or under his control as trustee, guardian, executor, or administrator, in the county in which he resides. Section 3563 provides that personal property of every private corporation is liable to taxation in the same manner as the personal property of a natural person, and shall be assessed in the name of such corporation, in the county where its principal place of business is, unless otherwise specially provided by law. The manner of assessment is provided by section 3593, which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

requires the assessor to set down on his roll, first, the names of all persons assessable in his county, and, among others, the taxable personal property owned by or to be taxed to such person. These are the principal provisions of the statute which in any way affect the present controversy, and it is clear that ample provision is made thereby for the assessment of a corporation. But it is urged that:

"We are dealing with property here represented by a court through its receiver, and there is no method of assessment provided for corporate property."

[1] The appointment of a receiver by a court does not destroy the entity of the corporation. It yet remains with corporate power, at least for the purpose of winding up the business of the concern, for it is corporation business always that the receiver transacts.

[2] All property being taxable, and corporations being liable to taxation, it is inconceivable that a suit in chancery and the appointment of a receiver by operation of law withdraws the corporate property from the power of assessment and taxation. Nor was it necessary that the receiver should, *eo nomine*, be designated as a person subject to assessment and taxation. He is but an arm of the court in the management of the corporation property, whether it be as a going concern or in process of dissolution, and the court holds the property subject to all the burdens and limitations to which the corporation itself was subject under the law, and one of these is the liability to taxation as a natural person. I am clear that a receivership does not withdraw the corporation from that liability. As is said by Mr. Chief Justice Fuller:

"Undoubtedly property so situated (*in custodia legis*) is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law." *In re Tyler*, 149 U. S. 164, 182, 13 Sup. Ct. 785, 790 (37 L. Ed. 689).

And it has been held that property in the hands of a receiver is properly assessable as the property of the corporation. *Stevens v. New York & O. M. R. Co.*, Fed. Cas. No. 13,405.

[3] Nor is it important to whom the assessment is made, whether to the corporation or to the receiver. It is not vital to the validity of the tax. *Wiswall v. Kunz*, 173 Ill. 110, 50 N. E. 184.

[4] Under the system for tax collections within this state, a tax does not become a debt, and an action at law does not lie for its recovery. Nor is the tax upon personal property made a lien thereon, nor does any lien attach until a warrant is levied, and it may happen, as where the property of the person taxed is taken into another state or disposed of, that the tax collector will be left remediless in forcing collections. *Marion County v. Woodburn Mercantile Co.*, 60 Or. 367, 119 Pac. 487, 41 L. R. A. (N. S.) 730.

[5] But, where property remains within the jurisdiction and within the hands of the person taxed, there is no impediment to the enforcement of the payment of the personalty tax assessed against him.

It is beyond question at this date that, when a court has appointed a receiver, his possession is the possession of the court for the benefit of

the parties to the suit and all concerned, and cannot be disturbed without proper leave of the court. *In re Tyler*, supra; *Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 672; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145.

Property so held may be said to be in equitable sequestration to answer the purposes of the receivership, and, if it is sought to enforce an equitable lien or other demand which is a rightful charge against the property, it must be done by leave and under the sanction of the court so having the possession. The levy of a tax warrant is a sequestration, like the levy of an ordinary *fiery facias*. Hence such levy could not in any greater degree be permitted to disturb the court's possession without its explicit sanction previously procured. *Ex parte Huidekoper et al.* (C. C.) 55 Fed. 709; *Oakes v. Myers* (C. C.) 68 Fed. 807; *Ledoux v. La Bee* (C. C.) 83 Fed. 761.

[6] In the present case there has been no attempt to levy a warrant, but it is urged, going back of the warrant, that there was no authority for the assessor, the property being in custodia legis, to assess the property, or for the proper officers to levy the tax, without leave of the court, and that the tax therefore is without validity, and should not be ordered paid out of the estate.

Seeing that property in the hands of a receiver is subject to assessment and taxation, I am of the opinion that the assessment and levy of the tax, since an invasion of the possession of the receiver is unnecessary to effect the purpose, is regular and valid. Being so, it is the duty of the court to require payment of the taxes levied, if there be funds in the hands of the receiver applicable thereto. It was so held by the Supreme Court of Missouri, where, as in this state, a personalty tax was not a lien upon the property taxed, and where also, as here, the state has the right to payment out of the assets paramount to other creditors. *Greeley v. Provident Savings Bank et al.*, 98 Mo. 458, 11 S. W. 980.

"Having such paramount right," says the court in *Central Trust Co. v. N. Y. C. & N. R. R. Co.*, 110 N. Y. 250, 257, 18 N. E. 92, 95 (1 L. R. A. 260), "the court may, in its discretion, listen to the petition of the state, through its Attorney General, and direct its officer to make the payment asked for."

Indeed, the court may not only do so, but there is an imperative duty incumbent upon it to take cognizance of the laws of the state relative to assessment and taxation, and to require of its receivers payment of such taxes as are just and regularly levied, out of any assets they may have in their hands applicable thereto. See *In re Tyler*, supra, and *George et al. v. St. Louis Cable & W. Ry. Co.* (C. C.) 44 Fed. 117, 119.

This renders it clear that taxes levied upon the personalty of the corporation for the years 1908, 1909, 1910, and 1911 should be discharged, and equally clear that the court should direct the receiver to pay them.

[7] But it is further urged that the receiver should not be required to pay the penalty and interest, notwithstanding the taxes have been long delinquent. Of this we may now inquire.

Taxes under the statute governing, as it relates to the collection of

these now in controversy, were made payable on the first Monday of April of each year, with the provision that, if one-half of such taxes were paid by the 15th day of March, the time of payment for the remaining one-half should be extended until the first Monday of October. It is further provided, however, that, should the remaining half not be paid on the first Monday of October, the taxpayer should be subject to a penalty of 10 per cent. on the amount of the taxes remaining due, and also be subject to the payment of 12 per cent. interest thereon from the first Monday in April until paid. Section 3682, Lord's Oregon Laws. By the following section it is made the duty of the tax collector immediately, on the first Monday of May in each year, to proceed to collect all taxes levied whereof one-half was not paid on or before the first Monday of April. And so also to collect all taxes that might remain unpaid by the first Monday of October, together with the penalty of 10 per cent. and the interest thereon at 12 per cent. per annum.

It will be seen that a direct penalty is imposed for nonpayment of taxes when due, but there is a further burden imposed upon the taxpayer to pay interest at the rate of 12 per cent. per annum. This interest is double the legal rate of interest otherwise fixed by statute, and is above the rate which parties may charge by express agreement. While the statute calls it interest, it is very obvious that it operates as a penalty, and I am impelled to the conclusion that the exaction of the 10 per cent. and the 12 per cent. called interest must each be regarded as in effect a penalty for the nonpayment of taxes when due.

Now, in the case at bar, the taxing officers were early advised that the receiver would resist the payment of taxes assessed against personal property within his hands. This before any of the taxes in question were levied. While it may be the duty of the receiver to pay the taxes legitimately due, or to apply to the court for authority to do so, yet when a question has arisen touching the validity of the tax, and the taxing officers are advised of that fact, the duty is all the more incumbent upon the tax collector to proceed promptly in the proper way to require the payment of such tax. Under present conditions, there was no way for the tax collector to proceed other than to apply to the court for an order requiring the payment by the receiver. In such procedure the legality of the tax could well be determined, and, if found proper, the order for payment would reasonably follow.

But the tax collector was not required to enforce collection until after the taxes became delinquent. He should have proceeded immediately, however, on the first Monday in May of each year. At this time the penalty of 10 per cent. had been incurred, and the interest at 12 per cent. had accrued for the time intervening from the first Monday in April. If prompt application had been made to the court, further penalty would not have been visited upon the receiver. I think this should have been done, and the tax collector should not have waited one, two, three, and four years before attempting to enforce the tax in the only way in which it could be done. For this reason, I am not inclined to burden the estate with the accruing interest from and after the first Monday in May each year as it relates to the taxes for the several years involved. This conclusion is sustained by the prin-

ciple announced in the cases of County Com'rs of Prince George's Co., etc., v. Clarke & Berry, 36 Md. 206, and Blakistone v. State, 117 Md. 237, 83 Atl. 151.

The receiver will therefore be directed to pay the state, county, school, and municipal taxes for the years 1908, 1909, 1910, and 1911, together with the penalty of 10 per cent. on the amount of the tax for each year, and the interest of 12 per cent. accruing between the first Monday in April and the first Monday in May; and such will be the order of the court.

THE C. S. HOLMES.

(District Court, W. D. Washington, N. D. February, 1914.)

No. 2539.

1. COURTS (§ 365*)—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

Where there is a conflict between the maritime law and the local law, the decisions of the state courts are not binding on a court of admiralty.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969-971; Dec. Dig. § 365.*]

2. SEAMEN (§ 29*)—INJURY IN SERVICE—LIABILITY OF VESSEL.

Neither a vessel nor the owner is chargeable with the negligence of the master or other officer in respect to the details of navigation through which a seaman is injured.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188-194; Dec. Dig. § 29.*]

3. SEAMEN (§ 29*)—SUIT FOR INJURY—SUFFICIENCY OF LIBEL.

Allegations of a libel *held* insufficient to charge a vessel with liability on the ground that the master was in fault or negligent in the employment of a physician to treat an injured seaman.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188-194; Dec. Dig. § 29.*]

In Admiralty. Suit by Gust Fondahn against the schooner C. S. Holmes. On exceptions to amended libel. Exceptions to first and second causes of action sustained.

For former opinion, see 209 Fed. 970.

Daniel Landon, of Seattle, Wash., for libellant.

Ballinger, Battle, Hurlbert & Shorts, of Seattle, Wash., for claimant.

NETERER, District Judge. This is an action in rem in which libellant seeks recovery of damages for personal injuries, damages for negligence in furnishing medical treatment, expenses of medical treatment, and wages. The matter was heretofore considered by the court upon exceptions to the libel, which were sustained, 209 Fed. 970. An amended libel has been filed, and the matter is now before the court on the claimant's exceptions to the amended libel.

The amended libel, after alleging the employment of libellant as a seaman on board the C. S. Holmes, recites:

"That while on the return voyage and while performing his duty as a seaman, on the 3d of January, 1913, in the afternoon a heavy storm arose, and the ship sought shelter in Neah Bay. A tug was sent out to look at the con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dition of the weather, and came back and reported that it was not fit for any vessel to go out on account of the mountain of sea running at 12 o'clock noon. With the weather conditions unchanged the steamer Goliah gave the said C. S. Holmes a steel cable of five inches thickness, which was taken on board and made fast on the forward end of the said ship by being placed three times around a square bit; and by order of the captain of the said ship C. S. Holmes the steamer Goliah towed her to sea, it taking the steamer seven hours to tow the C. S. Holmes a distance of eight miles."

"That at about 7 o'clock, and while weather conditions were unchanged, the said steamer blew her whistle to let go the wire; the captain of the Holmes gave general orders for everybody to go forward and take hold of the wire; the crew held back; when they received the orders the second time everybody went forward, but none went to the wire except the libelant, the captain standing about four feet above the libelant, where he could see everything going on; libelant being in a position where he could not see the condition of the wire, libelant inquired of the captain how the wire was on the bow, and he was told by the captain that the wire was slack, and that everything was all right and to let go, and libelant let go the lashings and went away as quickly as possible to avoid danger. The wire was tight and sprang back and hit libelant, causing a compound fracture of libelant's right arm, paralyzing and bruising his side."

To the cause of action above alleged the claimant excepts as follows:

"Claimant excepts to all such allegations in said amended libel as are allegations of facts purporting to constitute such first purported cause of action, for the reason that such a cause is not an admiralty and maritime cause of action, and is not within the jurisdiction of this honorable court, and for the reason that said amended libel does not allege facts sufficient to constitute such cause of action."

By reference to the former opinion, it will be seen that the negligence upon which the libelant there relied was—

"that the captain, with the rest of the crew standing near by, negligently failed to insist upon giving libelant assistance."

The negligence here relied upon is that:

"Libelant inquired of the captain how the wire was on the bow, and he was told by the captain that the wire was slack, and that everything was all right and to let go, and libelant let go. * * * The wire was tight and sprang back and hit libelant."

The former ground of negligence was held insufficient to charge the owners or the vessel under the rule laid down by the Circuit Court of Appeals of the Ninth Circuit in *Olson v. Oregon Coal & Nav. Co.*, 104 Fed. 574, 44 C. C. A. 51. The question now to be determined is whether the latter ground of negligence is sufficient to charge the vessel.

Libelant relies upon *Keating v. Pacific Steam Whaling Co.*, 21 Wash. 415, 58 Pac. 224. The negligence there charged, however, was an unsafe appliance for towing, which might be sufficient to bring the case within the rule laid down in the *Olson Case*, *supra*. The defendant nevertheless contended that plaintiff might have been ordered to do the work in a safe manner, and the failure of the mate to order him to do it in such a manner was negligence of the mate in a detail of navigation, for which the owner would not be liable—citing *Quinn v. New Jersey Lighterage Co.* (C. C.) 23 Fed. 363; *The Queen* (D. C.) 40 Fed. 694. The court meets this contention with the general statement that the mate and captain are not fellow servants of an ordinary seaman, and cites *Chicago, etc., Ry. Co. v. Ross*, 112 U. S. 377, 5 Sup.

Ct. 184, 28 L. Ed. 787, and *The Transfer* No. 4 and *The Car Float* No. 16, 61 Fed. 364, 9 C. C. A. 521.

[1] Libelant contends that the holding of the state court should govern. Jurisdiction in admiralty cases being exclusively vested in the United States District Court by article 3, § 2, of the Constitution, and sections 24 and 256 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091, 1160 [U. S. Comp. St. Supp. 1911, pp. 135, 233]), this contention cannot be sustained. It was expressly so held in *Workman v. New York City*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314. In the absence of a holding of the Supreme Court of the United States, this court must be governed by the holdings of the Circuit Court of Appeals for the Ninth Circuit.

[2] *Quinn v. New Jersey Lighterage Co.*, and *The Queen*, *supra*, were both considered and approved in the *Olson* Case. Each state that the rule in *Chicago, etc., Railway Co. v. Ross* does not operate to charge the owner with negligence of the master in respect to the details of navigation. Not only is this so, but *The Transfer, etc.*, 61 Fed. 364, 9 C. C. A. 521, which the Washington Supreme Court cites in support of its holding, is based expressly upon *Chicago, etc., Ry. Co. v. Ross, supra*, which was overruled by the Supreme Court in the case of *New England Railroad Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181. Referring to this case, Judge Ross, in the *Olson* Case, *supra*, 104 Fed., at page 576, 44 C. C. A., at page 53, says:

"In the recent case of *Railroad Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181, where the case of *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787, was finally and squarely overruled, the Supreme Court announces the true rule to be, both upon principle and authority, 'That the employer is not liable for an injury to one employé occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough to bring the case within the general rule of exemption if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes, or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end.'"

The negligence here complained of was in a mere detail in the navigation of the ship; it was not with respect to any duty which the owner personally owed to the libelant. For such negligence of any member of the crew, whether seaman or captain, the owner is not liable, and the vessel cannot be proceeded against in rem. *Olson v. Oregon Coal & Nav. Co.*, 104 Fed. 574, 44 C. C. A. 51; *The Queen* (D. C.) 40 Fed. 694; *Quinn v. Lighterage Co.* (C. C.) 23 Fed. 363; *The Governor Ames* (D. C.) 55 Fed. 327; *The Bunker Hill* (D. C.) 198 Fed. 587; *The City of Alexandria* (D. C.) 17 Fed. 390; *The C. S. Holmes* (D. C.) 209 Fed. 970, filed December 31, 1913.

[3] The libel further alleges:

"That the captain gave orders to go back to Port Angeles; libelant requested to be taken to Port Townsend to the Marine Hospital, but was informed that it would cost \$100 to do, and that there was a marine doctor at Port Angeles, and so refused; they arrived at Port Angeles at 3 o'clock in the morning; the libelant again requested to be taken to Port Townsend to the Marine Hospital, and the captain again refused; at about 7 or 8 o'clock

the captain took libelant to Dr. Taylor, wrote out a permit, gave it to the said doctor, informing him at the same time that it was good for all expenses incurred, the said doctor asked the captain to explain the permit, the captain then told him: 'I have nothing to explain; the man is in your care now, and he is out of my hands'—at the same time laughing at the doctor in a manner that would indicate that he had knowingly deceived him. The captain knew all the time that there was no marine doctor at Port Angeles; and that the permit was valueless for any purpose other than to be used for admission at the Port Townsend Marine Hospital. The captain deliberately put libelant off at Port Angeles for the purpose of getting rid of him, knowing and intending that he would at most only receive temporary relief; at the same time he knew, or should have known, that libelant needed prompt and permanent attention on account of the condition of his injuries."

"That the libelant was taken to the office of the doctor, and in the presence of the captain an attempt was made by the then unwilling doctor to fix him up temporarily, which was not successful, and two days later, while libelant was still in a helpless condition, the doctor requested the libelant to leave; libelant was unable to move; he received no more attention or treatment for six days longer, when, with considerable of effort, he made his way to Port Townsend; during the time he was at Port Angeles blood poison set in, and after two months' treatment at the Marine Hospital at Port Townsend, an attempt was made to set the bones, but the ends of the bones so broken had commenced to decay by reason of treatment being neglected when injured, and the arm was in such condition that the plates used to hold the bones together broke loose, and the bones are still continuing to decay."

Claimant excepts to the above cause of action as follows:

"To all such allegations in said amended libel as are allegations of facts purporting to constitute such second purported cause of action, on the ground that such amended libel does not allege facts sufficient to constitute such a cause of action."

In the former opinion in this case it was held that the owner is liable for the negligence of a physician employed by the captain only where the master is negligent in employing him. The duty was there held analogous to that of selecting a competent fellow servant, where the master is held liable only when he knew, or should have known, of the incompetency of the fellow servant. 26 Cyc. 1295, 1298.

It was stated that the mere act of not going to Port Townsend to take libelant to the Marine Hospital would not be negligence. The question then remains whether in the employment of this particular physician there was such negligence as to charge the owner. It is nowhere alleged that the master knew of the physician's incompetence, nor are any facts alleged sufficient to charge him with knowledge. It is alleged that the master gave the physician a permit to the Marine Hospital, telling him that it was good for all expenses, when the captain knew that it was valueless for any other purpose than admission to the hospital. It is then alleged that "in the presence of the captain an attempt was made by the then *unwilling* doctor to fix him up temporarily." Only by the most liberal inference can the missing links between the representations of the master and the malpractice be supplied. It can be only by reading into the libel allegations that the *unwillingness* caused the malpractice, and that the unwillingness was caused by the falsity of the representations. The word "unwilling," as applied to the doctor, expresses a conclusion as to a state of mind, and no words or acts of the doctor are alleged which manifested to the master such a state of mind. It is evident that the physician ac-

cepted the employment and undertook to minister to libelant. Even had he done so gratuitously, there rested upon him "the same degree of care and skill and the same measure of duty" as would have rested upon him had he received compensation. 22 Am. & Eng. Enc. Law, 801. Here he had not only the liability of his patient, but that of the owners and the vessel as well, upon which to rely. *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760; *The New York*, 204 Fed. 764, 123 C. C. A. 214; *The City of Alexandria* (D. C.) 17 Fed. 390. A misrepresentation as to the method of payment, under such circumstances, cannot be reasonably anticipated to result in malpractice. It is not such negligence or fault as will charge the vessel. The other allegations are merely of conclusions, from which no implication of negligence is necessarily drawn, and are to be disregarded. *Straus v. Foxworth*, 231 U. S. 162, 34 Sup. Ct. 42, 58 L. Ed. —; *Jackson v. Chicago, Mil. & St. Paul Ry.* (D. C.) 210 Fed. 495, filed in this court February 2, 1914.

The claimant admits that libelant is entitled to the \$30 alleged to have been paid for medical treatment, provided he can prove he has paid such sum, and that he is entitled to wages to the end of his voyage if he can prove that he has not been paid the same.

The exceptions to the first and second causes of action are sustained.

SHERIDAN STATE BANK v. ROWELL et al.

(District Court, D. Oregon. April 6, 1914.)

No. 6028.

1. CONTRACTS (§ 264*)—RESCISSION—CONDITIONS PRECEDENT.

There must be a willingness and ability to perform on the part of one seeking a rescission, as well as a legal tender of whatever he has received under the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1184, 1185; Dec. Dig. § 264.*]

2. VENDOR AND PURCHASER (§ 97*)—RESCISSION BY VENDOR—TENDER.

Where, under a contract for the sale of land, deeds to the purchaser were placed in escrow for delivery upon payment of the balance of the purchase price, a tender by the vendor's assignee of a quitclaim deed from it was not a sufficient tender of performance to enable it to rescind the contract, as the purchaser was entitled to the original vendor's deeds, which were in escrow, especially where the assignor's title was imperfect; the deed to it from the vendor being defective.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 161, 162, 166; Dec. Dig. § 97.*]

3. BANKRUPTCY (§ 188*)—VENDOR'S LIEN—PRIORITY.

The holder of a note given for the purchase price of land had a purchase money lien on the land paramount to all other demands against it, and which was not affected by the purchaser's bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286-289, 291-295; Dec. Dig. § 188.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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4. BANKRUPTCY (§ 400*)—EXEMPTIONS—MARSHALING PROPERTY.

The setting aside of a homestead to a bankrupt did not impair a purchase-money lien, but necessitated a marshaling of the property, so as to preserve the homestead to the bankrupt, if possible.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670-675; Dec. Dig. § 400.*]

5. BANKRUPTCY (§ 400*)—EXEMPTIONS—CLAIM OF EXEMPTION.

It is the ordinary and usual method, and the one sanctioned by the rules and forms in bankruptcy, for a bankrupt to claim her homestead exemption in the schedule attached to her voluntary petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670-675; Dec. Dig. § 400.*]

6. BANKRUPTCY (§ 400*)—EXEMPTIONS—SETTING APART—OBJECTIONS AND EXCEPTIONS TO REPORT.

Where a bankrupt claimed her homestead exemption in the schedule attached to her voluntary petition, but the trustee refused to set aside the homestead, whereupon she filed exceptions to his report, notice to the creditors of the hearing on such exceptions before the referee was unnecessary, as the objection to the report was but a continuation of the proceeding initiated by the claim for exemption, and the trustee or creditors could have the proceedings certified to the court for adjudication or review.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670-675; Dec. Dig. § 400.*]

7. BANKRUPTCY (§ 400*)—SALES—DISPOSITION OF PROCEEDS.

Upon the sale of a homestead set apart to a bankrupt to satisfy a purchase-money lien, any surplus should be paid to the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670-675; Dec. Dig. § 400.*]

In Equity. Suit by the Sheridan State Bank against Lee Rowell, trustee in bankruptcy of Ida L. Myers and others. Decree for plaintiff.

Ralph A. Coan and Harry H. Pearce, both of Portland, Or., for plaintiff.

McCain, Vinton & Burdett, of McMinnville, Or., and W. O. Sims, of Sheridan, Or., for defendants Ida L. Myers and S. A. D. Myers.

R. L. Conner, of McMinnville, Or., for trustee.

WOLVERTON, District Judge. This suit was instituted June 11, 1913, against the defendants, with the purpose of having rescinded a certain contract, entered into on February 27, 1909, between Lizzie Millsap and Ida L. Myers, whereby Mrs. Millsap placed in escrow with the plaintiff, Sheridan State Bank, two deeds duly executed, conveying certain real property and an easement appurtenant thereto to Mrs. Myers, the deeds to be delivered by the bank to Mrs. Myers upon the payment by her of \$1,300, the balance of consideration for said premises, in one year from date, with interest at 7 per cent., for which a promissory note was given; the entire consideration being \$1,800, \$500 of which was paid down. Mrs. Myers went into possession, and subsequently constructed two houses upon the premises, at a cost of \$2,000, and paid the interest on the note to the bank up to February 26, 1912. On December 10, 1912, Mrs. Millsap, who had previously intermarried with J. D. Nairn, assigned her interest in the contract to the

bank. Mrs. Myers was, by her voluntary petition, adjudged a bankrupt on December 31, 1912, and the defendant Lee Rowell was in due course appointed trustee in bankruptcy of her estate. By her Schedule B accompanying the petition Mrs. Myers claimed certain of the premises described in the deeds placed in escrow as her homestead and exempt from the operation of the bankruptcy act. The trustee made report, refusing to set aside the exemption, and thereupon Mrs. Myers filed objections or exceptions to the report, and the matter was brought on for hearing before the referee in bankruptcy. After consideration, the referee ordered and directed the trustee to set aside the premises to Mrs. Myers pursuant to her claim, the order having been made and entered March 15, 1913. In compliance with such order, the trustee, on March 17th, set aside the premises to claimant as her homestead exemption. Prior to this date, namely, on February 26, 1913, the bank gave Mrs. Myers written notice that if the note and interest accruing thereon were not paid on February 27, 1913, it would declare the contract forfeited. Following this up, the bank, on May 15th, tendered to the trustee and Mrs. Myers, each in turn, a quitclaim deed from the bank to Mrs. Myers, to the premises described in the Millsap deeds in escrow, together with the \$500 paid on the contract, with interest at 6 per cent. from the date of payment, and \$2,000, the value of the improvements, less \$1,540 claimed as rental from the date of the contract, and thereupon demanded a rescission of the contract, which was refused. At the time of this alleged tender the bank claimed title to the premises through the assignment of the contract between Mrs. Millsap (then Mrs. Nairn) and Mrs. Myers, and a quitclaim deed from Mrs. Nairn and her husband, defective in that the easement was omitted from the description of the premises. The omission was corrected by a subsequent deed, but not until May 21st, which could not aid the tender.

The question primarily for decision is whether plaintiff has made a sufficient tender to entitle it to a rescission of the contract.

[1] There must be a willingness and ability to perform on the part of one seeking a rescission, as well as legal proffer to return whatsoever he has received under the contract, so as to put the parties in statu quo, before a rescission can be insisted upon.

[2] Now, the tender made was of a quitclaim deed executed by the bank to Mrs. Myers, not the deeds of Mrs. Millsap which were deposited in escrow to be delivered to Mrs. Myers when she paid the consideration in full. This was clearly not a sufficient tender of performance. Mrs. Myers was entitled, under the contract, to Mrs. Millsap's deeds, and a proffer of the delivery of the deed of some other person to the premises was not equivalent to a proffer of performance. The very question was determined in *Wollenberg v. Rose*, 45 Or. 615, 619, 78 Pac. 751, 752, where it was said:

"But a third party, a stranger to the undertaking, could not discharge the obligation, though in a position to convey a good and sufficient title, for the very good reason that the vendee has not contracted for his deed, but for that of the vendor, or, in case of his death, that of his heirs, legatees, or personal representatives."

See, also, *Taylor v. Porter*, 1 Dana (Ky.) 421, 25 Am. Dec. 155, and *Farm Land Mortgage Co. v. Wilde* (Okla.) 136 Pac. 1078.

In the present case, Mrs. Myers had not only contracted for Mrs. Millsap's deeds, but the very deeds which she was to have were drawn and executed and agreed upon, and deposited in escrow to be handed to her on payment of the full consideration, and it is not a compliance for an assignee of the vendor to tender its deed, and not the deeds of Mrs. Millsap which were in escrow. Besides this, the bank's title was imperfect, and it could tender no better title than it had. It follows, without taking note of other objections, that the plaintiff is not entitled to rescission as its relief.

[3] The case, however, will admit of relief by way of foreclosure of the purchase-money lien which the bank has upon the premises; it being the holder of the note given as evidence of the balance due on the purchase price. This lien is paramount to all other demands against the property, and is not displaced in any way by reason of the bankruptcy proceedings; that is to say, the lien continues in its full force notwithstanding the vendee has been adjudicated a bankrupt.

[4] There has been set aside to Mrs. Myers by the referee in bankruptcy, however, her homestead out of this property. And it may be added that this does not impair plaintiff's lien, but it does present a question of marshaling the property, so that her homestead may be preserved to her, if possible.

[5] It is urged that the homestead has not been regularly assigned. The bankrupt claimed her homestead exemption in the schedule attached to her petition, praying that she be adjudged a bankrupt. This is the ordinary and usual method of making such claim, and the one sanctioned by the rules and forms prescribed by the Supreme Court in bankruptcy proceedings. The trustee refused to set aside the homestead, to which the petitioner filed exceptions, and a hearing was had before the referee, resulting in the homestead being assigned. The bank was represented at that hearing, although it seems to think it was not. To my mind the evidence shows clearly enough that counsel representing the trustee were also present in the interest of the bank. The bank was about the only creditor of the estate. The attorneys representing the trustee had previously brought an attachment for the bank against Mrs. Myers, and the bank's officers were in attendance at the hearing, no doubt at the attorneys' instance, to protect its claim. The protection of its claim, as it was supposed, was in resistance to the setting aside of the homestead; otherwise there would have been no objection or resistance thereto. So that if the appearance was nominal for the trustee, it was in reality for the bank.

[6] But if there had been no appearance and no notice to the bank other than that imported by the record, the proceeding to set aside the homestead was sufficient. The objection to the trustee's report was but a continuation of the proceeding initiated by making the claim for exemption in Schedule B, and no notice to creditors of the hearing to be had before the referee was necessary or required. Either the bank or the trustee might have had the proceedings before the referee certified to the court for adjudication or review, and such was their rem-

edy. See General Order No. 17 (89 Fed. viii, 32 C. C. A. xix), McGahan v. Anderson, 113 Fed. 115, 117, 51 C. C. A. 92, In re Reese (D. C.) 115 Fed. 993, and In re Maxson (D. C.) 170 Fed. 356, 359.

The order of the referee, therefore, must be held valid and binding upon the trustee and the bank, but it did not deprive the bank of its lien upon the premises, nor was there any attempt to do so. The trustee was proceeding regularly in selling that portion of the premises not comprised by the delimitation of the homestead, and if he had been allowed to proceed, the bank would have received an amount sufficient to discharge the lien in full, and the homestead would have been wholly relieved of it.

[7] Seeing that the cause is in a court of equity with adequate jurisdiction and power to do justice, the plaintiff will be awarded a decree foreclosing its lien upon the premises, with direction that that portion of the premises not comprised by the homestead be first sold, and the proceeds thereof applied to the discharge of the lien, if sufficient for that purpose. If not, then that the homestead be sold and the proceeds applied to any balance remaining due, with the privilege, however, to Mrs. Myers to discharge such balance and thereby preserve her estate from sale, the privilege to be exercised within 60 days after the sale of the premises not comprised by the homestead. Any surplus remaining of the homestead should be paid to Mrs. Myers. Bank of Nez Perce v. Pindel, 193 Fed. 917, 113 C. C. A. 545. Of course, if the portion first sold brings more than sufficient to discharge the lien, the surplus should be paid to the trustee for the benefit of the estate. When plaintiff's lien is discharged, if the homestead be not sold, the bank will be directed to deliver to Mrs. Myers the escrow deeds deposited with it by the parties to the contract of sale, and also to quitclaim to her whatever interest it may have in the premises comprised by the homestead.

I find that the interest has been paid on the demand, namely, the \$1,300 note, to February 27, 1912, and the decree will be for that sum and interest from the date to which it has been paid, without attorney's fees or costs.

COOPER v. NORTHERN PAC. RY. CO.

(District Court, D. Montana. March 31, 1914.)

No. 265.

1. PENALTIES (§ 3*)—RAILROADS (§ 483*)—FIRES—INJURY TO INDIVIDUALS—DAMAGES—"PENALTY OTHERWISE PROVIDED."

Mont. Rev. Codes, § 4310, requires railroad operators to keep their rights of way free from dead grass or combustible material, failing which they are made liable for damages from fire from operating the road, and section 8524 declares that every railroad operator who fails to perform any of the duties required by law with reference to railroads, the penalty for which is not otherwise provided, is punishable by a fine. *Held*, that the damages given to individuals injured by such failure are com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pensatory only, and so are not a "penalty otherwise provided" for within section 8524.

[Ed. Note.—For other cases, see Penalties, Cent. Dig. § 3; Dec. Dig. § 3; * Railroads, Cent. Dig. §§ 1737-1739; Dec. Dig. § 483.*]

2. **CONTRACTS (§§ 103, 137*)—VIOLATION OF LAW—VALIDITY—PUBLIC POLICY.**

A provision of a contract to exempt another from liability for violation of law is contrary to public policy and void, and if the provision is not severable, it avoids the entire contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 468-470, 701-712; Dec. Dig. §§ 103, 137.*]

3. **RAILROADS (§ 470*)—RIGHT OF WAY—COMBUSTIBLE MATERIALS—STATUTES.**

Mont. Rev. Codes, §§ 4310, 8524, requiring railroad operators to keep their rights of way free from combustible materials, and providing a penalty and also a liability for damages resulting from fire from operation of the road, are for the benefit of all going on the right of way for purposes of, or incidental to, transportation and of all off the right of way who may be injured by the railroad's failure to perform the duty imposed, but does not extend to trespassers or tenants on the right of way who take the same as they find it, or subject to the terms of their occupancy.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1666; Dec. Dig. § 470.*]

4. **CONTRACTS (§ 141*)—CONSTRUCTION—VALIDITY.**

Where a contract is fairly open to two constructions, one lawful, and the other unlawful, the former will be preferred and will prevail, unless it appears that there was an intent to make, or that there was actually made, an illegal contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 461, 1760, 1761, 1785; Dec. Dig. § 141.*]

5. **RAILROADS (§ 469*)—LEASES—CONSTRUCTION—FIRES—EXEMPTION FROM LIABILITY.**

A lease of a portion of a railroad's right of way provided that the lessee assumed all risk of loss, damage, or destruction to buildings or contents, or to any other property brought upon or in proximity to the leased premises, without regard to whether such loss was occasioned by a fire or sparks from locomotive engines, or other causes incident to or arising from the movement of locomotives, or whether it was the result of negligence or misconduct of any person in the service of the company. *Held*, that the lease should be construed as exempting from liability from fire incident to or arising from railway operation, and not from fires due to the railroad company's violation of Mont. Rev. Codes, § 4310, making it the duty of railroad operators to keep their rights of way free from combustible material, and imposing a liability for damages from fire resulting therefrom, and hence it was no defense to an action for loss occasioned by a failure of the railroad company to keep its right of way free from combustible materials.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1665; Dec. Dig. § 469.*]

At Law. Action by Walter Cooper against the Northern Pacific Railway Company. On demurrer to complaint. Overruled.

Ransom Cooper, of Great Falls, Mont., and Geo. Y. Patten, of Bozeman, Mont., for plaintiff.

Gunn, Rasch & Hall, of Helena, Mont., for defendant.

BOURGUIN, District Judge. Plaintiff is lessee of defendant of a part of the latter's right of way. His property thereon, and on adjoin-

ing premises of his, was destroyed by fire due to dead grass, weeds, brush, and other combustible material upon the right of way, fired by sparks and fire from a locomotive moving cars upon the road. The lease, amongst others, contains the following provisions:

"It is understood by both parties hereto that the leased premises are in dangerous proximity to the tracks of the railway company and that persons and property on the leased premises will be in danger of injury or destruction by fire or other causes incident to the operation of a railway, and the lessee accepts this lease subject to such dangers. It is therefore agreed, as one of the material considerations of this lease without which the same would not be granted, that the lessee assumes all risk of personal injury to the lessee and to the officers, servants, employés, or customers of the lessee while on said premises, and all risk of loss, damage or destruction to buildings or contents or to any other property brought upon or in proximity to the leased premises by the lessee, or by any other person with the consent or knowledge of the lessee, without regard to whether such loss be occasioned by fire or sparks from locomotive engines or other causes incident to or arising from the movement of locomotives, trains or cars, misplaced switches or in any respect from the operation of a railway, or to whether such loss or damage be the result of negligence or misconduct of any person in the employ or service of the railway company, or of defective appliances, engines or machinery. And the lessee shall save and hold harmless the railway company from all such damage, claims and losses."

It is alleged the aforesaid combustibles were negligently permitted upon the right of way contrary to defendant's statutory duty, and damages are sought in the sum of \$14,778. Defendant demurs for insufficient facts to constitute a cause of action, contending the aforesaid lease furnishes to it a full defense. Plaintiff contends the causes of his loss are not within the lease, and that if they are, the lease is contrary to public policy, unlawful, and void.

Section 4310, Rev. Codes Montana, provides that it shall be the duty of all railroad operators to keep their right of way free from dead grass or combustible material, failing which they shall be liable for damages from fire from operating the road.

[1] Section 8524, Rev. Codes, provides that every railroad operator who fails to perform any of the duties prescribed by law in reference to railroads, the penalty for which is not otherwise provided, is punishable by a fine not exceeding \$5,000. Such failure is within the statutory definition of a misdemeanor. The common law of contracts has been largely incorporated in the Revised Statutes. It would seem that the law of the state imposes a positive duty upon railroad operators to keep clear of combustibles their right of way, and makes any failure therein a public offense, punishable by fine. The damages given to individuals injured by such failure are not extraordinary, but compensatory only, and so are not a penalty otherwise provided for within section 8524 supra.

[2, 3] The duty imposed as aforesaid is in behalf of the public, and for its breach is a penalty to the state for the public wrong and damages to the individual for his private injury—the usual consequences of public offenses inflicting private injury. It is familiar law that any contract which tends to exempt from liability for a violation of law is contrary to public policy and void. And if any part of a

nonseverable contract is thus void, the entire contract is rendered void. The law aforesaid in respect to railroad rights of way is for the benefit of all going upon such way for purposes of or incidental to transportation, and of all off said way who may be injured by the railroad's failure to perform the duty imposed. It does not extend to trespassers or tenants upon the said way. They take it as they find it, or subject to the terms of their occupancy. See cases, *Checkley v. Illinois Central Ry. Co.*, 257 Ill. 491, 100 N. E. 942, 44 L. R. A. (N. S.) 1129. These terms may be exemption from liability for the railroad's negligence, and for fires such as here involved because the duty aforesaid in respect to rights of way does not extend to such tenants. They may even extend to such exemption for negligence in respect to property off the right of way, but cannot for violations of law and public offenses.

[4] As the lease involved is a nonseverable contract, if it is construed to exempt defendant for the losses involved it is unlawful and void in that it undertakes to exempt defendant for losses to property off the right of way and losses due to defendant's commission of a public offense. If this is the intent of the parties, these consequences cannot be avoided, and the demurrer must be sustained in that, the contract being pleaded, plaintiff is in *pari delicto*, and the law leaves him where he has placed himself. But it is also familiar law that if contracts be fairly open to two constructions, one lawful and one unlawful, the former is to be preferred. *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940.

[5] It is presumed parties intend legal contracts, and contemplate no violation of law—no public offenses. Contracts are presumed to be legal, and this prevails unless it appears there was intent to make, or there actually was made, illegal contracts. The lease involved exempts from liability from fire incident to or arising from railway operation. Such fire is a common hazard from lawful railway operation. Therein is a broad field for this covenant of the lease, without extending it by implication to fires due to unlawful operation, or due to a concurrence of lawful operation and unlawful acts, viz., violation of law in respect to conditions of the right of way. The latter is not within the letter of the lease, nor is it within reasonable interpretation thereof. The lease may be likened to a contract of insurance against fire, which would not insure against fire due to unlawful storage of explosives, though not prohibited therein. The fire involved is due, not to the operation of the road for which there is no liability by virtue of the lease, but is due to operation of the road and violation of law in respect to the condition of the right of way for which there is no exemption by virtue of the lease.

The situation invokes the rule that where damage follows acts of neglect for some of which the actor is not liable and for some of which he is liable, he must respond by reason of the latter.

It cannot be maintained that the fire involved is of those naturally or usually following operation of a railroad, and so incident to or arising from such operation within the terms of the lease. For these reasons the plaintiff is entitled to invoke section 4310, supra, in respect to the

property destroyed off the right of way, and to invoke the general law in respect to the property destroyed upon the right of way.

The complaint is sufficient for both, and the demurrer is overruled.

THE PRUDENCE.

THE DOROTHY.

(District Court, E. D. Pennsylvania. February 26, 1914.)

No. 38.

1. COLLISION (§ 95*)—TUGS WITH TOWS NAVIGATING CHANNEL—CARE TO PREVENT SWING OF TOWS.

Where a tug is towing on long hawsers, the highest degree of care is imposed on the tug and tows, in making turns in following a channel, to avoid injury to other vessels by the swinging out of the tows.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*]

2. COLLISION (§ 95*)—TOW AND ANCHORED VESSEL—NEGLIGENT NAVIGATION OF TOW—IMPROPER ANCHORAGE.

As a tug with two barges in tow on hawsers, the whole being 650 feet long, was moving up the Maurice river, near its mouth in the evening on a flood tide, and while passing to starboard around a bend, the last barge swung to port and came into collision with an anchored schooner whose lights had been seen for some time, and which was passed by the tug at a distance of about 200 feet. *Held*, on the evidence that the tug and barge were both in fault for failing to exercise ordinary care in making the turn, in view of the known effect of the tide; that the schooner was also in fault for anchoring without necessity where she was likely to be an obstruction to other vessels navigating the channel, in violation of Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 (U. S. Comp. St. 1901, p. 3543), and also for failing to keep an anchor watch.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*]

In Admiralty. Suit for collision by Sherman Hager, as master and owner of the schooner Annie Hodges, against the tug Prudence and the barge Dorothy. All three vessels held in fault, and damages divided.

Lewis, Adler & Laws, of Philadelphia, Pa., for libellant.

Howard M. Long, of Philadelphia, Pa., for respondents.

THOMPSON, District Judge. The steam tug Prudence and the barge Dorothy were attached to answer the libel of Sherman Hager, master and owner of the schooner Annie Hodges, to recover damages for injuries to the schooner caused by collision alleged to have been occasioned by the fault of the Prudence and Dorothy. The collision occurred in the Maurice river, near its mouth, on the night of June 18, 1912. The Annie Hodges, which was employed by her owner at the time as a fishing and oyster vessel, is 61½ feet long, 22 feet beam, with a draft of 5½ feet. The tug Prudence is a steam vessel

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

97 feet long, 20 feet beam, drawing $9\frac{1}{2}$ feet, and was bound up the Maurice river for Silver Run, towing the barges Karl and Dorothy. Maurice river cove, into which Maurice river flows, is of such shallow depth outside the mouth of the river that vessels of the draft of the Prudence are not able to enter the river at low tide. The depth on the flats at low water varies from 1 to 5 feet. At the mouth of the river on the western bank is Elder Point, and on the eastern bank is Grog Island. The course of the river is a tortuous one. On entering the river the course is north, and after passing Grog Island the channel curves to an easterly and then a southeasterly direction, into what is known as Greenbank Reach. The course into the river is found by following what is known as the Mouth ranges, which are indicated at night by two lights on the north shore. Vessels ascending the river follow the Mouth ranges until they have passed the shoal water along Grog Island, then bear off about four points and then follow the course of the channel until they come into Greenbank Reach. Upon the day in question, shortly after sundown, the Annie Hodges proceeded up Maurice river and anchored on the western side of the river some distance to the east of the Mouth ranges. The anchor was dropped at a point off what is known as the Boathouse pier in water about $4\frac{1}{2}$ fathoms in depth, with about 25 fathoms of anchor chain out.

While the testimony of the witnesses is conflicting as to the exact position of the Annie Hodges, I find from the evidence that her anchor was dropped at a point somewhat over 200 feet eastward of the Mouth ranges, and that when the flood tide was running, taking into account the length of the anchor chain, the schooner lay about 200 feet off shore, with her bow about 330 feet above the ranges heading down stream. A white anchor light was properly placed in the rigging of the vessel. About 9:30 o'clock p. m., while the tide was half flood, affording sufficient depth for the Prudence with her tow to cross the bar in Maurice river cove, she proceeded up the river following the ranges. The anchor lights of the Annie Hodges and of another schooner lying west of the ranges were observed by the master of the Prudence while a mile away, and, after following the ranges to what he considered a proper point to avoid the shoals on the Grog Island side, he bore to the northeast, and the tug passed the Hodges in safety at a distance of from 150 to 200 feet. The Karl and Dorothy were each about 200 feet in length. The Karl was being towed upon a hawser about 100 feet long, and the hawser between the Karl and the Dorothy 30 feet in length, making the total length of the tug with her tow about 630 feet. As the Prudence turned to starboard and passed the schooner, the barges were swung by the flood tide towards the western side of the channel. The Karl passed the schooner in safety, but the Dorothy struck her bow, breaking her bowsprit and otherwise injuring her. It is claimed on the part of the libellant that the collision was due to the fault of the Prudence in not leaving the ranges at a point further from the north shore of the river, that is, that she held the ranges so long that she was obliged to make a more abrupt turn than she otherwise

would, and, further, that having seen the light of the Hodges, the tug should have come to a stop and the barge should have loosed her hawser. The respondent's claim is that the collision was due to the negligence of the libelant in anchoring his vessel in the channel at a point close to the ranges, and where she obstructed the navigation of the river. The libelant claims that the point where the Hodges was anchored was a customary anchorage ground for oyster vessels, and that the Hodges was anchored where she had a right to be. The respondents rely in part upon the act of Congress of March 3, 1899 (U. S. Compiled Statutes 1901, p. 3543, 30 Stat. at L. 152, § 15), providing that it shall be unlawful to tie up or anchor a vessel or other craft in a navigable channel in such manner as to prevent or obstruct the passage of any other vessel or craft.

There is very considerable evidence upon the part of masters of schooners as to the point where a vessel may, with safety, leave the ranges in order to make the turn and follow the channel to Greenbank Reach. As the draft of the tug is considerably greater than that of the fishing schooners, whose owners testified and the circumstances under which the tug was navigating are essentially different, I do not consider that testimony at all conclusive. There is also evidence of soundings made by the libelant and by the captain of the Prudence to ascertain the depth of the water in the river in the vicinity of where the Hodges lay. The soundings taken by the libelant, while they indicate the depth at certain angles from the position of the Hodges to have been at least 12 feet for a distance of from 700 feet or more, do not, in my opinion, sufficiently establish the fact that that depth continued along the eastern side of the river between the two points where stakes were set. The evidence on the part of the Prudence was that she was sucking bottom about the time she passed the Hodges, which, if a fact, indicates that she had taken a course as far to the eastward as it was safe for her to go.

[1] It is impossible to determine from the evidence the exact distance from the Hodges at which the Prudence could have passed her in safety, but I am convinced from the evidence that she could have been so navigated as to tow the barges past the schooner in safety if ordinary care had been exercised. Those in charge of the Prudence and the Dorothy knew that the tide was setting in towards the west bank of the river. The light of the Hodges had been observed when the tug with the barges was at sufficient distance to have either laid the course of the tug and barges so as to avoid the collision, or, knowing that the tide would carry the barges across the channel, the hawser of the Dorothy could have been loosed and the barge could have anchored until the tug could get her under control. It is a matter of such common knowledge that, where tugs are towing with long hawsers, the tow is likely to inflict injury by making a wide sweep upon a turn that the greatest degree of care is imposed upon the tugs and tows in the interest of common safety. *The Hortensius* (D. C.) 174 Fed. 272; *The H. M. Whitney*, 86 Fed. 697, 30 C. C. A. 343; *The Gladiator*, 79 Fed. 445, 25 C. C. A. 32.

[2] As no precautions were taken by either the tug or the barge,

they must both be held in fault for the collision. The question then is whether there was contributing fault on the part of the Hodges.

I find from the testimony that the libelant selected the anchorage place for the Hodges on the night in question as a convenient point from which to go ashore and obtain supplies; that there were no other vessels anchored east of the Mouth ranges anywhere in the vicinity of the Hodges; that on the night in question a great many sailing vessels were anchored on the reach further up the river. West of the ranges, a few hundred feet below the Hodges, another schooner was anchored, and her position was such as not to interfere with or obstruct the navigation of the channel by other vessels or craft. The evidence on the part of the libelant that the point where the Hodges lay was a customary anchorage ground for schooners is not convincing, in view of the fact that of all the vessels anchored in the river no other schooner on the night in question was anchored in that part of the river where the Hodges lay, nor is there evidence of such anchorage ground in the channel having been designated by any one in authority. The Hodges lay in 27 feet of water and it is conclusively shown by the testimony that there was ample depth of water from where she lay to the western shore. From all the evidence I cannot see how the Hodges could have been anchored for the night in a place where she was more likely to obstruct the navigation of the river by tugs towing other craft. If she had gone below the ranges, she would have been in an entirely safe position because the vessels upon leaving the ranges steered to starboard, and she would thus have been entirely out of the way of navigation. Much stress has been laid upon the testimony for libelant contradicting respondents' witnesses as to the proximity of the Hodges to the ranges, but, if the fact is as the libelant contends, it is apparent from all the circumstances that she was in such a position as to obstruct navigation more effectually than if she had been anchored directly upon the ranges at the same distance from the shore. The negligence on the part of the Prudence and Dorothy does not excuse the fault of the Hodges in lying directly in what the witnesses designate as "the best water" in a sharp bend in the channel and at a point where vessels with tows ascending the river must have ample room to make the turn. The conditions of the tide were as well known to the libelant as to those in charge of the respondents, and it would have been almost impossible for the libelant to have selected a place for anchorage at night where his vessel would be more likely to be struck. The fault of the libelant in anchoring in that position overcomes the presumption in favor of an anchored vessel when struck by a vessel in motion. The schooner was anchored in an improper place, and her owner must take the consequences which fairly result from his own act.

The circumstances clearly indicate that, while the Prudence and Dorothy could have prevented the collision, it would have been necessary, in order to safely pass the schooner, to so maneuver the tug and tow as to impose upon them difficulties of navigation, which would be unnecessary if the Hodges were not anchored in the chan-

nel. The evidence is uncontradicted that, with full knowledge of the danger of the situation, the schooner was without an anchor watch, and no attempt was made to let out additional chain, which could readily have been done if there had been the proper watch. *The Sapphire*, 11 Wall. 164, 20 L. Ed. 127; *The Clara*, 102 U. S. 200, 26 L. Ed. 145; *The Clarita*, 23 Wall. 1, 23 L. Ed. 146.

The libelant must therefore be held partly in fault for the collision and the damages sustained equally by the libelant and the respondents, one-half to be borne by the libelant and one-half by the *Prudence* and *Dorothy*.

A decree will be entered accordingly.

THE PRUDENCE.

THE DOROTHY.

(District Court, E. D. Pennsylvania. February 26, 1914.)

No. 39.

COLLISION (§ 113*)—INJURY TO SEAMAN—RIGHT TO DAMAGES.

A seaman injured in a collision is entitled to recover full damages against other vessels in fault, notwithstanding the contributory fault of the vessel on which he was employed.

[Ed. Note.—For other cases, see *Collision*, Cent. Dig. §§ 239-242; Dec. Dig. § 113.*]

In Admiralty. Suit by William H. Cannon against the steam tug *Prudence* and the barge *Dorothy*. Decree for libelant.

Lewis, Adler & Laws, of Philadelphia, Pa., for libelant.

Howard M. Long, of Philadelphia, Pa., for respondents.

THOMPSON, District Judge. The libelant, William H. Cannon, a seaman on board the schooner *Annie Hodges* received injuries to his person in the collision between the *Hodges* and the *Dorothy*, which occurred under the circumstances fully set out in the opinion filed in the case of *The Prudence and Dorothy* (No. 38 of 1912) 212 Fed. 538.

Under the authority of *The Atlas*, 93 U. S. 302, 23 L. Ed. 863, and *The Eagle Point* (D. C.) 136 Fed. 1010, the libelant is entitled to recover damages against the *Prudence* and *Dorothy*, notwithstanding the contributory negligence on the part of the master of the schooner upon which he was employed, and a decree will be entered accordingly.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In re HARRINGTON et al.

(District Court, D. Massachusetts. January 3, 1914.)

No. 19,018.

1. BANKRUPTCY (§ 140*)—OWNERSHIP OF PROPERTY—CONDITIONAL SALES.

A written agreement between an automobile manufacturer and a dealer, gave the dealer the sale of the manufacturer's automobiles in specified territory, and provided for sales to the dealer at specified discounts, that the dealer on orders for parts should be allowed a specified discount from list prices; that title to all automobiles and parts should not pass to the dealer until fully paid for; that the dealer had made a deposit which would be repaid when all cars contracted for were paid for, except that at the manufacturer's option it might be credited against any parts or open accounts; that the dealer would keep a repository and repair station for satisfactory display, care, and repair of such automobiles; that the deposit might be retained by the manufacturer as liquidated damages for breach of the contract; and that the manufacturer should not be liable to the dealer for any loss or damage to automobiles or other goods while in transit. Both parties understood that the dealer might sell and dispose of parts, and there was no reservation by the manufacturer of a right to the proceeds of such sales, no provision as to insurance or prohibition against mingling the parts with other goods or the proceeds with other money of the dealer. *Held*, that the actual agreement between the parties was to be gathered from the complete understanding from which it appeared that there was a sale of the parts, and that the reservation of title was merely colorable, and intended only to safeguard the rights of the manufacturer in case the dealer should fail, and hence it was void as to the dealer's trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

2. SALES (§ 477*)—CONDITIONAL SALES—WAIVER OF CONDITION.

A provision in a contract between a manufacturer of automobiles and a dealer, retaining title to automobile parts furnished the dealer for sale, if valid and effective when made, was waived by a letter written the dealer, recognizing his right to resell without separating and reserving the funds received from such sales.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1411-1417; Dec. Dig. § 477.*]

In Bankruptcy. In the matter of John S. Harrington and others, bankrupts. On petition to review an order of the referee dismissing a petition of the Flanders Motor Company. Order affirmed.

Carver & Carver, of Boston, Mass., for petitioners.

George W. Reed, of Boston, trustee, pro se.

MORTON, District Judge. This is a petition to review an order entered by the referee dismissing a petition of the Flanders Motor Company of Detroit, Mich., as the successor of the Metzger Motor Car Company, for reclamation of certain automobile parts now in the possession of the trustee. The case was submitted on a short written statement of agreed facts, a further written statement of agreed facts, and certain documentary evidence therein referred to, including the contract in question and a letter from the claimant, and upon no other facts or evidence.

The property in dispute consists of a great number of parts of automobiles for use in "Everitt" cars. At the time of the bankruptcy they were in the possession of the bankrupts, commingled with other goods. They have since been separated by the trustee, and are held by him subject to these proceedings. The date of the bankruptcy was January 10, 1913. It is the contention of the claimant that the bankrupts did not own the parts in question, and that said parts had been delivered under a written agreement, by the terms of which the legal title remained in the claimant. The trustee contends that the sales to the bankrupts were absolute, and that the property in question is part of the bankrupt's estate.

[1] The written agreement on which the claimant relies is, in substance, as follows: It was made on June 28, 1911, at Detroit, Mich., between the Metzger Company and the bankrupts. By the first clause the company (or "manufacturer") granted to the bankrupts (called the "dealer") the sale of Everitt automobiles in all of the New England States except Connecticut, and agreed to sell said automobiles to the dealer at certain specified discounts from the catalogue prices. "The above prices are all f. o. b. at factory, Detroit, Mich." The fifth clause of the contract provides:

"The dealer shall, on orders for parts, be allowed 30% discount from the last list prices established by the manufacturer."

The ninth clause provides:

"It is expressly understood and agreed that the title to each and every automobile and to all automobile parts furnished to said dealer, under the terms of this agreement, shall not pass to the dealer until same is fully paid for in full and cash."

The twelfth clause provides that the dealer agrees to take not less than 500 cars "of the types and on the dates as hereinafter indicated." So little, however, seems to have been thought of this provision that, although the months are stated, from July, 1911, to June, 1912, both dates inclusive, no numbers or totals were carried out. The agreement recites that the dealer has deposited with the manufacturer the sum of \$3,000 to apply as a deposit on the cars ordered as above, and that:

"Said sum will be credited by the manufacturer to the dealer, and will be repaid when all the cars contracted for are delivered and paid for, except that any part or all of said deposit may, at the option of the manufacturer, be credited against any parts or open account due the manufacturer from the dealer."

The dealer agrees inter alia to maintain the manufacturer's list prices, to keep a repository and repair station for satisfactory display, care, and repair of such automobiles, and that the deposit may be retained by the manufacturer as liquidated damages for the dealer's breach of the contract.

The contract expired by its own limitation on July 1, 1912, but it provided that:

"All orders accepted by the manufacturer and all sales made by the dealer after such termination of this contract shall be governed by the terms and conditions thereof."

It was further provided that the manufacturer should not be liable to the dealer for any loss or damage to automobiles or other goods while in transit.

The parts of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) by which the rights of the parties are to be determined are as follows:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate." Section 67a.

"Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." Section 70a (5).

"And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon." Section 47a (2) (Added by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 [U. S. Comp. St. Supp. 1911, p. 1501]).

The rights of the parties depend upon the real and complete agreement between the claimant's predecessor and the bankrupts. The court is not limited to the mere language of the written instrument; it may examine all facts concerning the matter, and determine whether the written contract was made in good faith, or was merely colorable, and, if made in good faith, whether its provisions for the retention of title were waived by the vendor.

It is apparent that neither the claimant nor the dealer understood or believed, either at the time when the written contract was made or subsequently, that its terms were to be lived up to. Its stringent provisions in regard to the retention of title were inserted, not for the purpose of everyday business, but only in an effort to safeguard the rights of the vendor in case the dealer should fail. The parties plainly contemplated that the parts in question were to be taken and kept by the bankrupts in order that they might be promptly accessible for repairs upon Everitt automobiles in the dealer's territory, and that, as such parts should be needed for repairs, the bankrupts should sell and deliver them to the persons upon whose automobiles the parts were used.

It is absurd to suppose that the claimant can now replevy, from the various persons whose Everitt cars were repaired by the bankrupts, the parts used in such repairs, although by the literal terms of the contract of June 28, 1911, the claimant would have that right. Both parties to the contract understood that it did not mean what it said, and that the dealer did have the right to sell and dispose of parts in the ordinary course of business. It is to be observed that the vendor made no reservation of its right to the proceeds of such sales, no provision as to insurance upon the parts, no prohibition against mingling the parts with other goods, or the proceeds of the sales with other money of the dealer. The actual agreement between the claimant and the bankrupts is to be gathered, not from a single clause of the written contract, but from the complete understanding between the parties. The formal reservation of title in the written instrument is contradicted and nullified by the unwritten parts of the agreement, and the written contract is pro tanto merely colorable.

[2] Even if the agreement of June 28, 1911, be regarded as valid and effective at the time when it was made, its provisions as to the retention of title were not insisted upon by the vendor, and were waived, as is plainly indicated by the letter of October 31, 1912, contained in the agreed statement of facts, in which the right of the bankrupts to resell, without separating and reserving the funds received from such sales, is plainly and fully recognized.

The case is of course to be determined according to the law of Massachusetts, under which special interests in personal property are strongly protected. At the same time it seems to me that—

“the real purpose and understanding [of the parties to the contract] were to make an effectual sale, and that the writing, even if interpreted to withhold the title by its terms, was merely a convenient resort to provide the right to take the goods in event of disaster overtaking the [Harrington] concern.” Day, J., in *Ludvigh, Trustee, v. American Woolen Co.*, 231 U. S. 522, 34 Sup. Ct. 161, 58 L. Ed. —, December 15, 1913.

Several of the most important factors which were relied upon by the Supreme Court in the *Ludvigh Case* as indicating good faith and the validity of the agreement there in question are entirely absent in this case.

Order of referee affirmed.

THE FRED E. SANDER.

(District Court, W. D. Washington, N. D. March 6, 1914.)

No. 2540.

1. ADMIRALTY (§ 65*)—LIBEL—EXCEPTIONS.

Exceptions to a libel confesses only the facts properly pleaded, and any statement of a conclusion not supported by facts set forth in the libel must be disregarded.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 515-518; Dec. Dig. § 65.*]

2. MASTER AND SERVANT (§ 250¾, New, vol. 16 Key-No. Series)—WORKMEN'S COMPENSATION ACT—JURISDICTION OF ADMIRALTY COURTS—ELECTION.

A libel for personal injuries, which alleges that libelant was injured while engaged in an extrahazardous employment on the premises of his employer in the state of Washington, that he received from the Industrial Insurance Commission of the state a specified sum as a gratuitous payment out of a fund provided by the state, and to which defendant had never contributed, and that the amount received was not accepted as payment for any of the injuries sustained, shows that libelant after the injuries obtained relief under the Workmen's Compensation Act (Laws Wash. 1911, c. 74), which abolishes civil actions for damages by workmen for personal injuries, and he cannot proceed in admiralty for compensation for the injuries.

In Admiralty. Libel by James A. Thompson against the sailing schooner *Fred E. Sander*, her engines, etc. On exceptions to amended libel. Exceptions sustained.

S. A. Bostwick and J. Y. Kennedy, both of Everett, Wash., for libellant.

Ballinger, Battle, Hulbert & Shorts, of Seattle, Wash., for claimant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 212 F.—35

NETERER, District Judge. The exceptions to the libel were overruled, 208 Fed. 724. An answer was then filed by claimant, the fourth affirmative defense of which set forth the passage of the Workmen's Compensation Act by the Legislature of the state of Washington, which took effect between employer and employé on the 1st day of October, 1911; that libelant was injured while in the performance of his duty as a "workman" engaged in an "extrahazardous employment" on the premises of his employer, within the state of Washington, on the 18th day of November, 1912, within the meaning of said act, and on the 23d day of November, 1912, voluntarily made application to the State Industrial Insurance Commission for compensation under said act; that his claim was approved and allowed, and he was paid compensation from the "accident fund" provided in said act from the date of his injuries to the 18th day of August, 1913, and that said commission, after special examination of Thompson by its chief medical adviser, did, on October 5, 1913, forward to Thompson an additional award of \$300 in full compensation for said injuries; that all of said compensation has been received and accepted by him as aforesaid; that the owners of said schooner had paid into said "accident fund" all premiums demanded by said commission from them as employers of stevedores, as provided by said act; that libelant had elected to seek and receive compensation under said act, and had abandoned all his rights to seek compensation for the same injuries under any other law, and was estopped to maintain suit. Thereupon libelant asked and was granted permission to file an amended libel for the reason—

"that the interests of justice will be best subserved and the matter in issue can be best determined, and the law finally settled with relation to the issue presented in this case by permitting the libel herein to be amended as provided by admiralty rule No. 51."

An amended libel was then filed so as to confess and avoid or explain or add to the affirmative defenses, and by way of explanation of said new matter alleged as follows:

"That between the 18th day of December, 1912, and the 18th day of August, 1913, he [libelant] did receive from the Industrial Insurance Commission of the State of Washington the sum of \$360; that the same was a gratuitous payment from the said Industrial Insurance Commission of the State of Washington out of a fund provided by said state to which the defendant had not, and never has, contributed anything; and that the amount received was not in any manner accepted as payment for any of the injuries sustained by libelant, as alleged in his said libel, and that the libelant has at all times refused to accept any settlement offered by said Industrial Insurance Commission in satisfaction of damages for his alleged injuries, and that this libelant has received and accepted no further moneys from said Industrial Insurance Commission of said state."

[1] It is manifest from a reading of the amended libel that libelant received \$360 for injuries sustained by him. The phrase, "and that the amount received was not in any manner accepted as payment for any of the injuries sustained by libelant," is not a statement of a fact, but a conclusion, and if not supported by facts stated, will be disregarded. Exceptions to a libel, like a demurrer to a complaint, confesses all facts properly pleaded. Any statement of a conclusion which is not supported by facts set forth in the libel to sustain it, under the

rule that exceptions admit only facts, well pleaded, must be disregarded. *Strauss v. Foxworth*, 231 U. S. 162, 34 Sup. Ct. 42, 58 L. Ed. —, decided November 17, 1913; *Jackson v. Chicago, M. & St. P. Ry. Co.*, 210 Fed. 495.

From a statement of the facts contained in the amended libel is the legal question involved presented in such a manner that the issue can be determined by a ruling upon the exceptions to the amended libel, and save the litigants the expense, and the court the time of trial?

[2] The statement in the amended libel that the payments received were "gratuitous" from the Insurance Commission must be considered with reference to the act and the presumptions which obtain with relation to the conduct of public officials, the presumption being, when nothing appears to the contrary, that public officials act with and pursuant to law. 29 Cyc. 1437; 23 Am. & Eng. Encyc. of Law, 364. The only reasonable deduction, it seems to me, to be made from the amended libel, filed under the circumstances as disclosed in the record, is that libelant after injury did apply for relief under the Industrial Insurance Act and received payment thereunder. The officer of the state could not have paid the sums admitted to have been received without application therefor; and, in the absence of further statement in the pleading, it must be so held. Section 12 (a) Law of 1911, p. 364, provided:

"Where a workman is entitled to compensation under this act he shall file with the department, his application for such, together with the certificate of the physician who attended him."

Section 5, among other things, provides that each workman who shall be injured within the provisions of the act shall receive out of the "accident fund" compensation which shall be in lieu of any and all rights of action whatsoever against any person whomsoever. The allegation that claimant had not contributed to the "accident fund" is immaterial, and would be impotent even in a common-law action, in the absence of the further statement that such default continued after demand. The obligation to pay is a matter between the state and the owner, to enforce which an action will lie, and no action is revived for the benefit of the injured workman until default in payment of assessments after demand. Section 8 of the act, pp. 362, 363, provides:

"If any employer shall default in any payment to the accident fund hereinbefore in this act required, the sum due shall be collected by action at law in the name of the state as plaintiff, and such right of action shall be in addition to any other right of action or remedy. * * *

"The person so entitled under the provisions of this section to sue shall have the choice (to be exercised before suit) of proceeding by suit or taking under this act."

The common-law right of action being withdrawn, it is immaterial whether payment has been made by the employer to the "accident fund" or not. The fact that the defaulting employer is not protected against actions for injury in case of default of payment after demand will not defeat the injured workman's right to take under the act, should he so elect.

But for the enactment of the Workmen's Compensation Act of the state of Washington, libelant would have two remedies; one his com-

mon-law action for damages against the owners, and the other a proceeding in admiralty. The selection of the one remedy would bar a proceeding in the other. A party cannot enforce both remedies, and will be required to elect whether to pursue his common-law remedy or proceed in admiralty. The Workmen's Compensation Act, while it took away the common-law action, provided in its stead another remedy. If the libellant determined to obtain relief from the substitute which is provided for his common-law remedy, and received compensation under such act, then he cannot proceed in admiralty and thus obtain double compensation for the injury of which he complains. An injured workman who has made claim for and received compensation under the Workmen's Compensation Act has elected to accept under the act, and cannot therefore raise an action in admiralty. While the issue in this case was not directly presented to the Circuit Court of Appeals, I think the conclusion here reached is supported in *Meese v. Northern Pacific Ry.*, 211 Fed. 254, 127 C. C. A. 622. This court has held (208 Fed. 724) that the state cannot take from an injured workman his right to proceed in admiralty by abolishing his right to pursue a common-law remedy for personal injury. But where an injured person takes the benefit of a remedy provided by the state in lieu of his common-law remedy, he cannot thereafter pursue his remedy in admiralty.

The exceptions to the amended libel are sustained.

In re FREEMAN COTTING COAT CO.

(District Court, D. Massachusetts. July 28, 1913.)

No. 18,581.

1. BANKRUPTCY (§ 166*)—ACTS OF—ELEMENTS—INTENT TO PREFER.

There must be an intent on the part of the alleged bankrupt to prefer, in order that an alleged preferential transfer shall constitute an act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 166.*]

2. BANKRUPTCY (§ 166*)—ACTS OF—PREFERENCES—INTENT TO PREFER—CREDITORS' COMMITTEE.

Where, after a committee of creditors had been appointed, and the alleged bankrupt agreed to conduct its business under their "joint direction," loans were obtained with their consent from a trust company with which the bankrupt did business, upon notes which permitted the application of the surplus security upon antecedent indebtedness, to secure which loans accounts due the bankrupt were pledged which liquidated to an amount averaging 12½ per cent. more than the amount loaned, such transfers were not made by the bankrupt with intent to prefer the trust company, and the creditors, having given their approval thereto through such managing committee, were estopped to claim that the transfers constituted an act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 166.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Freeman Cotting Coat Company. Petition for adjudication dismissed.

See, also, 212 Fed. 551.

Friedman & Atherton, of Boston, Mass., for petitioning creditors.
Ferdinand A. Wyman, of Boston, Mass., for answering creditors.

MORTON, District Judge. This is an involuntary petition in bankruptcy. The acts of bankruptcy alleged are eight preferential transfers of property to the International Trust Company on various dates between April 23, 1912, and July 26, 1912. The respondent company has not answered, and as to it the petition goes by default. The International Trust Company has answered under section 59 of the act (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. Supp. 1911, p. 3445]), denying insolvency and intent to prefer. The referee has reported in favor of adjudication, and the case is here on his report.

The petitioners rely only on the first, third, fourth, fifth, and seventh acts of bankruptcy set out in the petition. The facts are not in dispute. In each instance the alleged bankrupt borrowed a sum of money from the trust company within the four months preceding the filing of this petition, and concurrently gave as collateral security for the loan assignments of accounts due to it to an amount in excess of the loan received, upon a form of note furnished by the trust company, which permitted the trust company to apply the surplus security upon antecedent indebtedness of the borrower. Practically all of the assigned accounts proved good, and in each of the five instances relied on the trust company subsequently collected an excess of collateral and under the terms of its notes applied such excess to the payment of the respondent's past indebtedness to it, which was of substantial amount. The excess of collateral received by the trust company varied on the different loans from 7 per cent. to 14 per cent. and averaged about 12½ per cent.; the total amount loaned being \$16,300, the total collateral \$18,626, and the total surplus \$2,026.

The respondent's financial condition had become difficult as early as the latter part of December, 1911. Under date of January 1, 1912, an examination of its affairs and a report on its condition was made by expert accountants and submitted to the trust company and to several others of its principal creditors. On April 25, 1912, it agreed in writing with a committee of three, representing certain creditors, to conduct its business under their "joint direction," to make no transactions without their approval, and "more especially we will not contract any bills, nor contract any debts or pay any bills, or prefer one creditor to any other, and at any time that you will jointly request, we will place our affairs in your hands." Mr. Sears, of Wellington, Sears & Co., was soon afterward added to this committee as a fourth member. Until the filing of the bankruptcy petition on August 23d the respondent conducted its business under the supervision of this committee in an effort to pull it out of its difficulties.

Each and all of the transactions relied on as acts of bankruptcy were made in pursuance of this effort, with the approval of said com-

mittee. Each of the three petitioning creditors were represented on the committee, and the representative of each petitioning creditor approved, at the time when they were made, each of the transactions now relied on as acts of bankruptcy.

[1, 2] This statement of facts is sufficient to dispose of the controversy. An "intent to prefer" is an essential element of the acts of bankruptcy alleged, and it is plain that no such intent existed. The loans in question were made, and the security therefor was given, with the full knowledge and consent of the very creditors, who now contend that the transactions were intended as preferences and were acts of bankruptcy. The creditors' committee was fully informed as to the respondent's condition. There is no greater reason to attribute an intent to prefer to the respondent than to the creditors. The fact is that all parties hoped that the respondent would be able to continue, considered it advisable for the respondent to make the loans in question for that purpose, and regarded it as proper for the respondent to give such security as was necessary to obtain the money desired. The amount of collateral was in no case excessive, and in one instance at least seems to have been decidedly less than usually required. The character of the transactions is to be judged at the time when they were made, not by how the collateral panned out afterwards. *Continental Trust Co. v. Chicago Title & Trust Co.*, 229 U. S. 435, 33 Sup. Ct. 829, 57 L. Ed. 1268.

Aside from the approval of the creditors the case is very different from those in which the amount of security given largely exceeds the loan made thereon, and those in which the security comprised a large proportion of the debtor's property. The presumption that a transfer which effects a preference was intended as a preference is not a conclusive one. It has been held not to arise where the payments were comparatively small, and in the ordinary course of a going business (*In re Gilbert* [D. C.] 112 Fed. 951; *In re Douglas Coal & Coke Co.* [D. C.] 131 Fed. 769; *In re Stovall Grocery Co.* [D. C.] 161 Fed. 882), and to be rebutted where the debtor established his ignorance of his insolvency and his honest belief that he was solvent (*Re Gilbert* [D. C.] 112 Fed. 951; *Jones v. Howland*, 8 Metc. [Mass.] 377, 385, 41 Am. Dec. 525; *Remington on Bankruptcy*, vol. 1, p. 117).

An insolvent has the right to endeavor to continue; he is not obliged to shut up shop the moment his assets become less than his liabilities. *Tiffany v. Lucas*, 15 Wall. 410, 21 L. Ed. 198. He has the right to borrow money and give security therefor according to the usual course of business.

It seems to me very doubtful whether there is any presumption of intent to prefer from loans like these, made in the ordinary course of business, upon a comparatively small margin of security, from the bank with which the debtor regularly did business. If such a presumption does arise, it is overthrown by other circumstances in this case. It would seem that an intent to prefer ought not to be presumed upon a transfer of property by an insolvent for a present advance thereon, unless the whole transaction is such as to indicate an ulterior purpose on the part of the debtor to benefit the transferee.

Even if the loans in question were acts of bankruptcy, it does not seem to me that these petitioners can complain of them. Each of the petitioners, through its representative on the creditors' committee, approved and consented to these transactions, and, having done so, is estopped from objecting to them. *Re Romanow* (D. C.) 92 Fed. 510; *Clark v. Henne & Meyer*, 127 Fed. 288, 297, 62 C. C. A. 172; *Simonson v. Sinsheimer*, 95 Fed. 948, 37 C. C. A. 337; *In re Weiss* (D. C.) 15 Am. Bankr. Rep. 457, 142 Fed. 279.

The view which has been taken of the case renders it unnecessary to decide whether the respondent was insolvent when the alleged acts of bankruptcy were committed. It does not appear that either the officers of the alleged bankrupt, or the creditors' committee, in fact believed the respondent to be insolvent on those dates, a circumstance of much significance on the question whether there was an intent to prefer. I have assumed for the purposes of this discussion that insolvency was established, without deciding that question.

The property of the respondent has been converted into cash and is now in the hands of the receivers appointed by this court. Both parties desire that it be distributed in this proceeding, but neither has suggested any way in which that result can be accomplished under a finding in favor of the respondent. I will hold the matter open for further suggestions on this point until September 8th, on which date, if no further order shall have been made in the meantime, the petition is to be dismissed, without costs.

In re FREEMAN COTTING COAT CO.

(District Court, D. Massachusetts. October 22, 1913.)

No. 18,581.

BANKRUPTCY (§ 88*)—INVOLUNTARY PROCEEDINGS—RIGHT OF CREDITORS TO INTERVENE.

Where a petition in involuntary bankruptcy, good upon its face, has been filed, intervening petitions filed by other creditors, who are not aware of the existence of an estoppel against the original creditors, will not be dismissed if properly and seasonably filed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 58, 98, 104, 109-112; Dec. Dig. § 88.*]

In Bankruptcy. In the matter of bankruptcy proceedings against the Freeman Cotting Coat Company. On motions to dismiss intervening petitions. Motions denied, and original petition dismissed.

See, also, 212 Fed. 548.

Friedman & Atherton, of Boston, Mass., for petitioning creditors.
Ferdinand A. Wyman, of Boston, Mass., for answering creditors.

MORTON, District Judge. The original petition was good upon its face and was brought in good faith. There is no evidence that the intervening creditors were aware of the facts upon which the estoppel

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

against the principal petitioners arises, nor that they did not act in good faith in intervening. The intervening petitions were properly and seasonably filed.

The motions to dismiss the intervening petitions are severally denied. See *Re Bedingfield* (D. C.) 96 Fed. 190; *Re Ryan* (D. C.) 114 Fed. 373; *Re Lewis F. Perry & Whitney Co.* (D. C.) 172 Fed. 744.

No further suggestions having been made by the parties, in accordance with the opinion herein dated July 28, 1913, the petition in bankruptcy is dismissed, without costs.

THE AFRICAN PRINCE.

(District Court, D. Massachusetts. March 13, 1914.)

No. 329.

1. SHIPPING (§ 13*)—CLEARING—FOREIGN SHIPPING—HEALTH AND QUARANTINE REGULATIONS.

Where a steamship after clearing from Yokohama, where it received all proper health and clearance papers, for Boston and New York, put into Kobe, Japan, and thereafter touched at a number of other Asiatic ports, at all of which other ports she received proper health and clearance papers, she did not clear from Kobe for a United States port within Act Feb. 15, 1893, c. 114, § 2, 27 Stat. 450 (U. S. Comp. St. 1901, p. 3313), requiring vessels at any foreign port clearing for any port or place in the United States to obtain a bill of health from the United States Consul or medical officer, and imposing a penalty for clearing and sailing without such bill of health and entering any port of the United States, in view of the old and technical meaning of the word "clearing" as applied to shipping, which had long been recognized and established in the statutes of the United States prior to the act in question.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 26, 27; Dec. Dig. § 13.*]

2. STATUTES (§ 241*)—RULE OF CONSTRUCTION—PENAL STATUTES.

Penal statutes are to be strictly construed, and their language is to be given its usual meaning, unless it is very plain that Congress intended otherwise.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.*]

3. SHIPPING (§ 16*)—ACTIONS FOR PENALTIES—AMENDMENT OF INFORMATION.

In a quasi criminal case, by information to recover a penalty for clearing for a port of the United States without a bill of health, where the offense had not in any way endangered health at the United States ports, an amendment of the information after the case had been fully heard would not be allowed.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 30-44; Dec. Dig. § 16.*]

Information to recover a penalty by the United States against the steamship *African Prince*. Finding for the defendant.

William H. Garland, Asst. U. S. Atty., of Boston, Mass.

Charles R. Hickox and Convers & Kirlin, both of New York City, for claimant.

MORTON, District Judge. This is an information to recover a penalty for an alleged violation of the quarantine laws by the steamship African Prince, in leaving the port of Kobe without having received a bill of health from the United States official there, and subsequently entering the port of Boston in the United States. The statute in question (Act Feb. 15, 1893) provides:

"Sec. 2. That any vessel at any foreign port clearing for any port or place in the United States shall be required to obtain from the consul * * * of the United States at the port of departure, or from the medical officer * * * a bill of health * * * setting forth the sanitary history and condition of said vessel" and various other things.

[1] The facts are as follows: The steamship African Prince having been fumigated and having received all proper health and clearance papers, cleared from the port of Yokohama, Japan, for Boston and New York. After having made one or two calls at Asiatic ports, she put into Kobe, Japan, where she lay about 20 hours. None of the crew went ashore at this port, and nobody came on board except four tally clerks. When the steamer was about to leave, the United States medical officer informed the captain that it would be necessary for the vessel or crew to be fumigated. As this would involve considerable delay and substantial expense, and as the steamer was to touch at various other ports on that coast before taking her departure for the United States, the captain declined to comply with the request, and the United States Consul thereupon refused clearance and health papers. The African Prince is a British steamer, and the captain then went to the British Consul at Kobe, by whom he was given a "Port Clearance," stating that the steamer was bound to Moji, Japan, and that she had conformed to the rules and regulations of the port of Kobe. The steamer also received a proper clearance from the Japanese authorities at the port of Kobe, but did not receive any bill of health from the United States officials at that port. From Moji the steamer proceeded down the coast, stopping several days at Shanghai and at Hong Kong, at each of which places she or her crew were fumigated by the United States medical authorities, and received all proper health and clearance papers. She then proceeded to Cebu, in the Philippines, and thence to Sabang, Sumatra, from which she departed for the United States. At both of the last-named ports also she received the proper health and clearance papers.

The fundamental question in the case is whether the African Prince "cleared" from Kobe for a port or place in the United States; because if she did not, the act in question does not apply. The government contends that the word "clearing" in the statute means "sailing from" or "leaving" a foreign port, that the words "for the United States" mean setting out with the United States as her ultimate destination, though it may be intended to call at many intermediate foreign ports before reaching the United States, and that as soon as a vessel so sets out, she is bound to take a bill of health from the United States authorities at every port at which she touches. There is a dictum in *The Dago*, 63 Fed. 182, 11 C. C. A. 117, which supports the government contention, but the point was not necessary for the decision of the case, and, to judge from the record and briefs, which I have ex-

amined, does not seem to have been greatly considered. No other case upon the point has been called to my attention.

The statute in question imposes a penalty upon any vessel "clearing and sailing from any such port without such bill of health and entering any port of the United States." The words "clearance" or "clearing," as applied to vessels leaving port, have a highly technical meaning. The formalities accompanying entry in and departure from a port are part of the police regulations of the sea, as well as of the customs and health service. Chapter 2 of title xlviii, U. S. Revised Statutes, is entitled "Clearance and Entry" (U. S. Comp. St. 1901, pp. 2839-2848), and specifies in considerable detail the duty of the collector to grant a clearance, the conditions under which it shall be granted, the form of clearance, the formalities as to entry, etc. This statute originated in 1799, but "clearances" in the technical sense were in use before that. See *Gibbs v. Two Friends*, Fed. Cas. No. 5386 (1781); *Arnold v. Delcol*, Fed. Cas. No. 556 (1794). An action for damages lies against a collector who unlawfully refuses clearance to a vessel. *Hendricks v. Gonzalez*, 67 Fed. 351, 14 C. C. A. 659; *Bas v. Steel*, Fed. Cas. No. 1087; *Bas v. Steele*, Fed. Cas. No. 1088 (1818). The statutory form of clearance (Rev. Stats. 4201) (U. S. Comp. St. 1901, p. 2841) requires the port for which the vessel clears to be stated therein.

[2] The word "clearing" had thus an old and technical meaning as applied to shipping, which had long been recognized and established in the statutes of the United States at the time when it was used by Congress in the act in question. Penal statutes are to be strictly construed, and their language especially is to be given its usual meaning, unless it is very plain that Congress intended otherwise. *Standard Oil Case*, 221 U. S. at page 59, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. Taking this statute as a whole, it seems to me that if Congress had intended to put such an onerous and (as the facts of this show) in many cases wholly unnecessary burden on foreign shipping, it would have made its intent clear, and would have used the words "sailing" or "setting out," instead of the word "clearing," which is used in more than one place in the act, and throughout in a manner consistent with its technical and well-understood signification. The *African Prince* did clear from Kobe, and took a clearance paper stating that she cleared, not for a port in this country, but for Moji, Japan.

[3] Upon all the evidence I find and rule that the *African Prince* did not clear from Kobe for a port in the United States, and that no offense has been committed. As I regard the offense charged as being at most merely technical, and as not having in any way endangered health at the ports of the United States to which the *African Prince* was destined and at which she entered, I am not disposed to allow an amendment to the information which was first suggested after the conclusion of the arguments. Undoubtedly power to allow such an amendment exists, but after a quasi criminal case like this has been fully heard, it does not seem to me that an amendment ought to be allowed, except to prevent serious miscarriage of justice.

SPERRY-HUTCHINSON CO. v. KUHN, Atty. Gen.

(District Court, E. D. Michigan, S. D. May 20, 1912.)

STATES (§ 191*)—ACTIONS—ENJOINING ENFORCEMENT OF STATUTES.

A suit against the Attorney General of a state to restrain him from enforcing a statute on the ground that it is unconstitutional is in effect a suit against the state, where the Attorney General is not charged with any duty to enforce the statute, and has not threatened presently to enforce it, and a preliminary injunction will be denied.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 179-184; Dec. Dig. § 191.*]

In Equity. Suit by the Sperry-Hutchinson Company against Franz C. Kuhn, Attorney General of the state of Michigan. Application for interlocutory injunction. Denied.

Frank T. Wolcott and Wm. G. Hamilton, both of New York City, for complainant.

George S. Law and Arthur P. Hicks, both of Detroit, Mich., for defendant.

Before WARRINGTON, Circuit Judge, and ANGELL and SESSIONS, District Judges (sitting in pursuance of section 266 of the Judicial Code).

PER CURIAM. This bill is filed against the Attorney General, as sole defendant, to enjoin him from enforcing Act No. 244 of the Public Acts of 1911 of the state of Michigan, being an act to prevent, under certain circumstances, the issuing of trading stamps. Complainant claims that this act deprives it of property without due process of law, and denies it the equal protection of the laws, and is therefore void. The bill alleges that the defendant informed complainant that he conceived it to be his duty to see that the provisions of said act were enforced until the court decided otherwise. Affidavits have been filed on the part of complainant and of the defendant bearing on the matter of threats by the defendant to enforce the statute. These affidavits add nothing of importance to the averment of the bill above set out. The motion for preliminary injunction and the demurrer to the bill have been heard together.

The statute here assailed imposes no duty upon the Attorney General. The statutes of the state define the functions of that officer. Under those statutes he is charged with no duty to make complaints or to file informations or otherwise to see to the enforcement of a statute such as is the one in question. It is manifest that he has made no threat to enforce this act. He has declined to say that he would not attempt to enforce it, if, before it was adjudged invalid, circumstances should arise which imposed upon him a duty to enforce it.

It is the claim of complainant that the case is ruled by *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, *Western Union Telegraph Co. v. Andrews*, 216 U. S. 165, 30 Sup. Ct. 286, 54 L. Ed. 430, and *Herndon v. Chicago, R. 1. & P. Ry. Co.*, 218 U. S. 135, 30 Sup. Ct. 633, 54 L.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Ed. 970. The defendant insists that the case falls within the doctrine laid down in *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535.

It seems to us that this case is distinguishable from those upon which complainant relies. In *Ex parte Young*, a bill was filed in the federal court by stockholders against a railroad company in which they held stock, the State Railroad Commission, and Young, Attorney General of Minnesota. The bill was filed to determine the constitutional validity of certain statutes of Minnesota, and it was alleged that Young, as Attorney General, was about to take proceedings to enforce the statutes complained of. An injunction issued against him to prevent his taking such proceedings. Thereafter he took such proceedings in the state court in disregard of the injunction. Thereupon contempt proceedings were taken which ultimately reached the Supreme Court. That court held that the Attorney General of Minnesota was charged with the general duty to enforce the statutes of the state, including the statute in question.

In *Western Union Co. v. Andrews*, a statute, attacked as invalid, made it the duty of the prosecuting attorney of every county to sue for a penalty in case of a disobedience of the statute. Seventeen such prosecuting attorneys were threatening to bring such suits, when the telegraph company filed its bill to restrain them. In *Herndon v. Railroad Co.*, also, the prosecuting officer was distinctly empowered by the act attacked to sue for the penalty thereby imposed.

In the last-named case the decision is put without discussion upon the authority of the two first named. The *Western Union Case* proceeds upon the authority of *Ex parte Young*, quoting from the opinion in that case, and basing the decision upon the fact, first, that "the statute specifically charges the prosecuting attorneys with the duty of bringing actions to recover the penalties"; and, second, upon the fact that the bill averred and the demurrer admitted that "they threatened and were about to commence proceedings for that purpose." In *Ex parte Young*, Mr. Justice Peckham, writing the opinion of the court, discusses at length the case of *Fitts v. McGhee*, and distinguishes it from the case under consideration by saying:

"In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party. * * * The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists. * * * The officers in the *Fitts Case* occupied the position of having no duty at all with regard to the act, and could not be properly made parties to the suit for the reason stated." 209 U. S. 157, 158, 28 Sup. Ct. 453, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

The court, having, as above stated, concluded that the Attorney General was under the law charged with the duty to enforce the act in controversy, held that the action as against him was maintainable.

In *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535, as above stated, the Governor and Attorney General were not charged

by law with any special duty in connection with the statute alleged to be invalid, and the distinction is pointed out between a suit against individuals, holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing some positive wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. The court remarked:

"In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the Legislature could be tested by a suit against the Governor and the Attorney General based upon the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as Attorney General, might represent the state in litigation involving the enforcement of its statutes."

In the case at bar, as has been said, it does not appear that the Attorney General is charged with any duty to enforce Act No. 244, nor that he has threatened presently to enforce it. In the light of the decisions above referred to, we are of opinion that this suit must be held to be one brought in effect against the state of Michigan to test the constitutionality of the act named; and that, in view of the doctrine enunciated in both *Fitts v. McGhee* and *Ex parte Young*, quoted above, it would be improper to grant the motion of complainant for preliminary injunction.

Defendant further objects that complainant has no valid contracts outstanding which could be affected by the provisions of the act. In the present state of the record we deem it unnecessary to express any opinion on this point. Nor, in view of what has been said, would it be appropriate to discuss other questions fully argued at the bar which affect the constitutional validity of the act in question.

For the reasons stated, an order must be entered denying the motion of complainant for a preliminary injunction.

IN RE URDANG.

(District Court, E. D. Kentucky. March 10, 1913.)

1. ALIENS (§ 68*)—NATURALIZATION—DECLARATION OF INTENTION.

Act June 25, 1910, c. 401, § 3, 36 Stat. 830 (U. S. Comp. St. Supp. 1911, p. 530), providing that any person qualified to become a citizen, who has resided in the United States for five years next preceding May 1, 1910, and who because of misinformation has acted under the impression that he was or could become a citizen, and has exercised the rights of a citizen or intended citizen, may show such facts to a court having jurisdiction, and, if the court believes that he has been for five years entitled to be naturalized, may receive a certificate of naturalization without proof of any former declaration of intention to become a citizen, is designed to

aid those who, on May 1, 1910, were in a position to invoke its provisions, and who for five years prior to that date were entitled to naturalization.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138-145; Dec. Dig. § 68.*]

2. ALIENS (§ 68*)—NATURALIZATION—DECLARATION OF INTENTION.

Act June 25, 1910, c. 401, § 3, 36 Stat. 830 (U. S. Comp. St. Supp. 1911, p. 530), does not authorize the naturalization without previous declaration of intention of one who attained his majority on January 22, 1909, as he was not entitled to naturalization for five years prior to May 1, 1910, various statutes showing that Congress recognized the common-law principle that a minor's acts are not conclusive, though there is no direct provision that a minor cannot petition for naturalization.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138-145; Dec. Dig. § 68.*]

Petition for naturalization by Moses Leo Urdang. Denied.

F. M. Dailey, of Frankfort, Ky., for petitioner.

Edwin P. Morrow, U. S. Atty., of Somerset, Ky. and Paul Armstrong, of Washington, D. C., for the United States.

COCHRAN, District Judge. Moses Leo Urdang, a subject of Russia, filed a petition for naturalization in the United States District Court at Frankfort on December 5, 1912. The fifth assertion of the petition and the certificate of the clerk following the petitioner's signature show "declaration of intention omitted under terms of the act of June 25, 1910." It appears that no declaration of intention had ever been made by this alien.

[1, 2] Act Cong. June 25, 1910, c. 401, § 3, 36 Stat. 831, reads as follows:

"That any person belonging to the class of persons authorized and qualified under existing law to become a citizen of the United States who has resided constantly in the United States during a period of five years next preceding May 1, 1910, who, because of misinformation in regard to his citizenship or the requirements of the law governing the naturalization of citizens has labored and acted under the impression that he was or could become a citizen of the United States and has in good faith exercised the rights or duties of a citizen or intended citizen of the United States because of such wrongful information and belief may, upon making a showing of such facts satisfactory to a court having jurisdiction to issue papers of naturalization to an alien, and the court in its judgment believes that such person has been for a period of more than five years entitled upon proper proceedings to be naturalized as a citizen of the United States, receive from the said court a final certificate of naturalization, and said court may issue such certificate without requiring proof of former declaration by or on the part of such person of their intention to become a citizen of the United States, but such applicant for naturalization shall comply in all other respects with the law relative to the issuance of final papers of naturalization to aliens."

The record shows that this alien was born on the 22d day of January, 1888, and it appears from the testimony given in open court by him that he claimed to be of that class of persons "who because of misinformation in regard to his citizenship or the requirements of the law governing the naturalization of citizens" Congress intended to relieve from the necessity of filing a declaration of intention.

It is a well-established principle, based upon the common law, that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a minor's acts are not conclusive. See *Van Dyne on Naturalization*, p. 111; *In re Merry*, 14 Phila. (Pa.) 212; *Mutual Benefit Life Insurance Co. v. Tisdale*, 91 U. S. 238-245, 23 L. Ed. 314. In the last-mentioned decision the court said:

"A certificate of naturalization issues from a court of record when there has been the proper proof made of a residence of five years, and that the applicant is of the age of 21 years, and is of good moral character."

Act June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1911, p. 528) and section 2165 (U. S. Comp. St. 1901, p. 1329) before it, contain no affirmative statement to the effect that a minor alien could not petition for naturalization, but section 2167 and various acts which dispense with the necessity of filing declaration of intention (section 2166, Act July 26, 1894, c. 165, 28 Stat. 124 [U. S. Comp. St. 1901, p. 1332]) show clearly that Congress unquestionably recognized this principle. Certainly they would not have placed an onus upon those aliens to whom liberal exemptions were granted.

It is believed that it is proper to hold, in construing the words, "and the court in its judgment believes that such person has been for a period of more than five years entitled upon proper proceedings to be naturalized as a citizen of the United States * * *" that it was the intention of Congress that the above-quoted portion of the law should be considered as a second condition to the first provision of the act referred to below:

"That any person belonging to the class of persons authorized and qualified under existing law to become a citizen of the United States who has resided constantly in the United States during a period of five years next preceding May first, nineteen hundred and ten. * * *"

In other words, that an alien should be "entitled for more than five years prior to May 1, 1910," and not five years prior to filing his petition. In giving this construction to the act I am impressed with the word "and" immediately following the descriptive words in the first condition laid down in the act, and immediately preceding the second condition, beginning with the words "the court in its judgment. * * *" The amendatory act is admittedly remedial legislation, and is believed was designed to aid only those who on the specific date mentioned in the statute were in a position to invoke its provisions.

Mr. Urdang had not attained his majority until the 22d day of January, 1909, and it will be evident, under the construction indicated above, that he was not at the time he filed his petition, one of the persons entitled to proceed under the amendatory clause, and hence his petition is denied.

LATHROP v. FREIGHTS OF THE JOHN ENA (J. H. WELSFORD & CO., Limited, Interveners).

(District Court, N. D. California, First Division. February 19, 1914.)

No. 15,420.

MARITIME LIENS (§ 60*)—JURISDICTION—SUIT AGAINST FREIGHTS—PROCEDURE.

A court of admiralty has jurisdiction of a suit in rem against freights earned by a vessel which are within the district, and may, on issues properly framed, determine the validity and priority of all liens claimed thereon; and under admiralty rule 38 it may on citation, "if no sufficient cause is shown," require the consignee or other person owing the freights to bring the same into court to answer the exigency of the suit. But if they have already been collected under a fair claim of right, it is "sufficient cause," and the court will make no order with respect to their possession until the rights of such claimant have been adjudicated.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 98; Dec. Dig. § 60.*]

In Admiralty. Suit by A. P. Lathrop against the freights of the American bark John Ena; J. H. Welsford & Co., Limited, interveners. On order to show cause.

McCutchen, Olney & Willard, of San Francisco, Cal., for libelant.

Frank & Frank, of San Francisco, Cal., for San Francisco Shipping Co.

McClanahan & Derby, of San Francisco, Cal., for interveners J. H. Welsford & Co., Limited.

DOOLING, District Judge. In 1912 the California-Atlantic Steamship Company, the charterer of the American bark John Ena from its owner the San Francisco Shipping Company, took on board a cargo at Philadelphia bound for San Francisco, and as is averred in the libel pledged and assigned the freights to be earned on the voyage to G. Amsinck & Co. to secure certain advances. Libelant A. P. Lathrop is the successor in interest to said G. Amsinck & Co. In April, 1913, the John Ena arrived at San Francisco with the said cargo on board, but before that time the California-Atlantic Steamship Company had gone into involuntary bankruptcy, and the San Francisco Shipping Company, the owner of the bark, collected the freights. This is a libel in rem against the said freights, based upon the pledge and assignment above mentioned. J. H. Welsford & Co., Limited, has intervened, also claiming the freights under an assignment thereof from the said California-Atlantic Steamship Company. An order was, upon application, under admiralty rule 38 directed to the San Francisco Shipping Company, requiring it to appear and show cause why the said freights so collected and held by it should not be brought into court to answer the exigency of the present suit. To this order the said company replies, by denying that the court has jurisdiction of the subject-matter set forth in the libel, denying also the power of the court to compel the delivery of said freights except after process regularly issued and a trial had upon issues made in ac-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cordance with law and a judgment thereon against said company, and asserting that the present proceeding is without due process of law. Further answering, the said company avers that it collected said freights in pursuance of its right as owner for the enforcement of certain liens, among them being the charter hire, expenses of stevedoring, wharfage, shifting, clerk hire, port-warden fees, and other charges as provided in the charter. It also claims to hold the freights to meet demurrage claims, as also to meet claims against the vessel for damage to cargo, averring that all of these various claims amount to about \$41,000, and that the total amount of freights collected by it is \$45,320.38. The action being in rem against freights, and the freights being within this district, I am satisfied that the court has jurisdiction over them, to the extent at least that the court may, in this action upon issues properly framed, determine the priority of the asserted liens, and make such distribution as the facts may warrant.

Where the freight money is owed and is still in the possession of the holder of the bill of lading or owner of the cargo, or indeed of any one making no claim to it, and such money is claimed by others, the party in possession may, under rule 38, be required to bring it into court to answer the exigency of the suit. But where, as here, one of the claimants to the freights has them in possession under a fair claim of right, I do not feel disposed to disturb such possession in advance of a full determination of the validity of such asserted right. This determination cannot well be had upon an order to show cause. The right asserted, coupled with the possession, seems to me to be too substantial to be disturbed upon such an order. The rule provides:

"If no sufficient cause be shown, the court may order the freights to be brought into court to answer the exigency of the suit."

I think the respondent here has shown sufficient cause within the meaning of the rule. After a trial the court will direct that such portion of the freights herein sued for as do not belong to respondent shall be by it paid into court and distributed to those who may have, upon such trial, established their right to them. The whole question may thus be disposed of upon a full trial and hearing of all the issues. The order to bring the freights into court will not be made at this time, but respondent will be directed to appear in this suit to answer to the libel and to be prepared to pay into court such portion, if any, of said freights as after a trial of the issues the court shall determine it is not entitled to retain.

EGAN v. MIDDLESEX & B. ST. RY. CO.

(District Court, D. Massachusetts. April 30, 1913.)

No. 231.

1. STREET RAILROADS (§ 117*)—PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE.

Where the evidence warranted a finding that plaintiff's intestate, while intoxicated, started to cross defendant's street car track, and, when on the track, suddenly fell forward and struck his head rendering him unconscious, and that he lay in that condition for several minutes before a car approached, which struck and injured him, *held*, that whether plaintiff's intestate was guilty of contributory negligence was a question for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

2. STREET RAILROADS (§ 117*)—INJURIES TO TRAVELERS—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to plaintiff's intestate by being struck by an approaching car after he had fallen unconscious on the track several minutes before the car approached, and the evidence warranted a finding that it was possible for the motorman to see him lying on the track for a distance within which the car could easily have been stopped if properly operated, whether defendant was negligent *held* for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

3. EVIDENCE (§ 268*)—PERSONAL INJURIES—MENTAL SUFFERING—FEAR—APPREHENSION.

In an action for injuries to an unskilled laborer who had lost a hand and a foot in a street railway accident, evidence, that while he was in the hospital he stated that if he had not lost his foot he could still have made a living, was properly admitted to show mental suffering, since fear, worry, and apprehension are typical sorts of mental suffering, and it is natural that a person under such circumstances should suffer from anxiety and apprehension over his inability to earn his livelihood in the future.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1061, 1062; Dec. Dig. § 268.*]

4. DAMAGES (§ 48*)—PERSONAL INJURIES—MENTAL PAIN.

Mental pain should be considered by the jury upon the question of damages; it being an independent element, separate and apart from the physical suffering and injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 100-103, 255; Dec. Dig. § 48.*]

At Law. Action by John J. Egan, as administrator, etc., against the Middlesex & Boston Street Railway Company. On motion for new trial. Denied.

John J. O'Hare and Joseph L. Keogh, both of Boston, Mass., for plaintiff.

Pitt F. Drew, of Boston, Mass., for defendant.

MORTON, District Judge. [1, 2] The evidence warranted a finding that the plaintiff while under the influence of liquor started to cross the street; that while on the defendant's track he suddenly fell

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

forward and struck his head, rendering him unconscious; that he lay in this condition upon the track for several minutes before the car which injured him came; and that it was possible for the motorman to see him lying on the track from a distance within which the car could easily have been stopped if operated in a careful manner. It cannot be said that the plaintiff was, as a matter of law, careless in attempting to cross the street or in falling as he did. It is not the case of a drunken man voluntarily lying down in a place of danger. The jury were warranted in finding that the plaintiff's position on the track was wholly involuntary on his part and was due to the fall by which he was stunned. It seems to me that the questions of the defendant's negligence and of the plaintiff's due care were for the jury to determine, and that I ought not to disturb their verdict upon these points.

[3] The evidence tended to show that the plaintiff lost both a foot and a hand. While he was in the hospital, he said, in substance, that if he had not lost his foot he could still have made a living. This evidence I admitted subject to the defendant's exception, and the defendant now urges that its admission was erroneous. A ruling having been made and a verdict having been found under it, the court will not ordinarily set aside the verdict unless convinced that the ruling was wrong. That the ruling appears doubtful is not sufficient.

[4] The question raised is a decidedly interesting one. The defendant contends that a plaintiff cannot increase his damages by fear and apprehension as to what the effect of his injuries will be on his ability to work; that the law assumes that the damages recovered will adequately compensate the plaintiff for his injuries; and that they cannot be enhanced by worry. The case presents very sharply the difference between physical and mental suffering. Fear, worry, and apprehension are typical sorts of mental suffering. The law recognizes mental suffering as a distinct element of damages, whenever it is a natural and probable consequence of the wrongful act. *McDermott v. Severe*, 202 U. S. 600, 26 Sup. Ct. 709, 50 L. Ed. 1162; *Post Publishing Co. v. Peck*, 199 Fed. 6, 24, 120 C. C. A. 1; *Sullivan v. Old Colony St. Ry. Co.*, 197 Mass. 512, 83 N. E. 1091, 125 Am. St. Rep. 378. That an unskilled laborer who had lost both a hand and a foot should suffer from anxiety and apprehension over his ability to earn his livelihood in the future seems to me entirely natural. I see no reason why his mental pain should not be considered by the jury upon the question of damages. It is an independent element, separate and apart from the physical suffering and injury. In some cases it might not exist, but when it does it is a proper element for compensation.

Motion for new trial overruled.

THE DAWN.

(District Court, S. D. Alabama. February 7, 1914.)

No. 1,448.

ADMIRALTY (§ 30*)—PROCEDURE—JOINDER OF CAUSES OF ACTION.

Where not otherwise provided in admiralty rules 12-20 (29 Sup. Ct. xl, xli), causes of action in rem and in personam may be joined in one libel, when such joinder will promote the cause of justice or conduce to the convenience of the parties and the court.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 298-300; Dec. Dig. § 30.*]

In Admiralty. Suit by the Mobile Barge Company against the Mobile Towing & Wrecking Company and the tug Dawn. On exceptions to libel for misjoinder. Exceptions overruled.

Rickarby & Austill, of Mobile, Ala., for libellant.

Hanaw & Pillans, of Mobile, Ala., for respondents.

TOULMIN, District Judge. Judge Brown, of the District Court of the United States for the Southern District of New York, in his opinion in *The Monte A*, 12 Fed. 331, held that:

"Under rule 46 of the Supreme Court rules in admiralty [29 Sup. Ct. xliiv] an action in rem may be joined with an action in personam against the master or owners for breaches of contracts of affreightment or charter parties. The same is true in other cases not expressly provided for under the Supreme Court rules in accordance with the prior and subsequent practice of the district courts."

And the court said:

"Those rules, while providing for the joinder of remedies in regard to various other subjects, do not provide for this; and under rule 46 it is, therefore, left subject to the regulation of the several district and circuit courts; and the former practice of joining these remedies in this class of cases exists in this district, as well as in other districts." 12 Fed. 336, 337.

The case of *The Alida* (C. C.) 12 Fed. 343, seems to be in conflict with the case of *The Monte A*, supra. The *Alida* was decided by Judge McKennan, one of the federal judges of Pennsylvania, who states the unquestioned law of England on the question of joining a proceeding in rem and in personam in the same libel, and cites *Citizens' Bank v. Nantucket S. S. Co.*, 2 Story, 57, Fed. Cas. No. 2,730, and *Dean v. Bates*, 2 Wood. & M. 87, Fed. Cas. No. 3,704, as deciding the question substantially the same way. He, however, states that these cases were decided before the promulgation by the Supreme Court of rules in admiralty. In less than two months after Judge McKennan's decision, Judge Brown took a contrary view of the same question and his decision in *The Monte A* was rendered doubtless without knowledge of Judge McKennan's decision, as he does not refer to it in his decision. In his day Judge Brown was regarded as one of the ablest admiralty judges on the bench, and his opinions were and are of great influence and weight. Moreover, his opinion in the case cited is sustained by sound reasoning and subsequent authorities.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the case of *The Director* (D. C.) 26 Fed. 708, it is said that:

"The admiralty rules from 12 to 20, inclusive [29 Sup. Ct. xl, xli], relating to joinder of causes of action, do not apply to cases not therein enumerated; but the same, under rule 46, may be proceeded with, in this respect, in such manner as the court may deem expedient for the administration of justice. Every argument founded on convenience and economy is in favor of their joinder in one suit." 26 Fed. 711.

Suits in rem and in personam may be joined. *The Baracoa* (D. C.) 44 Fed. 102, 103. Numerous authorities cited in this case.

"There seems to be no fixed rule of admiralty practice, and no reason on general principles, which prevents the joinder in one libel of causes of action in rem and in personam, when such joinder will promote the cause of justice, and conduce to the convenience of the parties and the court, and is not governed by the admiralty rules of the Supreme Court." *The Thomas P. Sheldon* (D. C.) 113 Fed. 779; *The Planet Venus* (D. C.) 113 Fed. 387.

The cause now before the court is one of tort, as of trespass or trover, and is not governed by the admiralty rules of the Supreme Court. It is not one of those cases enumerated therein and to which those rules apply.

"Admiralty rules 12-20 contain provisions when the suit may be in rem, when in personam, and when in both. But they are not intended to be exclusive, or to say that in cases not covered by their terms there shall be no remedy, whether in either form or in both combined." Hughes on Admiralty, pages 354, 355; *The Corsair*, 145 U. S. 335, 336, 342, 12 Sup. Ct. 949, 36 L. Ed. 727.

The case of *The Ethel*, 66 Fed. 340, 13 C. C. A. 504, cited by the proctor for respondents, was a suit for mariner's wages, and is one covered by admiralty rule 13 (29 Sup. Ct. xl) which provides how suits for mariner's wages may proceed, etc. The court said, this case being one where, under the admiralty rules, both remedies (in rem and in personam), could not be joined, the libel should have been dismissed. This decision was made in view of the facts of the case under admiralty rule 13, referred to.

I make no ruling on the exception to the fifth article in the libel, wherein \$1,000 for loss of the use of the barge under the contract of hire is mentioned. I am, however, inclined to the opinion that the respondents' proctor is correct in his contention as to that claim of the libellant. But I think it would more properly come up on the hearing of the case on the merits.

The exceptions to the libel are overruled.

THE DOLBARDORN CASTLE.

(District Court, N. D. California, First Division. January 22, 1914.)

No. 15,073.

SHIPPING (§ 141*)—LIABILITY OF VESSEL FOR DAMAGE TO CARGO—EXCEPTIONS IN BILL OF LADING.

A vessel *held* not liable for injury caused by moisture to cement and steel plates comprising part of a cargo carried for libellant as charterer from Rotterdam to San Francisco under a bill of lading exempting the ship from liability for loss or damage caused by "every danger and ac-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cidents of the seas," or for "damage by heat, sweat, or rust, unless occasioned by improper stowage"; it appearing from the evidence that a part at least of the damage was caused by sea water, which entered because the ship was strained by storms and unusually heavy seas encountered during the voyage, and that if any part was caused, as claimed, by the sweating of coke, which constituted part of the cargo, libelant had not sustained the burden resting upon it to prove that it was by reason of improper stowage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 493, 497-499; Dec. Dig. § 141.*]

In Admiralty. Suit by Parrott & Co., a corporation, against the British bark Dolbardorn Castle. Decree for respondent.

Andros & Hengstler, of San Francisco, Cal., for libelant.

Ira S. Lillick, of San Francisco, Cal., for respondent.

DOOLING, District Judge. This is a libel for damage to a cargo consisting of cement and steel plates, shipped from Rotterdam to San Francisco. The libelant claims that the damage was the result of sweat occasioned by a quantity of coke constituting a portion of the cargo. The respondent claims that the damage was caused by sea water entering through seams in the deck and through the ventilator during extraordinarily heavy weather encountered on the voyage.

The vessel was under charter to libelant, who selected the whole cargo, including the coke, so that no negligence may be imputed to the ship from the fact itself that coke formed a part of the cargo. The bill of lading provides that the cargo shall be delivered in like good order and condition as when received, subject to certain exceptions, among which are the "act of God, and all and every danger and accidents of the seas." It further provides that the ship is not liable "for damage by heat, sweat, or rust, unless occasioned by improper stowage." The damage complained of was the caking of the cement, and the rusting and pitting of the steel plates. This damage, both to the cement and to the steel plates, was occasioned by some form of moisture. If caused by the entrance of sea water, the ship cannot be held responsible, because the evidence is clear that whatever sea water entered did so by reason of the fact that the ship became strained by the storms and heavy seas encountered by her, and the damage falls within the first exception above noted. If the damage was caused by rust or sweat, then under the second exception the ship is not liable, unless such sweat or rust was occasioned by improper stowage.

The evidence offered by libelant tended to show that the moisture which caused the caking of the cement and the rusting and pitting of the plates was the result of sweat arising from the cargo of coke. If it be conceded that this fact is established, the burden of proving that the damage from such sweat was occasioned by improper stowage is upon the libelant. For, once the damage is brought within the exceptions of the bill of lading, the ship is exonerated unless the libelant show that, notwithstanding such exceptions, the ship is liable because of some negligence; in this case, the negligence of improper stowage. The testimony is very conflicting both as to the cause of the damage

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and the propriety or impropriety of the stowage. It appears, however, that the coke was stowed in the fore and after parts of the vessel, while the general cargo was carried amidships. The coke was separated from the general cargo by bulkheads made of boards placed one above the other, not dovetailed, but closely fitted; the whole being lined on the side next to the coke with dunnage mats. Respondents' witnesses testified that the boards were so closely fitted that daylight could not be seen through them, while the witnesses for libellant testified that there were frequent interstices between the boards and a considerable space between the top of the bulkheads and the deck. The bulkheads, however, were better ones for the purpose intended than those generally in use at the time, and on the whole case I am not prepared to say that the stowage was not proper. My conclusions therefore are:

1. That part of the damage at least was due to sea water forced through the deck and ventilator, and is excused by the exception in the bill of lading covering "all and every danger and accidents of the seas."

2. That if any damage was caused by sweat, it is excused by the exception covering "heat, sweat, or rust," unless such damage were occasioned by improper stowage.

3. That the burden of showing such improper stowage is upon the libellant.

4. That such burden has not been satisfactorily sustained.

5. That for these reasons the libellant is not entitled to recover, and the libel must be dismissed.

In re WISE et al.

(District Court, W. D. Washington, N. D. April 6, 1914.)

No. 5136.

1. BANKRUPTCY (§ 480*)—INVOLUNTARY PETITION—DISMISSAL—COSTS.

Bankr. Act July 1, 1898, c. 541, § 3e, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3423), provides that whenever a petition is filed to have another adjudged a bankrupt, and application is made to take charge of and hold the property of the alleged bankrupt, the petitioner shall file a bond conditioned for the payment, in case the petition is dismissed, to the respondent of all costs, expenses, and damages occasioned by the seizure, and, if the petition is dismissed by the court or withdrawn by the petitioner, the respondent shall be allowed all costs, counsel fees, expenses, and damages occasioned by the seizure, to be fixed by the court. *Held*, that counsel fees, expenses, and damages so provided are for special services or damages occasioned by reason of the wrongful taking of the property of the alleged bankrupt, and that the counsel fees expended and damages provided by such section are not taxable in the bankruptcy proceeding, but are to be recovered in an independent suit on the bond.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 902, 903; Dec. Dig. § 480.*]

2. BANKRUPTCY (§ 482*)—INVOLUNTARY PROCEEDING—DISMISSAL—COSTS.

Rev. St. § 824 (U. S. Comp. St. 1901, p. 632), provides that on a trial in equity \$20 attorney's fees shall be taxed in favor of the successful and against the losing party, and General Orders, Rule 34 (89 Fed. xiii, 32 C. C. A. xxxiii), declares that where the debtor in involuntary proceedings

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

resists adjudication the same costs that are allowed to the successful party in equity shall be taxed. *Held* that, where an alleged involuntary bankrupt successfully resists adjudication, he is entitled to have an attorney's fee of \$20 taxed as part of the costs in his favor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874-876, 897; Dec. Dig. § 482.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Boress Wise and the community composed of Boress Wise and his wife. On objections to cost bill, after a denial of an adjudication on an involuntary petition. Overruled.

James A. Dougan, of Seattle, Wash., for petitioners.

Shorett, McLaren & Shorett, of Seattle, Wash., for bankrupts.

NETERER, District Judge. A petition in involuntary bankruptcy was filed, and respondents answered denying bankruptcy. The issue thus raised was submitted to a jury, and a verdict returned in favor of respondent; motion for a new trial was made and denied; cost bill filed claiming, among other items, \$20 attorney's fees. Objection to the taxation of attorney's fees and other costs is made.

[1] It is contended by the petitioning creditors that section 3e of the Bankruptcy Act precludes the taxation of costs; such subdivision being:

"Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond * * * to be approved by the court or judge thereof, * * * conditioned for the payment, in case such petition is dismissed, to the respondent, * * * all costs, expenses and damages occasioned by such seizure. * * * If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by said seizure. * * * Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court. * * *"

It is manifest from a reading of this section that counsel fees, expenses, and damages provided for the seizing and holding of the property of an alleged bankrupt are for special services or damages occasioned by reason of the wrongful taking of the property of another. The counsel fees expended and damages provided by section 3e are a distinct matter and have no application to the instant case, and are not taxed in the bankruptcy proceeding, but are to be recovered in an independent suit upon the bond provided by this section. In re Hines (D. C.) 144 Fed. 147, 150.

[2] The costs in this case are controlled by section 824 of the Revised Statutes and Rule 34, General Orders in Bankruptcy (89 Fed. xiii, 32 C. C. A. xxxiii). Section 824, Revised Statutes (U. S. Comp. St. 1901, p. 632), provides that on a trial in equity \$20 attorney's fees shall be taxed in favor of the successful and against the losing party. Rule 34, General Orders in Bankruptcy, provides that in case of involuntary bankruptcy, where the debtor resists adjudication, the same costs that are allowed to a successful party in a suit in equity shall be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

taxed. Under the chancery rule the \$20 attorney's fee is taxable. In *re Hines*, *supra*.

I am conscious of the statement of Judge McPherson in *Re Morris* (D. C.) 115 Fed. 591, that "there is no provision in the act for the allowance of counsel fees or damages, except under section 3e, and this applies when the bankrupt's property has been taken out of his possession," and also note that he denied counsel fees in that case. This evidently was only intended to apply to counsel fees as a special service under section 3e, and not to the taxation of attorney's fees as costs under section 824 and rule 34, *supra*.

The objections to the cost bill are overruled.

Ex parte TUCKER.

(District Court, D. Massachusetts. January 21, 1913.)

No. 725.

1. ARMY AND NAVY (§ 47*)—COURTS-MARTIAL—REVIEW.

Civil courts have no appellate jurisdiction to review the proceedings of courts-martial.

[Ed. Note.—For other cases, see *Army and Navy*, Cent. Dig. §§ 93-95; Dec. Dig. § 47.*]

2. ARMY AND NAVY (§ 47*)—COURTS-MARTIAL—REVIEW BY CIVIL COURTS.

Civil courts will not interfere with the judgments of courts-martial, if it appears that they have jurisdiction of the person and subject-matter.

[Ed. Note.—For other cases, see *Army and Navy*, Cent. Dig. §§ 93-95; Dec. Dig. § 47.*]

3. ARMY AND NAVY (§ 47*)—COURTS-MARTIAL—REVIEW BY CIVIL COURTS.

Errors of procedure in military courts can be corrected only by the proper military authorities.

[Ed. Note.—For other cases, see *Army and Navy*, Cent. Dig. §§ 93-95; Dec. Dig. § 47.*]

4. HABEAS CORPUS (§ 30*)—RIGHT TO RELIEF—COURTS-MARTIAL—ERRORS OF PROCEDURE.

That a court-martial trying a naval officer permitted the judge advocate to be present for a short time during a closed session of the court, in express violation of Act July 27, 1892, c. 272, § 2, 27 Stat. 277 (U. S. Comp. St. 1901, p. 965), though a disregard of the defendant's legal rights, was nevertheless an error in procedure only, and was therefore not ground for a writ of habeas corpus.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 25; Dec. Dig. § 30.*]

Petition by William J. Kelly for a writ of habeas corpus on behalf of Henry Tucker. Petition denied.

Kelley & Sheenan, of Boston, Mass., for petitioner.

William H. Garland, Asst. U. S. Atty., of Boston, Mass., for respondent.

MORTON, District Judge. This is a petition for a writ of habeas corpus, brought by Mr. Kelly on behalf of Tucker, who is now im-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

prisoned under sentence of a naval court-martial. The respondent, Frank W. Kellogg, is a captain in the United States navy, in command of the receiving ship North Carolina at the Boston Navy Yard. On the filing of the petition, an order of notice issued to show cause why the petition should not be granted. The respondent filed an answer, and there was a hearing before me, at which the following material facts appeared:

Tucker was duly enlisted in the United States navy and was a petty officer therein. Charges of scandalous conduct tending to the destruction of good morals were preferred against him, and by order of the Secretary of the Navy a court-martial was duly convened for the trial of said charges. It is admitted by the petitioner that the court-martial was regularly organized in accordance with law and that it had jurisdiction both of Tucker and of the charges preferred against him. It found Tucker guilty and imposed a sentence of three years in prison, to be followed by dishonorable discharge and forfeiture of pay. The sentence was duly approved by the Secretary of the Navy, who designated the New Hampshire state prison, at Concord, N. H., as the place of confinement. Pending the removal of Tucker in execution of the sentence, this petition was brought.

The only complaint which the petitioner makes against the court-martial is that, in violation of chapter 272 of the Acts of Congress of the year 1892, the judge advocate of the court-martial was allowed to be present for a short time during a closed session of the court-martial. This is explicitly forbidden by the act referred to, and the petitioner contends that, by reason of the court-martial's disregard of the statute law, Tucker has not been properly tried, and that the sentence is illegally imposed upon him.

[1-4] It is clear that the civil courts are in no sense appellate tribunals for the revision of proceedings in courts-martial. It has been decided that in such cases the civil courts should not interfere if it appears that the court-martial had jurisdiction of the person and of the subject-matter which was tried before it, and that errors in procedure in military courts can be corrected only by the proper military authorities. In *re Grimley*, Pet'r, 137 U. S. 147, 150, 11 Sup. Ct. 54, 34 L. Ed. 636; *Ex parte Reed*, 100 U. S. 13, 23, 25 L. Ed. 538. It is true that Tucker's legal rights were disregarded by the court-martial when it allowed the judge advocate to be present, even for a short time, at the closed session; but I do not think it is the business of this court to correct the error. The statute in question relates to procedure, not to jurisdiction, and the nonobservance of it by military tribunals is a matter for the revising military authorities, not for the civil courts.

• The petition is denied, but without costs.

Ex parte SITNER.

(District Court, D. Massachusetts. July 14, 1913.)

No. 758.

ALIENS (§ 53*)—DEPORTATION—IRREGULARITIES IN PROCEEDINGS—EFFECT.

Where an alien, rejected by the board of special inquiry, was by mistake of the janitor at the detention station allowed to go at large, and was arrested under a departmental warrant, his rights were not changed and since he was within the control of the immigration authorities, and it not being disputed that he was never legally allowed to land, irregularities in the warrant proceedings were immaterial.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 53.*]

Petition for a writ of habeas corpus by Simon Sitner. Petition denied without prejudice.

See, also, 212 Fed. 572.

William H. Lewis, of Boston, Mass., for petitioner.

William H. Garland, Asst. U. S. Atty., of Boston, Mass., for respondent.

MORTON, District Judge. Sitner is an alien immigrant who is now held by the immigration authorities at the Port of Boston for deportation.

His case was heard before a board of special inquiry. A medical certificate was presented certifying that the applicant was feeble-minded and of defective vision. The board thereupon made the following decision: "Debarred 1-12 P. M.—feeble-minded."

After this the applicant was by mistake of the janitor at the detention station released from detention and allowed to go at large. He was later arrested under a departmental warrant, and his case was again heard upon the issue whether he was unlawfully in the country. He was examined by a board of three surgeons, who certified that they "found him to present such a degree of mental deficiency as to justify certification as feeble-minded in accordance with official instructions governing the medical examination of aliens." The assistant commissioner made the following "Summary and Findings":

"I find that Simon Sitner is an alien, subject of the Czar of Russia; that he arrived ex s. s. Franconia, May 8, 1913, was held for hearing before the board of special inquiry. A certificate was issued in his case, reading 'feeble-minded and defective vision.' He was therefore excluded as a member of the mandatory excluded classes. Pending his deportation he was released through carelessness, being allowed to leave the station with other discharged aliens. He was subsequently apprehended and a hearing given him under warrant regulations.

"No new evidence has been presented at the latter hearing which would in any manner affect the former decision of the board of special inquiry. The decision of the medical examiner is controlling, and the said certificate is further strengthened and fortified by the report of the medical board, sitting this day, May 20, 1913.

"I therefore recommend deportation."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The fact that Sitner was by mistake allowed to enter the country and to go at large before the order for his deportation had been carried out does not, I think, change his rights. He has never been legally admitted to this country. The situation is that he is again in custody, within the control of the immigration authorities, who are now in a position to enforce the first order of exclusion. The only fact material to this case settled by the warrant proceedings, viz., that Sitner was never legally allowed to land, is not in controversy. The irregularities in those proceedings are therefore immaterial. *U. S. ex rel. Rosen v. Williams*, 200 Fed. 538, 118 C. C. A. 632; *Siniscalchi v. Thomas*, 195 Fed. 701, 115 C. C. A. 501. The case seems to me essentially different from one in which the alien had been permitted to land by the proper authorities, in which event the warrant proceedings would be the basis for his deportation. While the defendant's answer sets up only the warrant, and does not refer to the prior order of exclusion, the record returned shows that such an order was made and is in force.

No evidence has been presented which justifies a finding that the Board of Special Inquiry acted unfairly. *U. S. ex rel. Aronowicz v. Williams* (D. C.) 204 Fed. 844.

The only doubt which I have about the case arises from the fear, based on what was said at the argument, that the immigration authorities felt bound by the medical certificate, which, as pointed out in the opinion in *Nora Joyce's Case*, 212 Fed. 285 (filed herewith), is not a correct view of the law. The petition will therefore be denied, but without costs, and without prejudice to the petitioner's right to file a new petition, if he expects to establish that the immigration authorities acted under an erroneous view of the law.

Ex parte SITNER.

(District Court, D. Massachusetts. January 26, 1914.)

No. 767.

1. ALIENS (§ 54*)—DETENTION AND RETURN OF IMMIGRANTS.

The assumption by a board of special inquiry that it was absolutely bound by the medical certificate in determining whether an alien should be excluded as a feeble-minded person was such a fundamental error of law as prevented a fair hearing.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 112; Dec. Dig. § 54.*]

2. ALIENS (§ 54*)—DETENTION AND RETURN OF IMMIGRANTS.

In a hearing on the merits of a habeas corpus proceeding by an alien, excluded by a board of special inquiry, evidence held to show that such alien was not a feeble-minded person nor liable on account of feeble-mindedness to become a public charge.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 112; Dec. Dig. § 54.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Habeas corpus proceeding by Simon Sitner. Petitioner discharged from custody.

See, also, 212 Fed. 571.

William H. Lewis, of Boston, Mass., for petitioner.

William H. Garland, Asst. U. S. Atty., of Boston, Mass., for respondent.

MORTON, District Judge. [1] A prior petition for a writ of habeas corpus, filed on behalf of this alien, was dismissed without prejudice for reasons stated in my opinion thereon. This petition was thereafter filed and was heard upon agreed facts and statements of counsel. It clearly appeared at the hearing upon this petition that the board of special inquiry had, in rendering its decision, assumed that it was absolutely bound by the medical certificate. Following my decision in the Nora Joyce Case, 212 Fed. 285 (to which reference may be made), I thereupon ruled that there had been such a fundamental error of law as prevented the hearing before the board of special inquiry from being fair to the alien, and ordered the writ to issue.

[2] The writ accordingly issued, the petitioner was produced in court, and there was a second hearing upon the question whether the petitioner was entitled to admission into the United States. At this hearing both parties were represented by counsel and such evidence was heard as either party desired to offer. For the petitioner two physicians testified that they had examined him and observed him, and saw nothing in the least abnormal or peculiar in his mental processes. They were both clearly of the opinion that he was not feeble-minded. From the testimony of other witnesses, which was not contradicted, it appeared that the petitioner had been married 23 or 24 years and had a wife and several children in Russia; that his trade was that of pot-maker (or potter), making earthenware from clay upon an old fashioned potter's wheel; that he had been continuously employed at this occupation in Russia before coming to this country, at the same place for 31 years; and that he had never been supposed or reputed to be naturally deficient in intelligence or understanding. During the period between his release and his re-arrest he worked for his brother-in-law, and after his release on bail he continued to work for his brother-in-law, sorting junk, peddling alone, and doing other jobs. The petitioner testified before me, and I was unable to detect any natural deficiency in intelligence or any indications of a subnormal intellect. The petitioner appeared to be fully as bright as other members of his race and class, and to have made unusual progress in learning English for the time which he had been in the country. No evidence whatever was offered on behalf of the respondent.

I therefore found and ruled that Simon Sitner is not a feeble-minded person, nor liable on account of feeble-mindedness to become a public charge; that he is not within any of the excluded classes and is entitled to admission. I directed an order to be entered discharging him from custody.

UNITED STATES v. CHICAGO, M. & ST. P. RY. CO.

(District Court, W. D. Wisconsin. April 16, 1914.)

MASTER AND SERVANT (§ 17*)—RAILROADS—HOURS OF SERVICE LAW—UN-AVOIDABLE ACCIDENT.

Where a railroad company's violation of the Hours of Service Law (Act March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1911, p. 1321]) resulted from a train being required to take impure water from a creek, due to heavy switching while the train was being run over a temporary logging road, causing the injectors, which were in good order, to fail to work properly, such delay was the result of an unavoidable accident which could not have been foreseen and prevented by the use of ordinary care, and hence the company was not liable for a penalty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 16; Dec. Dig. § 17.*]

At Law. Action by the United States against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for the United States.

Otis B. Kent, Special Asst. U. S. Atty., of Washington, D. C., for the United States.

Rodger M. Trump, of Milwaukee, Wis., for defendant.

SANBORN, District Judge. Action at law for violation of the Hours of Service Act of March 4, 1907 (34 Stat. 415). It appears from the agreed facts that four employes of defendant were on duty July 8, 1912, 18¼ hours, being an excess of 2¼ hours. A plea of guilty to a technical violation of the law was filed.

Defendant owns and operates a railroad between Star Lake and Buswell, Wis., 22½ miles; about midway between the two places a temporary logging road branches off from Boulder Junction to Ryan's Spur, 14 miles. The train started from Star Lake and ran northwest to Buswell, then retraced 11½ miles to Boulder Junction. From there it went out on the logging spur to Ryan's Spur, where there was considerable heavy switching, and then back to Boulder Junction. By this time the engine was out of water. There is no water tank between Star Lake and Buswell, nor would any be needed except for the extra 28-mile run to Ryan's Spur. There is, however, a creek on the main line between Boulder Junction and Buswell, where freight trains had been accustomed to obtain water. The engine was run from Boulder Junction to this creek, 2½ miles, and water raised into the tank. A pipe was lowered into the stream, and connecting the boiler steam with the pipe near its upper end, thus creating a partial vacuum in this end, and "aspirating" the water into the tank. The weather was warm, and the water low in the stream, and the result was warm, impure water in the tank, making it difficult for the injectors to work, in order to force water into the boiler. The engine returned to Boulder Junction and took up the train for Star Lake. The injectors worked properly for about three miles, and the crew were able to get the train within four miles of Star Lake, when the engine was cut off and run to the water tank at Star Lake, the cars being necessarily left on the main

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

track. As soon as the tank was filled up with colder water the injectors again worked properly, and the train was then brought into Star Lake. By this time the men had been on duty $18\frac{1}{4}$ hours. There was no defect in the injectors; their temporary failure being caused by the high temperature and impurity of the creek water.

Of course no railway company can be excused for not providing plenty of water on its permanent lines of road. But this 14-mile logging road was only a temporary affair, which might last a month or six months, and then be taken up. The company was not required to build a water tank on this extension, or at Boulder Junction on the main line, unless this was reasonably necessary under all the surrounding conditions. The creek had been found adequate, and sufficient water was actually supplied by it, but the water proved not to be suitable for the injectors, although the train was brought nearly to a junction point before it was found necessary to cut off the engine. It looks to me as if all this complication of circumstances, being the heavy switching work, the low, warm water in the stream, the injectors working up to within four miles of a water tank and then failing, may be called so unexpected as to be regarded as unavoidable. The violation was technical only. The injectors were in good order, but the foaming of the warm, impure water caused their temporary failure. Such failure was an unavoidable accident, which could not have been foreseen and prevented by the use of ordinary care. *United States v. Kansas City Southern R. Co.* (D. C.) 189 Fed. 471, Id., 202 Fed. 828, 121 C. C. A. 136.

Defendant having confessed to a technical breach of the law, judgment against it for costs only should be entered.

In re BACH et al.

(District Court, W. D. Washington, N. D. April 3, 1914.)

No. 5224.

BANKRUPTCY (§ 211*)—LIENS—DETERMINATION OF STATE COURT—STAY.

Where, prior to the filing of a bankruptcy petition, certain claimants had sued to foreclose loggers' liens on logs belonging to the bankrupts, in accordance with the state statute, and the logs had been sold and the money deposited in the registry of the state court, and prior to the issuance of a restraining order in the bankruptcy proceedings the trial judge had rendered his decision in favor of the lien claimants, adjudging the amount due them and directing the preparation of formal findings and decree, the entry of the formal judgment was a mere ministerial act, and would not be enjoined, nor would the fund be transferred to the bankruptcy court for distribution.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321, 323; Dec. Dig. § 211.*]

In Bankruptcy. In the matter of bankruptcy proceedings against Harry Bach and others. On motion to dissolve a restraining order. Granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Byers & Byers, of Seattle, Wash., for the motion.
Edward H. Chavelle, of Seattle, Wash., opposed.

NETERER, District Judge. On February 7, 1914, the above bankrupt filed his petition in voluntary bankruptcy, and an order of adjudication was entered. On the 13th a restraining order was issued restraining certain parties and attorneys from further proceeding in a certain action pending in the superior court for Kitsap county wherein the said bankrupts are defendants. A motion has been made to dissolve the restraining order, and upon the hearing of this motion it appears that prior to the filing of the petition numerous lien claimants had commenced an action against the above bankrupts seeking to foreclose loggers' liens upon logs upon which they had rendered services pursuant to the provisions of the statutes of the state of Washington; that pursuant to law and on application therefor the judge of the superior court of the state of Washington for Kitsap county appointed the sheriff to sell the logs and to pay the money into the registry of the court. This was done, and on the 11th of February, the said action came regularly on for trial upon the testimony of the plaintiffs in the foreclosure of said liens, and the presiding judge at the time and prior to the issuance of the restraining order had announced and rendered his decision in favor of the said lien claimants adjudicating the amount due to the said lien claimants, and directed the formal preparation of findings and decree, the same to be presented to the judge for signature the following morning.

On the statement made upon the hearing of this motion, I am satisfied that this motion to dissolve the restraining order should be granted. The announcement of the decision of the trial judge of the state court adjudicating the amount due to the several claimants and directing the preparation of the final decree is an adjudication of the issue between the various lien claimants and the bankrupt, and the entry of the formal judgment on the following day is purely a ministerial act. Black on Judgments, § 106. Adopting the language of the Supreme Court of the United States in *Hobbs v. Head & Dowst Co.*, 231 U. S. 692, 34 Sup. Ct. 253, 58 L. Ed. —:

"We shall not speculate upon that point, beyond saying that we see no reason to doubt that the state court was right (*Bergfors v. Caron*, 190 Mass. 168 [76 N. E. 655], and cases in 27 Cyc. 85, 87, and 20 Am. & Eng. Encyc. of Law [2d Ed.] 366-368), as we are satisfied that substantial justice has been done."

The matter having in effect been disposed of by the state court, no good purpose can be served by transferring the money in the possession of the state court, decreed to belong to the lien claimants, to this court, with added expense in its distribution.

An order may therefore be entered dissolving the restraining order.

GRAND RAPIDS & I. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. April 7, 1914.)

No. 2393.

1. CARRIERS (§ 38*) — INTERSTATE COMMERCE — REBATING — INDICTMENT — VARIANCE.

Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847, as amended by Act June 29, 1906, c. 3591, 34 Stat. 584, 587 (U. S. Comp. St. Supp. p. 1309), forbids a carrier in interstate commerce to employ any rebate, concession, or discrimination or any device whatever respecting the transportation of property at a less rate than that named in the tariffs published and filed by the carrier. *Held*, that where an indictment charged rebating in the application of an existing transit tariff to local shipments, in that defendant collected of the shippers enough to pay the transit rates and charges on both inbound and outbound shipments and then paid the shippers sums equal to the local tariffs previously received from them on the inbound shipments, which method operated in every instance, in form, to convert strictly local shipments and rates, both inbound and outbound, into transit shipments and rates, the fact that the offense charged was the giving of a rebate on the outbound shipment, while the proof showed that it was given, if at all, on the inbound shipment, and that the indictment averred violations of the local tariffs, while the proof showed violations of the transit tariffs, did not constitute a fatal variance.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. § 38.*]

2. CARRIERS (§ 38*)—INTERSTATE COMMERCE—REBATING—INDICTMENT—DEVICE.

In a prosecution of an interstate carrier for rebating, it is not necessary that the indictment should set out the method or device resorted to to avoid the law, the device constituting no part of the offense denounced by Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847, as amended by Act June 29, 1906, c. 3591, 34 Stat. 584, 587 (U. S. Comp. St. Supp. 1911, p. 1309).

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. § 38.*]

3. CARRIERS (§ 38*)—INTERSTATE COMMERCE—REGULATION—REBATING—EVIDENCE.

Where an indictment charged an interstate carrier with rebating in applying lower transit rates to strictly local shipments and alleged the applying of such transit rates to certain so-called outbound transactions, evidence of the carrier's acts concerning inbound shipments, tending to disclose a scheme calculated to conceal and carry out the offense charged in the indictment and to show the means used to accomplish the end, was admissible.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. § 38.*]

4. CARRIERS (§ 38*)—INTERSTATE COMMERCE—OFFENSES—REBATING.

The precise sums alleged to have been repaid by an interstate carrier not being of the essence of the offense of rebating in violation of Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847, as amended by Act June 29, 1906, c. 3591, 34 Stat. 587 (U. S. Comp. St. Supp. 1911, p. 1309) failure to prove the amounts pleaded in the various counts of the indictment as having been repaid as rebates was not material.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. § 38.*]

5. CARRIERS (§ 38*)—INTERSTATE COMMERCE—OFFENSES—REBATING—KNOWLEDGE.

Where, in a prosecution of an interstate carrier for rebating, papers and records giving complete information concerning the shipment were on file

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 212 F.—37

in the carrier's freight offices and accessible to the employes who conducted the so-called outbound transactions to which an improper transit rate was applied, the fact that the particular agents who executed such outbound transactions did not know that the lumber shipped and contained in the outbound cars had been used locally or reconsigned at the transit point so as not to be entitled to the lower transit rate was insufficient to show that the rebates were not knowingly made.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. § 38.*]

6. CARRIERS (§ 32*)—INTERSTATE COMMERCE—TRANSIT RATES—APPLICATION.

Before a lower transit tariff can be applied by an interstate carrier to a shipment through a transit point, it must appear that there is some relation between the outbound and an inbound shipment; it being conceded that an inbound shipment consumed or reconsigned at the transit point cannot rightfully be made the basis of a transit shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83-85; Dec. Dig. § 32.*]

7. CARRIERS (§ 38*)—INTERSTATE COMMERCE—REBATING—DEFENSES—INSTRUCTIONS.

Where, in a prosecution of an interstate carrier for rebating in applying lower transit rates to certain local shipments, defendant claimed that as soon as the error was discovered it collected from all the shippers but one, who refused to pay, amounts sufficient to cover the full tariff rates, an instruction, that the offense should be regarded as consummated, and beyond recall or not and the verdict rendered against or in favor of defendant according as the jury should conclude that defendant acted with or without knowledge of the facts, was as favorable to defendant as it was entitled to.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. § 38.*]

8. CARRIERS (§ 38*)—INTERSTATE COMMERCE—REBATING—TRANSIT SHIPMENTS.

In a prosecution of an interstate carrier for rebating in applying lower transit rates to local shipment of 14 outbound cars of lumber during March, April, and May, 1911, the court did not err in excluding evidence concerning all other transit shipments made by the same shippers during the same months to show that the disputed shipments were allowed by the carrier without any intention of violating the law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. § 38.*]

9. CARRIERS (§ 38*)—INTERSTATE COMMERCE—OFFENSES—REBATING—SEPARATE OFFENSE.

Defendant interstate carrier was indicted for rebating in applying transit rates to 14 local shipments of lumber. The indictment contained a separate count for each shipment, and it appeared that each outbound car load was transported under a distinct shipping order which was accompanied by a receipted bill called "expense bill" for freight charges which had been previously paid by the shipper on an inbound shipment, which bill was made the basis of a transit shipment of the outbound car load. Each refund was paid by a draft in the month succeeding the shipment, except one which was paid the second succeeding month, and four of the payments each included two car loads. Each of the four shipments, however, were made to different consignees, except two which were made on different dates. *Held*, that the joinder of payments was a mere matter of convenience, intended to be appropriately divided and applied to the transactions to which they respectively belonged; and hence the court

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

properly held that there were 14 and not 10 separate offenses and assessed the punishment accordingly.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. § 38.*]

What constitutes an unlawful preference or discrimination by a carrier under interstate commerce regulations, see note to *Gamble-Robinson Commission Co. v. Chicago & N. W. Ry. Co.*, 94 C. C. A. 230.]

In Error to the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

The Grand Rapids & Indiana Railway Company was convicted of rebating, and it brings error. Affirmed.

J. H. Campbell, of Grand Rapids, Mich., for plaintiff in error.

F. C. Wetmore, of Grand Rapids, Mich., and E. J. Bowman, of Greenville, Mich., for the United States.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. The railway company was convicted of having paid rebates in March, April, and May, 1911, upon certain shipments of lumber from Grand Rapids, Mich., to various destinations. Judgment was entered on the verdict and a fine imposed; the company prosecutes error. The proceeding was based on section 1 of the statute of Congress commonly known as the Elkins Act, approved February 19, 1903 (chapter 708, 32 Stat. 847), as amended June 29, 1906 (chapter 3591, 34 Stat. 584, 587 [U. S. Comp. St. Supp. 1911, p. 1309]).

The alleged rebates grew out of admitted abuses of transit privileges accorded to shippers of lumber. It was developed at the trial that 14 car loads of lumber had been shipped to and 14 car loads shipped from Grand Rapids, but without any transit relations that would entitle either the inbound shipments or the outbound shipments to the benefits of the transit rates; each group being entitled only to local rates. The lumber so shipped into Grand Rapids was not stopped there and treated according to any privilege granted by an existing transit tariff, and, on the contrary, was so disposed of at the transit point (Grand Rapids) as to forbid its being made the basis of a transit rate. Local rates from the points of origin of the lumber to Grand Rapids were paid by the consignees located in that city; and subsequently a transit rate was in every instance applied both to the inbound and outbound shipments, by exacting on account of the outbound shipments freight charges equal to the transit rates from the points of origin of these inbound shipments to the various destinations of the outbound shipments, and then paying back sums equal to the local rates previously paid on the inbound shipments.

What we have thus said in respect of all the transactions may be better understood by a statement of what was concededly developed under the first count; for the counts are all alike, save in immaterial details. March 8, 1911, at Little Falls, Minn., Soo Line car 17800, containing 48,800 pounds of "pine lumber," was consigned to the Dennis

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Lumber Company, Grand Rapids, and was transported from Mackinac over the line of the Grand Rapids & Indiana Railroad and delivered to the consignee March 11th. The Dennis Lumber Company, having previously paid the local freight rate (\$97.60) and sold the lumber as "pine crating strips" to the Phoenix Furniture Company, Grand Rapids, delivered it to the latter company March 13th, and that company paid for the lumber and used it in Grand Rapids for "making crates to cover furniture." March 18th, the Dennis Lumber Company delivered to the defendant at Grand Rapids one car load of "rough lumber," 42,100 pounds, with a shipping order stating: "Through rate, 23 cents. Charges of Soo Line 17800 from Little Falls, 3/11/11, 48,800 pounds, 20 cents—\$97.60." And accompanying this order was the receipted bill (called "expense bill") for the freight so paid. The defendant treated this order and the receipted bill as entitling the Dennis Lumber Company to have the existing transit rate of 23 cents per 100 pounds, consisting of 16 cents on the inbound and 7 cents on the outbound shipments, applied respectively to 42,100 pounds of the inbound car load (because its weight was 6,700 pounds more than that of the outbound shipment) and the 42,100 pounds weight of the outbound car load; and the transit rates were accordingly applied—that is, 16 cents to the inbound and 7 cents to the outbound shipments. The outbound car, P. R. R. 85817, was consigned to Charles F. Shiels & Co., Cincinnati. By so applying the transit rates (including \$3 transit charge, and also the local rate on the excess of 6,700 pounds just mentioned), the freight charge made against the consignee at Cincinnati was \$113.23. The consignee paid this amount to the defendant and charged it back to the Dennis Lumber Company; and the defendant then paid the latter company the amount of the local rate, \$97.60, which it had previously paid on the shipment in the Soo Line car 17800—the rate clerk of defendant at Grand Rapids testifying: "We refunded the Dennis Lumber Company the amount of \$97.60, which they had paid on the inbound car." The result of all this was to give to the Dennis Lumber Company the difference between the sum of the local rates and that of the transit rate (apportioned to the inbound and outbound shipments, as stated) from Little Falls to Cincinnati, to wit, \$39.10; and the payment of this sum was charged in the indictment and found below to be a rebate.

It is conceded that the defendant and its connecting corporation lines, as named in the indictment, had at the times in question duly established all the rates, both local and transit, that are involved in the indictment; and that all these companies were subject to the act to regulate interstate commerce, and its amendments and supplements. The rates themselves are not in dispute; and, as applied to the facts of the present case, we do not understand that there is any difference between counsel touching the conditions under which the transit privileges and rates were available. Indeed, counsel for the railroad concedes that inbound lumber "which had been used locally or reconsigned to another point" did not fall within any proved transit privilege. Upon this subject the trial judge instructed the jury:

" * * * In no such case, either where the lumber was purchased by a third person and consumed by that person at Grand Rapids, or where it was forwarded to some point beyond Grand Rapids, could such a shipment be the subject of a transit privilege, because that did not come within the terms of the transit tariff; * * * and under this ruling of the court counsel concede that the shipments involved in this case and in the various counts of this indictment were not entitled to the transit privilege, and were not the subject of a transit tariff, so called."

There is no assignment of error to this portion of the charge. Hence, no question arises touching the nature and extent of the privilege intended to be created by defendant's transit tariff. The transit rate was in each instance lower than the sum of the local rates that were ordinarily applicable to such inbound and outbound shipments as these; and of these inbound shipments of lumber, ten were consumed at Grand Rapids, and the remaining four were there merely reconsigned to points beyond.¹ It results that the relations of each of these inbound shipments, both to shipper and carrier, had terminated, when they and the local rates paid on them were made the foundation of the transit shipments in dispute. And it is to be observed and borne in mind that the effort made here to defend the transactions in issue is not based upon any fact or claim of rightful use of any transit privilege. Turning now to the principal features of the defenses relied on:

[1] 1. Fatal variance is claimed. The theory of this claim is twofold: (a) That the offense charged in each instance was the giving of a rebate on the outbound shipment while the proof shows that it was given, if at all, on the inbound shipment; and (b) that the indictment avers violations alone of the local tariffs but the proofs show violations, if any, only of the transit tariffs. It will be noticed that this is not a challenge of the sufficiency of the indictment, but of portions of the evidence offered in its support. This evidence relates to the inbound shipments and to the transit rates and charges; exception was taken to its admission at the trial, and the rulings are assigned as error. As it seems to us, counsel's theory is untenable. It fails alike in either view to observe that the offense charged, and the proofs alluded to are vitally related. It also fails to give due effect to the comprehensive provision of the statute, which forbids employment of "any rebate, concession or discrimination," or of "any device whatever," respecting the transportation of property "at a less rate than that named in the tariffs published and filed by such carrier." 34 Stat. 587, 588. It is true that the outbound, not the inbound, shipments and the local rates thereon are described in the indictment; and that the offense alleged in each instance relates to the outbound shipments and local rates alone. We have seen, however, that the defendant collected of the shippers (through the consignees at destinations) enough to pay the transit rates and charges on both the inbound and outbound shipments, and then

¹ The inbound shipments so consumed in Grand Rapids were identified with and involved in the outbound shipments described in counts 1 to 6, both inclusive, and 8, 9, 10, and 12; and the four reconsigned inbound shipments were connected with the outbound shipments described in counts 7, 11, 13, and 14, and were respectively forwarded to Holland, Mich., St. Joseph, Mich., Kokomo, Ind., and Fairmount, Ind.

paid the shippers sums equal to the locals previously received of them on the inbound shipments. This method operated in every instance, in form, to convert strictly local shipments and rates, both inbound and outbound, into transit shipments and rates. It cannot escape attention, either, that the results attained through the formal exactions and repayments made touching the outbound and inbound shipments were essential elements of the outbound transactions. For otherwise there could have been no possible excuse for collecting transit rates upon the inbound shipments which had already been subjected to local rates.

[2, 3] Now to say that these facts are inadmissible is to deny that the outbound transactions are open to explanation; and yet they are distinct issues presented by the indictment. It is true that the method so resorted to, the device, is not set out in the indictment; but this was not necessary, since the device is not the offense denounced. *Armour Packing Co. v. United States*, 153 Fed. 1, 17, 82 C. C. A. 135, 14 L. R. A. (N. S.) 460 (C. C. A. 8th Cir.); s. c., 209 U. S. 56, 83, 28 Sup. Ct. 428, 52 L. Ed. 681. Thus counsel's objection is aimed against the proofs that at once describe the outbound transactions and also the device employed to carry them into effect. The natural tendency of the facts concerning the inbound shipments and the transit rates and charges was to disclose a scheme that was calculated alike to conceal and carry out the very thing charged in the indictment—to disclose the means used to accomplish the end in view; and, since these means entered into and formed a vital part of the outbound transactions, we are unable to see why the proofs were not admissible. *Armour Packing Co. v. United States*, before cited, 209 U. S. 56, 72, 28 Sup. Ct. 428, 52 L. Ed. 681; *Cleveland, C., C. & St. L. Ry. Co. v. Hirsch*, 204 Fed. 849, 853, 123 C. C. A. 145 (C. C. A. 6th Cir.). The execution of such a method clearly operated to transport the outbound lumber at less rates than those named in the local tariffs "published and filed" by defendant.

[4] Hence we pass by an objection urged that the amounts of the rebates stated in the counts of the indictment were not proved, with the remark that the precise sums alleged were not of the essence of the offense. The case in this respect must therefore fall within the general rule that it is sufficient if substantial amounts be proved. *United States v. Harper* (C. C.) 33 Fed. 471, 476, Circuit Judge Jackson and District Judge Sage concurring; *Commonwealth v. O'Connell*, 12 Allen (Mass.) 451, 453, 454; 1 Wharton, *Crim. Ev.* (10th Ed.) § 131, at page 357. The proofs pointed out, with the rest of the evidence, were submitted to the jury, under instructions to return a verdict for the defendant unless it was found that the concessions were intended to be made upon the outbound shipments.

It may be added that the usual tests of the necessary relations between an indictment and the evidence are, we think, to be found here. The indictment sets out: The regularly established local rates respecting each shipment from Grand Rapids to destination; the date and destination of each outbound shipment, the usual description of car, and the kind and weight of lumber transported; the interstate character of the carriers and the lines engaged in each movement; and the

plan of first collecting the regular rates, and then, through subsequent repayments, in effect transporting the lumber at less rates than those named in the tariffs. While the indictment might properly have contained more details, the essential elements of the offense are stated with such particularity as fairly to have informed defendant of what it must meet, and in the event of conviction or acquittal to enable it to plead the indictment in bar of any subsequent prosecution for the same offense. *N. Y. Cent. v. United States*, 212 U. S. 481, 497, 29 Sup. Ct. 304, 53 L. Ed. 613; *Harrison v. United States*, 200 Fed. 662, 673, 119 C. C. A. 78 (C. C. A. 6th Cir.); *Foster v. United States*, 178 Fed. 165, 171, 101 C. C. A. 485 (C. C. A. 6th Cir.); *Standard Oil Co. of N. Y. v. United States*, 179 Fed. 614, 618, 103 C. C. A. 172 (C. C. A. 2d Cir.).

[5] 2. It is contended that the refunds, as they are called, were not made knowingly. The argument is that defendant's agents who executed the outbound transactions did not know that the lumber in the inbound cars had been used locally or reconsigned at the transit point. We do not understand it to be claimed, however, that defendant did not have agents who knew these facts as well as all other details of the transactions. Concededly, papers and records were kept in the freight offices of defendant in Grand Rapids, which contained all the information upon the subject. These papers and records were made out by defendant's agents, were in their custody, and admittedly were accessible to the very men who conducted the outbound transactions; and, as illustrative of the pertinent facts so at hand, the disposition in each instance of the inbound shipments was known to and reported by the yardmaster and at least one of the car checkers. These men, as also the rate clerk, the freight agent, the cashier of the local freight office, and his assistant, testified, and while each did not know all the facts, it is plain enough that, if the composite knowledge so possessed by its agents was imputable to the defendant, its knowledge was complete. In the course of the charge the District Judge said:

"To warrant a conviction in this case you must find: First, that a rebate was given; second, that such rebate was given knowingly; third, that it was given with respect to the transportation of the lumber set forth in the indictment; and, fourth, that thereby such lumber was transported at a less rate than that set forth in the published and filed tariffs. So that the second question for you to determine, if you find in favor of the government upon the first question, is this: Was the rebate paid knowingly by the defendant?"

After calling the attention of the jury to a number of the witnesses who testified upon the subject, the court in substance stated that it was not necessary that one or two of these men should know all of the facts, but that:

"* * * The sum of the knowledge of those two men (referring to the rate clerk and the car checker) and others, other employes of the defendant, acting within the scope of their employment, constituted the knowledge of this defendant. * * * If you find that this defendant did not knowingly give the rebate in respect to the outbound shipment, it will be your duty to acquit the defendant. * * *"

Having in mind these instructions and the verdict, can it be rightfully said that the defendant did not knowingly commit the acts charged?² The Elkins Act, as amended June 29, 1906, provides (34 Stat. 588):

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person."

The only change made by the amendment of this provision was to enlarge it so as to include shippers. In *New York Cent. R. R. v. United States*, 212 U. S. 481, at page 497, 29 Sup. Ct. 304, at page 308 (53 L. Ed. 613), it was claimed that this provision in its original form was unconstitutional, because it in effect made the crime of one person that of another and so deprived the latter of due process of law and the presumption of innocence; but there, as here, the railroad agents were not parties, and Mr. Justice Day said:

"There can be no question that Congress would have applied these provisions to corporation carriers, whether individuals were included or not. In this view the act is valid as to corporations. *Berea College v. Kentucky*, 211 U. S. 45, 55 [29 Sup. Ct. 33, 53 L. Ed. 81]."

In the course of the discussion which led to this conclusion, the learned justice said (212 U. S. 494, 495, 29 Sup. Ct. 307, 53 L. Ed. 513):

"It is true that there are some crimes which, in their nature, cannot be committed by corporations. But there is a large class of offenses, of which rebating under the federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. * * * If it were not so, many offenses might go unpunished and acts be committed in violation of law where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices, forbidden in the interest of public policy."

Counsel's argument will not bear the test of the statutory provision so sustained and construed. It overlooks the doctrine of imputability thus established; it considers only particular agents, who denied knowledge concerning the local use or reconsignment of the inbound lumber at the transit point, and so ignores the knowledge of other agents who confessedly knew these facts. It may for the purposes of the question be conceded that agents who were in truth ignorant of such facts could not themselves be successfully prosecuted, but it would not follow that the corporation could not. The statutory provision plainly fastens upon the corporation responsibility for the acts of all its agents, whose combined knowledge and conduct necessarily

² The question here is not whether evidence tending to show want of knowledge was erroneously excluded, but it is whether the evidence actually received, as a whole, tended to charge defendant with knowledge that the inbound lumber had been used locally or reconsigned at the transit point; and so the case differs in this respect from *Standard Oil Co. of Indiana v. United States*, 164 Fed. 376, 381, 382, 90 C. C. A. 364 (C. C. A. 7th Cir.).

affect the validity of any particular transaction that is executed by only some of its agents; if this were not so, the ordinary system of departmental corporate agencies could be used to frustrate the law. This may be seen, for instance, upon the slightest consideration of the outbound transactions.

[6] The concession that inbound lumber consumed or reconsigned at the transit point cannot rightfully be made the foundation of a transit shipment is tantamount to saying that, before the benefits of a transit shipment can be accorded, some relation must in fact exist between the proposed outbound shipment and an inbound shipment that is capable of being forwarded under the transit tariff. Since no such relation whatever is here claimed, the requisite degree of relationship need not be considered. It results, however, that the transit tariff gives a conditional privilege; that is, a special privilege, which is available only under certain terms and conditions (*Diamond Mills v. Boston & Maine R. Co.*, 9 Interst. Com. Com'n Rep. 311, 315; *Barnes, Interstate Transp.* § 216, at p. 386); and for services rendered and expenses incurred in the granting and exercise of such a privilege the carrier is entitled to reasonable compensation (*Southern Ry. Co. v. St. Louis Hay Co.*, 214 U. S. 297, 301, 29 Sup. Ct. 678, 53 L. Ed. 1004). Thus the privilege, besides being conditional, may be of mutual profit to carrier and shipper; certainly no one can both receive such benefits and shut his eyes to the existence or not of the conditions essential to the granting of the privilege. Therefore, to hold that the carrier may establish a transit tariff and then shield itself against responsibility for granting its privileges where the conditions do not warrant it, upon the theory that its particular agents who conducted the outbound transactions did not acquaint themselves with the real conditions, while others of its agents did possess such knowledge, would be, as it seems to us, to subvert alike the letter and the intent of the statute. It follows that defendant must be held to have knowingly granted the refunds; and the necessary effect of this was purposely to violate the statute. 34 Stat. 588; *Armour Packing Co. v. United States*, 209 U. S. 56, 86, 28 Sup. Ct. 428, 52 L. Ed. 681; *Chicago, St. P., M. & O. Ry. Co. v. United States*, 162 Fed. 825, 842, 843, 90 C. C. A. 211 (C. C. A. 8th Cir.); *Ellis v. United States*, 206 U. S. 246, 257, 27 Sup. Ct. 600, 51 L. Ed. 1047, 11 Ann. Cas. 589.

[7] 3. It is claimed that as soon as defendant discovered its errors, so-called, it collected from all the shippers, except one that refused to pay, amounts sufficient to cover the full tariff rates, and so relieved itself of every charge made in the indictment; and it is true that these sums were repaid. The charge of the court upon the question so raised was in effect that the offense should be regarded as consummated and beyond recall or not, and the verdict rendered against or in favor of the defendant, according as the jury should conclude that defendant acted with or without knowledge of the facts involved in the transactions in dispute; and we are constrained to believe that this was as favorable a presentation of the rights of defendant as the law would permit. For reasons already stated concerning defendant's knowledge, we must regard this question as concluded by the verdict.

[8] In this connection we may speak of an assignment of error touching the exclusion of evidence offered by defendant to show all the transit shipments that were made during the period involved in the 14 shipments. It seems that the shippers of the lumber contained in the 14 outbound cars made 112 additional shipments which were accorded the transit privilege during the months of March, April, and May, involved in the indictment; and the insistence is that, since the 14 outbound cars were only a small portion of the total transit shipments made, the presence of the whole number would support defendant's claim that the disputed shipments were allowed without any intention of violating the law. It is plain that, unless the excluded shipments were admittedly entitled to the transit privilege, their introduction would confuse the issues concerning the 14 shipments; and the absence of such admission would warrant their exclusion as irrelevant and so immaterial. But conceding that they were entitled to the transit privilege, if we are right in the holding herein that this privilege is conditional and that defendant was chargeable with knowledge that the condition had not been performed, no prejudicial error was committed by excluding the other shipments. It might be that their presence would aid in excusing the agents who executed the outbound transactions, but not the defendant.

[9] 4. The last objection is that there were not more than 10 offenses, if any were committed, because "there were 10 payments of refunds on 14 shipments." The court imposed a fine of \$1,000, upon each of the 14 counts—a total of \$14,000. Special attention must now be given to the form of allegation contained in each of the counts, and to the lack of relationship between the transactions they describe. The offense charged in each count is in substance stated in the margin.³ Each outbound car load was transported under a distinct shipping order. This order was accompanied by the receipted bill, called "expense bill," for freight charges which had been previously paid by the shipper on an inbound shipment; and this expense bill was made the basis of a transit shipment of the outbound car load. A memorandum was at the same time made by defendant at Grand Rapids, which, among other things, showed the amount of the refund that was to be made later; that is, the inbound freight charges represented by the expense bill. Each refund was paid by draft in the month succeeding the shipment, except one that was paid the second succeeding month; and four of the payments each included two car loads. The lack of relationship between the two shipments that were covered by each of the four drafts may be further emphasized by the facts that these shipments

³ That on a stated date defendant received from the shipper a car load of lumber for transportation from Grand Rapids to a particular destination; that defendant did immediately thereafter transport the lumber (over its road and connecting lines) and collect the "lawful charges" at destination; that on a later date named defendant at Grand Rapids "did knowingly and willfully offer, grant and give" to the shipper "a rebate," in an amount specified, "in respect to the transportation of such property * * * whereby such property was transported * * * at a rate and charge less" by the sum so paid "than the rate and charge * * * named in the schedule and tariff * * * published and filed. * * *"

were made to different consignees, except two and they were made on different dates.

Concededly the 10 drafts completed 10 of the offenses charged; but it is insisted that the inclusion of a second car load in four of the payments operated in each instance to complete only one offense, not two offenses. Now it will be recalled that the pertinent language of the charge made in each count is that the defendant "did * * * offer, grant and give * * * a rebate," and it should be stated that the date alleged in respect thereto corresponds in each instance with the date of payment of the rebate alleged. However, if it was permissible to allege and prove a method of rebating, which involved the offering, granting, and giving of rebates, it is clear enough that the proofs tending to show adoption of the previously paid inbound rates as "expense bills," their entries in defendant's books as refunds to be made later, and their subsequent payment, made a case of 14 offenses. If such a course was not tenable, then two independent transactions, which were separately initiated and step by step executed down to the point of payment, may in effect be merged into one transaction and one offense simply by ignoring the preconceived device and employing one sum, instead of two, to close both transactions. Here the joinder of payments was obviously a matter of convenience, and the only natural inference is that they were intended to be appropriately divided and applied to the transactions to which they respectively belonged; and as we read the decisions, in the light of their facts, there is nothing in the law to forbid observance of that intent in an indictment and prosecution. This is not saying that payment is not necessary to complete such offenses (*New York Central R. R. v. United States*, supra, 212 U. S. at page 498, 29 Sup. Ct. 304, 53 L. Ed. 613); and to hold that these payments did not each complete two distinct transactions, and consequently two offenses would be to ignore and defeat the clear purpose of the payments themselves. The present case in this respect is quite like that of the *United States v. Standard Oil Co. of N. Y.* (D. C.) 192 Fed. 438; and Judge Hazel's conclusion and reasons as there stated seem to us to be sound.

In view of the opinion in that case, it is not necessary to state the differences between the present case and the cases there cited and distinguished; and this is true of the earlier opinion of Judge Hazel, and its affirmation, in *Standard Oil Co. of New York v. United States*, 179 Fed. 614, 625, 103 C. C. A. 172 (C. C. A. 2d Cir.). The case of *United States v. Stearns Salt & Lumber Co.* (D. C.) 165 Fed. 735, differs from the instant case in that the proofs here show an express agreement for refund at the time of each individual shipment; and no question concerning the form of the indictment as respects this feature is raised. We think *United States v. Bunch* (D. C.) 165 Fed. 736, is distinguishable upon the same theory. We do not discover that the Supreme Court has passed upon the precise question thus involved.

Upon the whole, we are convinced that the judgment below must be affirmed.

NICHOLS & COX LUMBER CO. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. April 7, 1914.)

No. 2409.

1. STATUTES (§ 161*)—IMPLIED REPEAL.

The principle that where a later act embraces a whole subject it supplants an earlier act dealing with such subject does not avoid the rule that repeals by implication are not favored.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230-234; Dec. Dig. § 161.*]

2. CARRIERS (§ 23*)—REBATES—IMPLIED REPEAL.

Interstate Commerce Act Feb. 4, 1887, c. 104, § 10, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3160), as amended by Act June 18, 1910, c. 309, § 10, 36 Stat. 549 (U. S. Comp. St. Supp. 1911, p. 1293), making it an offense to offer, grant, give, or solicit, accept, or receive a rebate from a carrier for the transportation of goods in interstate commerce, and prohibiting the shipper from obtaining, or attempting to obtain, by false statement or representation as to cost, value, nature, or extent of injury, or by the use of any false bill, bill of lading, receipt, etc., any allowance, refund, or payment for damages, or otherwise, was not repealed by implication by Hepburn Act June 29, 1906, c. 3591, § 2, 34 Stat. 587 (U. S. Comp. St. Supp. 1911, p. 1289), making it an offense to obtain interstate transportation at less than tariff rates by false billing, false classification, false weighing, or false report of weight, etc.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 57-59; Dec. Dig. § 23.*]

What constitutes an unlawful preference or discrimination by a carrier under interstate commerce regulations, see note to Gamble-Robinson Com'n Co. v. Chicago & N. W. Ry. Co., 94 C. C. A. 230.]

3. CARRIERS (§ 32*)—INTERSTATE COMMERCE—REBATES—TRANSIT PRIVILEGE.

Where lumber comprised in two shipments was sold and consumed at the transit point, and that contained in a third inbound shipment was redesignated at the transit point to another city in the state, so that the objects, as well as the shipments, were fully accomplished at the transit point, an application of transit rates to such shipments which were lower than the local rates applicable thereto constituted rebating.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83-85; Dec. Dig. § 32.*]

4. CARRIERS (§ 38*)—OFFENSES—ACCEPTING REBATES—ACTS OF AGENT.

Where transit rates were applied by an interstate railroad company to certain shipments of lumber which were not entitled thereto, and some of the agents of defendant corporation knew what was done with the inbound lumber, and that the shipments were not entitled to such rates, defendant was chargeable with their knowledge, and was subject to prosecution for accepting a rebate.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. § 38.*]

5. CARRIERS (§ 38*)—INTERSTATE COMMERCE—RATES—REBATES—APPLICABLE RATES—KNOWLEDGE—PRESUMPTION.

Where an interstate railroad company wrongfully applied transit rates to certain shipments of lumber, which were only entitled to higher local rates, the shipper's agents would be presumed to have knowledge as to which rates were applicable, which knowledge would be imputed to the shipper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. § 38.*]

6. CARRIERS (§ 38*)—INTERSTATE COMMERCE—RATES—REBATES.

Where a shipper of lumber knowingly accepted a settlement on the basis of a transit rate, when the shipments were only entitled to local rates, it was no defense to a prosecution for rebating that the railroad company did not keep its rate sheet posted in two public and conspicuous places in its depot, as required by the Interstate Commerce Law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. § 38.*]

7. CARRIERS (§ 38*)—INTERSTATE COMMERCE—REBATING—INDICTMENT—VARIANCE.

In an indictment for accepting a rebate from an interstate carrier by the application of transit rates to certain local shipments of lumber to the transit point, and a reshipment thereof to other points, the fact that one of the cars was sold to the Illinois Central Railroad Company, shipped from the transit point to Chicago, and from there by the purchasing company to New Orleans, and that the latter company absorbed the charges between Chicago and New Orleans over its own line, did not constitute a fatal variance.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. § 38.*]

In Error to the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

The Nichols & Cox Lumber Company was convicted of accepting and receiving a rebate on an interstate shipment of lumber, and brings error. Affirmed.

P. H. Travis, of Grand Rapids, Mich. (Ganson Taggart and Charles McPherson, both of Grand Rapids, Mich., of counsel), for plaintiff in error.

F. C. Wetmore, of Grand Rapids, Mich., and E. J. Bowman, of Greenville, Mich., for the United States.

Before WARRINGTON, KNAPPEN and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. The defendant below was indicted and convicted upon three counts, in each of which it was alleged that the defendant did "knowingly and willfully solicit, accept, and receive," from the Grand Rapids & Indiana Railway Company, "a rebate," in a sum stated "in respect to the transportation" of property in interstate commerce, "whereby such property was transported * * * at a rate and charge less" by the sum so stated "than the rate * * * named in the schedules and tariffs * * * published and filed and posted" by the certain common carriers named in the indictment. The three counts describe three car loads of lumber shipped from Grand Rapids to destinations, as follows: The first count, a car load of hard wood flooring to New Orleans; the second, a car load of dressed lumber to Binghamton, N. Y.; and the third, a car load of rough lumber to Milwaukee. These shipments are the same as those described in counts 6, 7, and 8 of the indictment against the Grand Rapids & Indiana Railway Company, involved in the decision this day rendered in No. 2393 (212 Fed. 577); and, since the shipper is forbidden knowingly to "solicit,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

accept, or receive," just as the carrier is to "offer, grant, or give" rebates, and such acts are alike declared to be misdemeanors and punishable with the same penalties, the questions decided in the railroad case are determinative of this case, except as otherwise stated herein.

[1] 1. It is claimed that the provisions of the statute upon which the indictment and prosecution were based "have been repealed as a necessary result of the subsequent legislation on the same subject." Counsel's argument comes to be an assertion of conflict between section 10 of the original act to regulate commerce, as amended June 18, 1910 (36 Stat. L. 549, 550), and section 1 of the Elkins Act, as amended by the Hepburn Act of June 29, 1906 (34 Stat. L. 587, 588). The theory is that this conflict is such as to work an implied repeal; but the settled rule that repeals by implication are not favored is admitted. The principle sought to be applied is that the later act embraces the whole subject, and so supplants the earlier act. This does not, however, avoid the rule concerning repeals by implication; for, as Mr. Justice Harlan said in *Frost v. Wenie*, 157 U. S. 46, 58, 15 Sup. Ct. 532, 537 (39 L. Ed. 614):

"Where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both."

[2] Comparison of the two sections in dispute shows that they are aimed at different evils, and that they define and denounce the acts constituting such evils as separate and distinct offenses. Broadly speaking, these evils and the consequent offenses are described and known as "rebating" and "false billing"; the former usually succeeding and the latter preceding payments of freight charges. It is true that the results sought to be attained by the perpetrators of such offenses are the same, in the sense that they operate to reduce the established rates; it results that the language found in each of the enactments is in some respects necessarily similar to that of the other; and yet the dominant features of each act point to a distinction that cannot be misunderstood. In the earlier act, for example, it is made unlawful "to offer, grant or give, or to solicit, accept or receive a rebate;" while in the later act "false billing, false classification, false weighing or false report of weight" are denounced against the carrier, and "false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement" against the shipper.¹ This is enough, we think, at once to differentiate the two enactments and reconcile the legislative objects of preserving both, as also of providing a different penalty for the violation of each. Hence, unless we

¹ Further illustration of this distinction may be found in another provision of section 10, above mentioned, which prohibits the shipper from obtaining or attempting to obtain "by false statement or representation as to cost, value, nature, or extent of injury, or by the use of any false bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious or fraudulent statement or entry * * * any allowance, refund, or payment for damage or otherwise," whereby transportation is secured at less than the regular rates.

are mistaken in our interpretation of the main purposes of these two acts, there can be no escape from the decision in *Frost v. Wenie*, supra.

[3] 2. It is not conceded here, as it was in the railroad case, that there was no transit privilege of the railway company which could be rightfully applied to the three inbound shipments that were made the basis of the transit rates accorded to the three (outbound) shipments described in the present indictment. In the course of the charge, when defining a "transit or stop-off privilege," the court said:

"As applied to shipments of lumber the privilege consists in the right to stop a car in transit for certain purposes, for the purpose of dressing, manufacturing, sorting, storing, reconsigning, partly unloading, or to complete loading, and the reforwarding under a through rate from point of origin to destination; in other words, the tariffs then in force entitled a shipper of lumber to stop a car at Grand Rapids for the purpose of dressing, or sorting, or partially unloading, or manufacturing, and then reshipping or reconsigning that, or some other lumber, or the product of that lumber.

"It appears from the evidence in this case and is undisputed that under the transit tariff then in force, neither of the inbound shipments of lumber was entitled to a transit privilege nor a stop-off charge."

Error is specially assigned to this latter paragraph. After describing the three inbound shipments that were used with the three outbound shipments for the purpose of applying the transit rates, the court ruled (and exception thereto was taken though error is not assigned):

"So that as a matter of law none of the inbound shipments specified in the proofs in this case could constitute or did constitute the basis of a transit privilege, and the defendant had no right to claim a transit privilege, upon any of those shipments."

Now, if we assume that the assignment reaches all these portions of the charge, it is unavailing. In the first place, under the transit privilege given by the railway tariff—in part quoted in the margin ²—

2 "Lumber and articles taking lumber rates * * * in car loads which originate on G. R. & I. Ry. or on foreign lines named below, may be stopped to dress, work, sort, consign, partly unload or to complete loading at stations on Grand Rapids & Indiana Ry. on basis of through rate point of origin to final destination in effect at date of shipment via routes provided in tariffs lawfully on file with Interstate Commerce and State Commissions at a charge of \$3.00 per car in addition to tariff rates, except as provided in item No. 10, settlement to be made with agent at stop-off station. The stop-off charge is to be applied on the car or cars received at the stop-off station. * * *

"When from other foreign lines, the through rates from points of origin to final destinations will apply, provided all lines over which the shipments travel join in the rates. * * *

"On shipments originating on the Grand Rapids & Indiana Railway, the rate to stop-off station will be the difference between the through rate from point of origin to final destination and the rate from stop-off station. * * *

"On shipments originating on foreign line, the rate to junction station, where received on Grand Rapids & Indiana Railway, will be such lines' proportion of the through rate to final destination. * * *

"To receive the benefit of through rates point of origin to final destination, shipments must be re-consigned within one year from date of bill of lading at point of origin. * * *

"The lading forward must be of the same kind as the original lading, i. e., soft lumber inbound and outbound, hard wood lumber inbound and outbound,

a through movement is contemplated, with suspension at the transit point for one or more specified purposes, and later a reconsignment to destination. In the next place, considering all the tariff provisions pointed out, we may, in deference to counsel's argument, assume, though the facts do not call upon us to decide, and we do not decide, either that an inbound shipment of lumber may be stopped at the transit point and piled (say in defendant's yard) and then replaced by and the movement continued with other similar lumber, or that the inbound movement may, through reconsignment alone, be continued with the same lumber; but it will be noticed that upon this theory at least constructive relation and identity between such piled and substituted lumber, and actual relation in the other instance, may be shown to exist between the inbound and outbound shipments. Still, upon this view, or even on the most liberal theory of interpreting the transit tariff, the lumber involved in the instant case was not entitled to a transit rate. The facts concerning the three inbound shipments are not in dispute. The lumber comprised in two of them was sold and consumed in Grand Rapids, and that contained in the remaining inbound shipment was reconsigned at the transit point and sent to Holland, Mich.

It is too clear for argument that the objects of these inbound shipments, including that of the reconsigned shipment, had been fully accomplished; the objects, as well as the shipments, were beyond recall within the most generous view that can be taken of the transit tariff—they were dead. It is therefore impossible in such circumstances to show the existence of any sort of relations between such inbound lumber and that of the outbound shipments; and this is what the present case comes to. However, complaint is made that defendant was not permitted to show that at the time it presented the inbound freight bills, which it had paid on these dead shipments, it had other inbound bills that might rightfully have been used as a basis

shingles inbound and outbound, etc., mixed car loads of the above commodities, will be permitted, but no substitution that will in any way impair the integrity of the through rate.

"The station at which the stop takes place must be on the direct line of G. R. & I. Ry., in direction shipment is moving between points of origin and final destinations. * * *

"Shipments may be reconsigned under the above conditions without stop-off charge provided there has been no change in lading and car is not delayed more than 24 hours and no extra switching service has been performed at station where reconsignment takes place. If delayed beyond 24 hours \$3.00 stop-off will be charged for each car.

"Billing Instructions. Agent making card and regular waybills for original load will insert under proper heading name of station at which car should be stopped and for what purpose, name of party who is to handle shipment, and will stamp at top margin of card and regular waybills in two conspicuous places 'stop-off car.' Regular waybill must be mailed to the stop-off station.

"Shipments will be billed to the stop-off station at the weights and rates provided for herein. The charge made for stopping cars should be inserted on regular waybills in 'advance' column specifying what it is for and notation must also be made in bills of lading. * * *

"All shipments will be rebilled from the stop-off station at remainder of through rate after deducting the rates which are applied from point of origin to the stop-off station."

for the transit rates in dispute. Further, it is, in substance, urged that the outbound lumber was transit stock, and entitled to the benefit of transit rates; the idea being that the lumber was not produced at Grand Rapids, but at points beyond from which it might have been moved on through rates. And so it is at last insisted that the most the defendant did was to obtain proper rates in an improper manner. Surely this argument, however plausible, cannot be sound. It fails to consider that a transit tariff is, as pointed out in the railroad case, a special privilege which is available only on the performance of a condition precedent. As applied to counsel's argument, defendant was not entitled to a through rate except on the surrender of a legally applicable inbound bill—a live bill, not a dead one. Nor is it important that the outbound lumber might in seasonable time have been given the transit privileges and rates between the points of origin and the ultimate destinations. This was no more the performance of the requisite condition precedent than was the presentation of dead bills. In short, upon any theory of the transit tariff, defendant's acts and omissions precluded it from so procuring the through rates, and since its methods were improper, the rates it obtained were themselves improper; both were in plain conflict with the act of Congress, which forbids soliciting rebates.

[4, 5] 3. It is strenuously urged that the defendant could not rightfully be convicted because: (a) its agents, who in effect solicited the unlawful rates, were ignorant of the disposition that had been made of the inbound lumber; and (b) they acted "under a good-faith misapprehension as to the interpretation to be given to the tariffs." It is enough to say of the first of these reasons that the evidence in the instant case was sufficient to warrant the jury in finding that some of defendant's agents really knew what had been done with the inbound lumber; and we see no way rationally to distinguish this feature of the case from the corresponding portion of the decision in the railroad case. As to the second reason, the only question involved concerned a choice between the local and the transit rates, and, aside from their obvious knowledge that the latter was the lower rate, the agents, and consequently the defendant, must be presumed to have known which was applicable. *Chicago & Alton R. R. Co. v. Kirby*, 225 U. S. 165, 166, 32 Sup. Ct. 648, 56 L. Ed. 1033; *Armour Packing Co. v. United States*, 209 U. S. 56, 86, 28 Sup. Ct. 428, 52 L. Ed. 681; *Rosen v. United States*, 161 U. S. 291, 16 Sup. Ct. 434, 40 L. Ed. 606; *Standard Oil Co. of N. Y. v. United States*, 179 Fed. 614, 627, 103 C. C. A. 172 (C. C. A. 2d Cir.); *Reynolds v. United States*, 98 U. S. 145, 167, 25 L. Ed. 244. And here we may dispose of a somewhat kindred assignment of error respecting the court's charge that:

"It appears by the evidence in the case, and it is undisputed, I think, that the railway tariffs and schedules of rates were properly filed and posted and published," etc.

[6] Apart from the evidence tending to show that the railroad rate sheet was accessible to defendant's agents, it is sufficient to say that, even if printed copies were not "kept posted in two public and conspicuous places in every depot" etc., such failure would not excuse

defendant. *United States v. Miller*, 223 U. S. 599, 604, 32 Sup. Ct. 323, 56 L. Ed. 568.

[7] 4. It is insisted that there is a fatal variance between the allegations of count 1 and the evidence adduced in its support. The difficulty arises from the facts that among the connecting lines alleged in the indictment to have transported the lumber from Grand Rapids to New Orleans was that of the Illinois Central between Chicago and New Orleans, and that the Illinois Central, having purchased the lumber from defendant, transported it over its line without charge. It is alleged in the indictment that the "lawful charges" for transporting the lumber were collected at destination. It is not disputed that the allegations of the indictment in all other respects were proved. The proofs in this case show a scheme like that passed upon in the case against the Grand Rapids & Indiana Railway Company, before cited, and it is not necessary to repeat the facts in that behalf here. The circumstance that the Illinois Central absorbed the charges over its own line did not mislead the defendant, or in any wise prejudice its defense. 1 U. S. Comp. Stat. § 1025, p. 720. With this explanation, what was said in the railroad case upon the subject of variance must be regarded as concluding the present question.

Our consideration of the record satisfies us that upon the issues made at the trial the evidence was sufficient to warrant the verdict, and that no reversible error occurred in the rulings or charge of the trial court.

The judgment below is accordingly affirmed.

INVESTMENT REGISTRY, Limited, v. CHICAGO & M. E. R. CO. et al.

REYNOLDS et al. v. MOSES.

(Circuit Court of Appeals, Seventh Circuit. June 6, 1913.)

No. 1993.

1. APPEAL AND ERROR (§ 82*)—DECISIONS REVIEWABLE—FINALITY OF INTERLOCUTORY DECREE—DENYING CONFIRMATION OF SALE.

The successful bidder for property sold under a decree of foreclosure, whether or not previously a party to the suit, becomes a new party in his capacity as purchaser, and as to him a decree or order denying confirmation of the sale is final and appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 379-385, 414, 416, 478, 479, 482, 483, 517-522; Dec. Dig. § 82.*]

Finality of judgments and decrees for purposes of review, see notes to *Brush Electric Co. v. Electric Improvement Co. of San Jose*, 2 C. C. A. 379; *Central Trust Co. v. Madden*, 17 C. C. A. 238; *Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co.*, 28 C. C. A. 482.]

2. APPEAL AND ERROR (§ 154*)—PERSONS ENTITLED TO APPEAL—ESTOPPEL.

A reorganization committee of bondholders, whose purchase of the property of a corporation at foreclosure sale was set aside on the ground that they were parties to a combination to suppress competition at the sale, did not estop themselves from exercising the right to appeal from the decree denying confirmation by offering to increase the amount of their bid.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 957-969; Dec. Dig. § 154.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. MORTGAGES (§ 526*)—FORECLOSURE SALE—PERSONS WHO MAY QUESTION VALIDITY.

A court may on the motion of the master or an outsider even, or on its own motion, investigate charges of actual or constructive fraud in a foreclosure sale made under its order, and the position or previous conduct of the party objecting to confirmation is immaterial.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1530-1534; Dec. Dig. § 526.*]

4. RAILROADS (§ 192*)—FORECLOSURE SALE—VALIDITY—COMBINATION IN RESTRAINT OF BIDDING.

Pending a suit to foreclose a mortgage securing bonds of an electric railroad company, third persons, having no previous interest, bought up a large number of the bonds with the intention of buying the property at the foreclosure sale and using the bonds in payment. Prior to the sale, however, they sold their bonds to a syndicate of bondholders for a sum largely in excess of the cost to them and more than \$300,000 greater than the actual or market value of the bonds, with an agreement that they and their agents would "to the extent of their power and influence * * * in every reasonable way aid and assist the purchasers in becoming the purchasers" of the property. The syndicate transferred the bonds to a reorganization committee, which assumed its obligations under the contract, including liability for a deferred payment of the greater part of the purchase price. Such committee was the only bidder at the foreclosure sale and purchased the property of the company for less than its fair value. *Held*, on the evidence, that it was one of the purposes of the syndicate in buying the outside bonds to prevent the holders from competing at the sale, that the reorganization committee was chargeable with notice of the purpose and effect of such contract, and that the court properly refused to confirm the sale on objections by a nonassenting bondholder.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 391, 634-642; Dec. Dig. § 192.*]

5. RAILROADS (§ 192*)—FORECLOSURE SALE—VALIDITY—COMBINATION IN RESTRAINT OF BIDDING.

Such contract was not rendered lawful by the fact that at the time it was made the sellers of the bonds by their purchases had acquired an interest under the mortgage where their sole purpose was to use the bonds in buying the property at the sale.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 391, 634-642; Dec. Dig. § 192.*]

6. RAILROADS (§ 192*)—FORECLOSURE SALES—VALIDITY.

In cases of foreclosure sales of the property of railroad companies or other large corporations, where by reason of the large sums involved general bidders are excluded and it has become customary for bondholders to combine and buy in the property for the purpose of reorganization, where there are nonassenting bondholders it is the duty of the court to be vigilant to see, on the one hand, that a dissenter is not permitted to create a maneuvering value in his bonds by opposing confirmation, and, on the other, that the majority does not use its power to oppress the minority.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 391, 634-642; Dec. Dig. § 192.*]

7. RAILROADS (§ 192*)—FORECLOSURE SALES—VACATION AND RESALE.

Where a sale of the property of a railroad company under a foreclosure decree was set aside and increased bids were offered by others, it was discretionary with the court to receive competitive bids in open court or to order a resale.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 391, 634-642; Dec. Dig. § 192.*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by the Investment Registry, Limited, against the Chicago & Milwaukee Electric Railroad Company and others. George M. Reynolds, Ernest A. Hamill, W. E. Stavert, George A. Somerville, Miller Lash, and others appeal from an order sustaining objections of Matilda W. Moses, and vacating a sale of the property of defendant railroad company. Affirmed.

For opinion below, see 206 Fed. 488.

This is an appeal by the Reorganization Committee, which was the sole bidder and became the purchaser at the foreclosure sale of the property of the Chicago & Milwaukee Electric Railroad Company of Illinois, from a decree refusing to confirm the sale and ordering a resale.

Two corporations of the same name had been organized, one under the laws of Illinois, the other, of Wisconsin; their roads constituted a continuous line from Chicago to Milwaukee; and, under a lease of the Wisconsin road, the Illinois corporation operated the entire line.

A finding of facts was made by the trial court, as follows:

"The court doth find that said objector, Matilda W. Moses, is now and has since November, 1905, been the owner and holder of 12 bonds of the Chicago & Milwaukee Electric Railroad Company (Illinois corporation), dated July 1, 1902, and maturing July 1, 1922, being part of the issue of \$4,000,000 of an authorized issue of \$5,000,000 of bonds of said company secured by a deed of trust to said Merchants' Loan & Trust Company, trustee, and described in the decree herein, together with interest coupons attached to said bonds and maturing on and after July, 1908; that said bonds of said objector had never been filed by her with any bondholders' protective committee or any reorganization committee of the properties of either of said railroads, but are still in the possession of said objector.

"The court further finds that, after default in the payment of interest due July 1, 1908, upon the bonds of the Chicago & Milwaukee Railroad Company (Wisconsin corporation) on the issue of \$10,000,000, certain of the bondholders, owning certain of said bonds, entered into a so-called Bondholders' Protective Agreement, bearing date the 10th day of October, 1908, with John V. Clark and C. B. Shedd, of Chicago, Miller Lash, George A. Somerville, and Robert Cassels of Toronto, Canada, wherein and whereby said persons last named were constituted a committee in the interest of the bondholders of said Wisconsin corporation who might deposit their bonds with certain depositories therein designated, under and pursuant to the terms of said agreement; that subsequent to the organization of said committee, certain of the bondholders of said Wisconsin corporation, deposited with the depositories therein named the bonds owned by them respectively; that the personnel of said committee continued the same until the death of John V. Clark in May, 1911, whereupon, pursuant to the terms of the agreement providing for the filling of vacancies in the membership of said committee resulting from the death of any of the members thereof, Ernest A. Hamill, of Chicago, was made a member of said committee in his place; and that continuously since said time said committee was and is now composed of said Hamill, said Lash, said Shedd, said Somerville, and said Cassels; that, from and after the creation of said committee, said committee was and continued to be represented by Jacob Newman and the firm of Newman, Northrup, Levinson & Becker, of Chicago, and Miller Lash, of Toronto, as their attorneys and counsel.

"The court further finds: That some time in the year 1908, and after the appointment of the receiver herein, a syndicate was organized, named and known as the Chicago & Milwaukee Assisting Syndicate (hereinafter for brevity called the 'Assisting Syndicate'); said syndicate being composed of various banks, bankers, and institutions in the Dominion of Canada, which banks, bankers, and institutions had, in the course of business and before the

appointment of the receiver herein, acquired, held, and owned, in the years 1909 and 1910, and previously thereto, a large number of bonds of the Chicago & Milwaukee Electric Railroad Company (the Wisconsin corporation), forming a part of said \$10,000,000 issue of bonds, and aggregating between \$3,000,000 and \$4,000,000 face value, and also a small quantity of the bonds of the Chicago & Milwaukee Electric Railroad Company (the Illinois corporation), forming a part of said \$5,000,000 issue of bonds. That some time in the year 1908 a syndicate was likewise organized, named and known as the Chicago & Milwaukee Underwriting Syndicate (hereinafter for brevity called the 'Underwriting Syndicate'); said Underwriting Syndicate being likewise composed of various banks, bankers, and financial institutions in the Dominion of Canada, some of which were the same as composed said Assisting Syndicate, said Underwriting Syndicate having been organized for the purpose of formulating and putting into operation a plan of reorganization of the properties of said Illinois corporation. That some time in the year 1909 said Underwriting Syndicate procured the control, by contract with certain holders residing in Holland and known as the Dutch bondholders, of bonds of said Illinois corporation aggregating 1647 in number of said 1922 issue of bonds, for the purposes of said plan of reorganization of said Underwriting Syndicate, but without such Underwriting Syndicate thereby acquiring any proprietary interest therein or ownership thereof. That said Assisting Syndicate and said Underwriting Syndicate, from and after the time of their organization respectively, were represented by and acted through H. S. Osler, as the counsel of each of said syndicates, said Osler being the same Osler who became a member of the Reorganization Committee hereinafter mentioned.

"The court further finds: That prior to the year 1908 there was organized under the laws of the state of Wisconsin and existing a corporation known as the Milwaukee Electric Railway & Light Company; also, a corporation known as the Milwaukee Light, Heat & Traction Company. That the said Milwaukee Electric Railway & Light Company was then, and thereafter continued to be the owner and operator of lines of electric railroad in, and in the vicinity of, Milwaukee. That the Milwaukee Light, Heat & Traction Company then and thereafter owned and operated, and continued to own and operate interurban lines of electric railroad between the city of Milwaukee and various points outside of said city, including an electric line from the city of Milwaukee to the city of Kenosha, in the state of Wisconsin. That the stocks of said two corporations last named were, at said time, and thereafter continued to be at the times hereinafter mentioned, largely owned and controlled by a holding company known as the North American Company of New Jersey. That John I. Beggs and Charles F. Pfister were at said time, and thereafter continued to be, the sole resident directors in Wisconsin of said North American Company, and that said Beggs, Pfister, Fred Vogel, Jr., and George P. Miller, the attorney of said traction company, were the only resident directors in the state of Wisconsin of said traction company. That at and for some time prior to January 1, 1910, the parties in interest and control of the said North American Company, said traction company, and said railway and light company had planned an extension of said interurban line between Milwaukee and Kenosha so as to ultimately have a continuous line of electric railroad from Milwaukee to the city of Chicago to be used in competition with the interurban lines of the Chicago & Milwaukee Electric Railroad Company (Wisconsin and Illinois corporations). That after the appointment of receivers herein and about January, 1909, the said persons interested in and controlling said line from Milwaukee to Kenosha, acting for and on behalf of said traction company, conceived the plan and scheme of acquiring for said traction company a controlling interest in the Chicago & Milwaukee Electric Railroad Company (the Illinois corporation), through the purchase of a majority or more of the outstanding bonds of said railroad, and of a majority or more of the outstanding bonds of an underlying issue of bonds of \$1,080,000 (said underlying issue being a prior lien upon all the properties of said railroad other than said West Line of said railroad and the line from Lake Bluff

to Rockefeller, to said \$5,000,000 issue of bonds), with a view and for the purpose and object of ultimately bidding in and acquiring by purchase at said foreclosure sale, to be held in this proceeding, the properties, rights and franchises of said Chicago & Milwaukee Electric Railroad Company (the Illinois corporation) and of using said bonds for said purpose, and of connecting up the lines of railroad of the latter corporation with the lines of railroad of said traction company running between Kenosha and Milwaukee, so as to give the latter company a continuous right of way and line between Milwaukee and Chicago. That pursuant to said plan and scheme, and with the object aforesaid, the said traction company, through its officers and agents, secretly and without disclosing their identity or their object and purpose, proceeded to and did buy from various holders thereof in the open market bonds of said Chicago & Milwaukee Electric Railroad Company (Illinois corporation), being a part of said Illinois issue of bonds, and had, in the latter part of 1910, acquired by purchase, and then owned, bonds of said issue aggregating at par approximately \$300,000, and bonds of said underlying issue aggregating approximately \$520,000 par value, and that said purchases were made by said traction company with its own funds.

"The court further finds that in the month of December, 1910, certain of the officials in control of said North American Company and said traction company found fault with the said purchases of said bonds, and thereupon said Beggs and Pfister offered to and did purchase and acquire of and from said traction company, all the said bonds then held by it, at the price paid therefor, by said company, with interest; that thereafter, between the month of December, 1910, and April 21, 1911, said Beggs and Pfister continued to, and did, from time to time, during said period, acquire other of said bonds, so that, on April 21, 1911, said Pfister and Beggs owned 401 of said bonds known as 1922 bonds and 530 of said underlying bonds known as the 1919 bonds, said purchase of said Pfister and Beggs having been made by them pursuant to and under the same plan and scheme, and with the same object and purpose in view, as had been the purchases by said traction company, and having likewise been made secretly and without disclosing their identity or their said object and purpose; that, at the time of the appointment of receivers herein, neither said traction company, said railway and light company, said North American Company, nor said Pfister and Beggs, owned, held, or were interested in any of the bonds of said Chicago & Milwaukee Electric Railroad Company (Illinois corporation); and that said purchases of said bonds were made for the purpose of enabling said traction company and said Pfister and Beggs to use said bonds in bidding for the properties, rights, and franchises of said Illinois corporation at said foreclosure sale herein, and not for the purpose of the investment of their funds therein.

"The court further finds that in the latter part of 1910 it came to the knowledge of said committee of said Wisconsin bondholders and to the knowledge of said Assisting Syndicate and their respective counsel that said traction company and said Pfister and Beggs had acquired said bonds pursuant to said scheme and plan and with the purpose and object aforesaid, and that thereafter in the month of April, 1911, the said Assisting Syndicate, by and with the knowledge, consent, and approval of said Wisconsin Committee, opened negotiations with said Beggs and Pfister for the purpose of securing said 401 1922 bonds and said 530 1919 bonds from said Pfister and Beggs by purchase and of thereby preventing and defeating consummation and execution of their said plan and scheme and of thereby frustrating their proposed action having in view the bidding in and acquisition of the properties, rights, and franchises of said Chicago & Milwaukee Electric Railroad Company (Illinois corporation) at the foreclosure sale to be held herein, in competition with other persons proposing to bid at said sale, and of thereby persuading and inducing said Pfister and Beggs to refrain and desist from their said intention to acquire the said properties, rights, and franchises and to refrain and desist from bidding upon said properties, franchises, and rights at said foreclosure sale.

"And that said negotiations in the month of April, 1911, resulted in the sale by said Pfister and Beggs and the acquisition by said Assisting Syndi-

cate, acting in the interests of its members and of said Wisconsin Committee, by agreement dated April 21, 1911, of said bonds then owned by said Pfister and Beggs, aggregating \$931,000 par value of said Illinois corporation, at a price of \$1,122,636.25, of which said amount said Pfister and Beggs received the sum of \$300,000 in cash; that according to the terms of said agreement the balance of said purchase price, namely, \$822,636.25, was not to be paid to said Pfister and Beggs by said Assisting Syndicate until 30 days after the sale herein; that said agreement was not consummated until May 1, 1911, at which time the same was finally approved and consummated by the members of said Assisting Syndicate and by said Pfister and Beggs; that, before said approval thereof by the members of said Assisting Syndicate, said Wisconsin Committee and the members thereof entered into an agreement with said Assisting Syndicate wherein and whereby said Wisconsin Committee obligated itself to hold said Assisting Syndicate harmless from all liability on account of said purchase price of said bonds to said Pfister and Beggs in excess of the sum of \$260,650 [being the purchase price of said 401 1922 bonds at \$650 per bond], and pledging as security for said indemnity all of the Wisconsin bonds theretofore deposited with said committee under the terms and provisions of said deposit agreement.

"That as part and parcel of said agreement of purchase it was provided that the said Pfister and Beggs, and their attorneys and associates, should, to the extent of their power, influence and in every reasonable way aid and assist the said purchasers in becoming the purchasers of the Chicago & Milwaukee Electric Railroad property (both Illinois and Wisconsin divisions) and in making effective their plan of reorganization thereof; that the plan of reorganization referred to was a plan of reorganization substantially the same as the plan of reorganization formulated by the Reorganization Committee under the agreement of January 26, 1912.

"The court further finds that the amount so agreed to be paid by said Assisting Syndicate to said Pfister and Beggs for said 931 bonds of said Illinois corporation was more than \$300,000 in excess of the amount paid therefor by said traction company and said Pfister and Beggs and was approximately 120 per cent. of the par value of said bonds; that at the time said agreement of April 21, 1911, was executed, said 1922 bonds did not have a market value in excess of \$650 per bond; that said excessive purchase price was agreed to be paid by said Assisting Syndicate, and said covenant on the part of said Pfister and Beggs, for themselves, their associates and attorneys, taken for the purpose of requiring said Pfister and Beggs, their associates and attorneys, to desist and refrain, and said Pfister and Beggs, their associates and attorneys, did by reason thereof desist and refrain, from bidding or offering to purchase or acquire the properties, rights, and franchises of said Chicago & Milwaukee Electric Railroad Company (said Illinois corporation) at said foreclosure sale held under the decree herein, as they would otherwise have done but for the purchasing of said bonds aforesaid and the understanding and agreement aforesaid.

"And the court further finds that by reason of the action of said Assisting Syndicate in purchasing said bonds, and by reason of said understanding and agreement with said Pfister and Beggs as aforesaid, bidding at said sale for said properties, rights, and franchises of said Illinois corporation was and was intended by the parties thereto to be chilled, suppressed, stifled, and restrained.

"The court further finds that in the month of January, 1911, and after said plan and scheme of said traction company and said Pfister and Beggs had come to the knowledge of said Assisting Syndicate and said Wisconsin Bondholders' Committee, it came to the knowledge of said Assisting Syndicate and said Underwriting Syndicate that George P. Miller, the attorney of said traction company and said Pfister and Beggs, was in negotiation with said Dutch bondholders owning said 1647 bonds of said Illinois corporation, for the purpose of acquiring the same by purchase for and on behalf of said Pfister and Beggs, and that thereupon and in the month of January, 1911, said Assisting Syndicate, fearing that said negotiations conducted in behalf of said Pfister

and Beggs would result in the acquisition by them of said 1647 bonds, again opened negotiations in their own behalf for the purchase of said bonds from said Dutch bondholders; that as a result of said negotiations said Assisting Syndicate, on March 10, 1911, entered into a tentative contract of purchase for said bonds with said Dutch bondholders, by the terms of which said 1647 bonds were agreed to be sold by said Dutch bondholders to said Assisting Syndicate, said Assisting Syndicate agreeing to pay therefor by the bonds of a new company to be organized pursuant to said plans of reorganization of said Underwriting Syndicate, or, in the event that the properties of said railroad were not acquired at foreclosure sale by said Assisting Syndicate or said Underwriting Syndicate, upon the basis of the payment of \$600 net per bond in cash for each of said 1647 bonds; that said tentative agreement of March 10, 1911, was within a few days thereafter confirmed, and said agreement became operative, and that within ten days after such confirmation of such tentative agreement said negotiations between said Assisting Syndicate and said Pfister and Beggs were begun.

"The court further finds that thereafter and on the 26th day of January, 1912, a certain plan and agreement for the reorganization of said Chicago & Milwaukee Electric Railroad Company (Illinois corporation) and Chicago & Milwaukee Electric Railroad Company (Wisconsin corporation) was entered into as of that date between George M. Reynolds and said Ernest A. Hamill, said George A. Somerville, said Miller Lash, and said Robert Cassels, all of whom, save said Reynolds, then constituting said Wisconsin Committee under said agreement of October 10, 1908, W. E. Stavert, R. Floyd Clinch, H. S. Osler, Edward A. Shedd, and John R. Thompson, all on the one part, Chicago Title & Trust Company of Chicago and the National Trust Company, Ltd., of Toronto, Canada, on the other part, and the holders of bonds issued by said Illinois and said Wisconsin corporations depositing their bonds under said agreement of January 26, 1912, on the last part, wherein and whereby said Reynolds and others were constituted a Reorganization Committee of said roads; that said Reorganization Committee had, as part of said agreement, formulated a plan contemplating the purchase of the properties of both the Illinois and Wisconsin corporations by said Reorganization Committee in the interests of bondholders depositing their bonds thereunder in the organization of a new corporation or corporations under the laws of Wisconsin or Illinois, or both, which should acquire the properties of said Illinois and Wisconsin corporations from said Reorganization Committee when acquired at said foreclosure sale; that said plan further contemplated the issuance of a new bond issue of \$10,000,000, \$4,500,000 of which was to be immediately issued, a second bond issue of \$4,500,000, a third bond issue of \$6,000,000, and a capital stock issue of \$6,000,000, making a total of \$26,500,000 par value of bonds and stock proposed to be issued, of which \$21,000,000 par value of bonds and stocks were to be presently issued upon the security of the present property, rights, and franchises of said Illinois and Wisconsin corporations, and none others, and at a cost to said Reorganization Committee of not to exceed \$6,500,000, said cost including all expenses to be incurred by said Reorganization Committee in adjusting and discharging liens, and rehabilitating the properties of said Illinois and Wisconsin corporations in Illinois and Wisconsin, including all extensions and betterments thereof, and including a connection with the elevated roads in Chicago.

"That immediately upon the organization of said committee, Jacob Newman, the firm of Newman, Levinson, Becker & Cleveland, John P. Wilson of Chicago, and Miller Lash and H. S. Osler of Toronto, Canada, became and continued to act as the attorneys and counselors of said Reorganization Committee; that pursuant to said plan and agreement of January 26, 1912, said Reorganization Committee, through said Harry E. Smith and Norman J. Ford, became and were the only bidders of said properties, rights, and franchises of said Illinois corporation at said foreclosure sale herein, and also became and were the only bidders of the properties, rights and franchises of said Wisconsin corporation at the foreclosure sale held at Racine, Wis., on September 25, 1912; that the deposits made by said Smith and Ford, as prospective bidders,

with the special master in chancery appointed herein to conduct said sale and said sale at Racine, were in truth and in fact the funds of said Reorganization Committee; and that the real bidders at said sales were said Reorganization Committee appointed under said agreement of January 26, 1912.

"The court further finds that on the 26th day of January, 1912, said Reorganization Committee, by resolution of that date, by unanimous vote at a meeting held on said date, as a condition to the deposit by said Assisting Syndicate under said plan of reorganization of bonds aggregating \$3,671,000 of said Illinois corporation then owned or controlled by said Assisting Syndicate, accepted a proposition of said Assisting Syndicate submitted to said Reorganization Committee on said date by said H. S. Osler and W. E. Stavert to assume and pay, and did on said day undertake to assume and pay the liability of said Assisting Syndicate to pay said Pfister and Beggs the balance due on their said contract of April 21, 1911, viz., the sum of \$822,635.25, with interest thereon at 5 per cent. from April 7, 1911, as provided in said contract, and the obligation of said Wisconsin Committee to said Assisting Syndicate incurred by said agreement between said parties dated May 1, 1911.

"That at the time said action by said Reorganization Committee was taken, said committee was chargeable in fact with full knowledge of the existence of said agreement and understanding hereinbefore found between said Pfister and Beggs and their associates and attorneys on the one part, and said Assisting Syndicate and said Wisconsin Committee on the other part, to prevent, chill, suppress, stifle, and restrain competition at said foreclosure sale of said Illinois properties, and that said action of said Reorganization Committee in assuming and agreeing to pay said obligation amounted to aiding and abetting said Assisting Syndicate and said Wisconsin Committee in carrying out said scheme and plan and was taken to enable said Reorganization Committee, pursuant to its said plan and scheme of reorganization, to acquire said properties, rights, and franchises at a price inadequate and disproportionate to the real value of said properties, to be arbitrarily fixed and determined by said Reorganization Committee without competition from said Pfister and Beggs and their associates.

"The court further finds that the properties, rights, and franchises of the Chicago & Milwaukee Electric Railroad Company (the Illinois corporation) were on the 25th day of September, 1912, reasonably worth approximately \$4,500,000; that the same were offered for sale on said date, under and pursuant to the decree of sale herein, subject to said underlying mortgage of \$1,080,000, with interest thereon from July 1, 1912, and subject also to the other liens and charges in said decree of sale mentioned, existing and remaining unpaid at the time of said sale; and that the said bids of said Harry E. Smith and Norman J. Ford, made for and on behalf of said Reorganization Committee, of \$50,000 for the west line of said Illinois corporation, and of \$1,600,000 for the remaining properties, rights, and franchises of said Illinois corporation described in said decree, were and are, and each of them was and is, insufficient and inadequate; and that such insufficiency and inadequacy in the said purchase prices of the properties aforesaid, bid at such sales, resulted from and were caused by the said stifling, chilling, preventing, and suppressing of competitive bidding at the said foreclosure sales, as hereinbefore found.

"The court further finds that said motions of said Merchants' Loan & Trust Company, as trustee, and of Harry E. Smith and Norman J. Ford, to approve said special master's report of sale and to approve and confirm said sale of said properties, rights, and franchises of said Illinois corporation to said Smith and Ford, in accordance with the recommendations of said special master's report of sale, should be denied, and that said objections, as amended, to said special master's report of sale herein should be sustained, and that the said bids of the said Smith and Ford, and each of them, for said properties, rights, and franchises of said Illinois corporation should be rejected. * * *

"The court further finds that upon the hearing hereof said objector submitted in writing, dated October 8, 1912, the offer of John Griffiths guaranteeing to the court upon a resale of the said properties, rights, and franchises of said Illinois corporation, pursuant to the terms of the decree herein, the sum of \$200,000 for said West Line, and the sum of \$1,800,000 for the remain-

ing properties, rights, and franchises of said Illinois corporation, accompanied by two certified checks of said Griffiths aggregating \$20,000, and to bid said respective amounts for said respective properties upon such resale.

"Whereupon come the said Harry E. Smith and Norman J. Ford, and the said George M. Reynolds, Ernest A. Hamill, W. E. Stavert, Miller Lash, George A. Somerville, Robert Cassels, E. A. Shedd, R. Floyd Clinch, H. S. Osler, and John R. Thompson, constituting said Reorganization Committee aforesaid, and offered to bid for the properties, rights, and franchises of said Illinois corporation the amount bid therefor by said John Griffiths, and moved the court to confirm the sale of said properties, rights, and franchises to said Smith and Ford for the sum of \$2,000,000.

"Whereupon said objector presented in open court the written proposition of said Griffiths guaranteeing to bid upon a resale \$2,100,000 for said properties, rights, and franchises, pursuant to the terms of the decree herein of February 23, 1912, and accompanied said proposition with an additional certified check of said Griffiths of 10 per cent. of the amount of the increase in said Griffiths' said proposed bid.

"It is therefore further ordered and decreed by the court that said motions of said Smith and Ford and of said Reorganization Committee, constituted as aforesaid, be and the same are hereby denied. * * *

"And thereupon said Smith and Ford and said Reorganization Committee, constituted as aforesaid, without waiving any of their motions heretofore made herein, and without prejudice to their objections to this decree, and for the reason that a resale and the delay incident thereto will entail a heavy loss, cost, and expense upon the bondholders represented by them, and solely to avoid such loss, cost, and expense, now here in open court tender and offer to pay to said objector herein, Matilda W. Moses, the sum of \$1,350 in cash for her pro rata share of \$450,000, being the difference between the said \$2,100,000 bid of said Griffiths and the said bids of said Smith and Ford aggregating \$1,650,000, and also to bring into this court, for the benefit of all other holders of bonds of said Illinois corporation who have not deposited their bonds with said Reorganization Committee under and pursuant to said agreement of January 26, 1912, their pro rata share in cash of said difference of \$450,000; said tenders and offers being made upon the express condition that said objections of said objector be either withdrawn or overruled.

"But said objector did not accept said offer and tender, and did not withdraw her objections herein.

"And thereupon said Smith and Ford and said Reorganization Committee, constituted as aforesaid, expressly reserving their rights and without prejudice thereto, as aforesaid, and for the reasons aforesaid, moved the court for an order dismissing and overruling said objections of said objector, Matilda W. Moses, upon the payment or tender by them to said objector of said sum of \$1,350 and bringing into this court the pro rata share of said difference of \$450,000 for the benefit of said nondepositing bondholders, as aforesaid.

"Which said motion was then and there overruled and denied by the court.

"Whereupon said objector entered her motion herein for an order directing a readvertisement and resale of the properties, rights, and franchises of said Illinois corporation under and pursuant to the terms of the decree herein, which said motion was, upon due consideration by the court, granted, and it was further ordered and decreed by the court that Charles B. Morrison, special master in chancery of this court, be and he is hereby ordered and directed to forthwith proceed to readvertise and reoffer for sale at public auction under and pursuant to the terms of the final decree herein, and in the manner and at the time therein directed, the properties, rights, and franchises of said Chicago & Milwaukee Electric Railroad Company (Illinois corporation) in said decree more specifically mentioned and described, and that he report in due course to this court his acts and doings in the premises.

"That said resale shall be in all respects made and conducted as provided in said decree of February 23, 1912, all the terms and provisions of which shall be applicable to such resale; provided that no bids shall be received or accepted by said special master on such resale unless the combined bids for

said West Line of railroad and the remaining properties, rights, and franchises, directed by said decree to be sold, amount in the aggregate to at least the sum of \$2,100,000.

"It is further ordered and decreed by the court that said Charles B. Morrison, as such special master in chancery, be and he is hereby authorized and directed to deliver to said Harry E. Smith and Norman J. Ford, if by them requested so to do, the certified checks deposited by said Smith and Ford with said special master in chancery pursuant to the terms of said final decree and aggregating in amount \$200,000, being the checks referred to in said special master's report of sales herein.

"And it is hereby ordered and decreed that the said three certified checks aggregating \$210,000 heretofore tendered by said John Griffiths, and now in the possession of Joseph W. Moses, one of the counsel of said objector, duly indorsed, be forthwith delivered to said special master in chancery, Charles B. Morrison, to be held by him as a guaranty and as security that there will be bid in the manner required by said decree of February 23, 1912, and pursuant to the terms thereof upon such resale of the said properties, rights, and franchises of said Illinois corporation, as herein directed, the sum of at least \$2,100,000 in the aggregate for all the properties, rights, and franchises of said Illinois corporation mentioned and described in said decree, and, upon the delivery of said three checks to said special master, they shall be held by him for the purposes aforesaid, and such delivery shall qualify said Griffiths as a bidder at such resale as provided in said decree."

Levy Mayer, of Chicago, Ill., for appellants.

Joseph W. Moses, of Chicago, Ill., for appellee.

Before BAKER and SEAMAN, Circuit Judges, and CARPENTER, District Judge.

BAKER, Circuit Judge (after stating the facts as above). Appellee has moved that the appeal be dismissed on the grounds: (1) That the decree is not final, and (2) that appellants by offering to meet Griffiths' bid released the alleged errors.

[1] A decree setting aside a sale on foreclosure and ordering a resale confessedly does not end the case. That continues with all the parties in that were in before the sale. But the bidder at the sale becomes a new party; the acceptance of his bid gives him the rights of a purchaser unless legal objections to confirmation can be shown; and the decree which puts him out of court as a party and terminates his asserted rights as a purchaser appears to us very clearly a final decree as to him. No difference is perceived by reason of the fact that the purchaser may have been a party to the foreclosure issues. In the capacity of a purchaser he certainly first became a party when the property was struck off to him at the sale. And here, the Reorganization Committee, representing only depositing bondholders, is not the same party as the complainant trustee, representing all the bondholders. To say that the successful bidder at the first sale may become the purchaser at the second or subsequent sales seems to us no answer. He may not. And the finality of a decree is to be determined by its own force, not by contingencies outside the record. We find nothing in *Butterfield v. Usher*, 91 U. S. 246, 23 L. Ed. 318, *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. 118, 35 L. Ed. 893, and *Doyle v. London Guaranty Co.*, 204 U. S. 599, 27 Sup. Ct. 313, 51 L. Ed. 641, relied on by appellee, to require a different conclusion; and the numerous cases respecting confirmation may rightly be taken to indicate the general

opinion of the profession that decrees granting or denying confirmation are appealable as final decrees.

[2] If one accepts by his acts a decree against him, he may be estopped from prosecuting an appeal. In this case the sale was set aside because suppression of competition resulted in one inadequate bid. If there was no stifling of intending bidders, the sale should have been confirmed, for a bid of 50 to 60 per cent. of the after-opinion value of property offered at public auction is not shockingly inadequate. By offering to raise their bid, appellants, in our judgment, did not waive their right to insist that they had not chilled the sale. Their conduct was not a confession of wrongdoing; not even, as we regard it, an admission of the inadequacy of their first bid; but amounted at most only to this, that if the objections were withdrawn and the sale confirmed they would pay into court for appellee and other non-depositing bondholders their part of the increase rather than have the estate suffer the expense and loss by delay from a resale, which expense and loss might well exceed the nondepositing bondholders' proportionate share of the increase. Appellants' offer neither advantaged them nor prejudiced appellee with respect to the validity and full operativeness of the decree, and is not, we believe, a sufficient basis for an estoppel against the appeal. The motion to dismiss is overruled.

[3] On the other hand, appellants seek to relieve us from taking up the merits by asserting that appellee was not in a position to object to confirmation. Through a representative appellee had cause to believe that the Reorganization Committee had planned to suppress competition, was present at the sale, and neither bid nor objected to the proceedings. Appellee could not know in advance that the wrongful intent would be acted on. She was under no obligation to bid. And objections should be presented, as she did promptly, to the court, not to the court's salesman. It is also said that Griffiths and appellee had an ulterior purpose to better Griffiths' position as a bondholder of the Wisconsin corporation. We are not now concerned with the Wisconsin case. In the record of these Illinois proceedings we find nothing to impugn the motives of appellee or of Griffiths. But if there has to be a resale or other disposition of the Illinois property, the money of Griffiths or of appellee, even if they were wrongdoers, should be as acceptable as that of the Reorganization Committee whose acts rendered confirmation impossible. At all events, the sale was the court's and we are of the opinion that the court, on the motion of the master or of any outsider or on its own motion, could investigate allegations of actual or constructive fraud in the sale.

[4] Our conclusions respecting the facts may be disclosed most briefly by saying that we approve generally the finding of the trial court and by answering the material objections of appellants to that finding.

It may be true that the Milwaukee Traction Company was eliminated as a prospective bidder when it disavowed the action of Beggs as its president. But Beggs, associating Pfister in the plan, continued the purchase of Illinois bonds and the negotiations for entry into Chicago over the Elevated Railroad until they made their contract with

the Assisting Syndicate. Nothing in the record impugns their ability to maintain their position as intending bidders, and the action of the Assisting Syndicate seems to us a recognition of that ability.

We cannot accept the contention that the Assisting Syndicate's purchase of the 1,647 Dutch bonds destroyed the ability and intention of Beggs and Pfister. That purchase gave the Assisting Syndicate a total of 1,900 bonds. Beggs and Pfister through their ownership of 401 bonds and control of 1,100 by virtue of their agreement with the Illinois Committee, had 1,500 bonds at command. Before the Dutch purchase the Assisting Syndicate therefore had only about 250 bonds. Instead of being a death blow to Beggs and Pfister, the action of the Assisting Syndicate in forestalling Beggs and Pfister in the purchase of the Dutch bonds was necessary to prevent an opposing bidder from having 3,150 bonds against their 250. After the Dutch purchase the two intending bidders were on nearly an equal footing.

Whether the Assisting Syndicate was merely buying bonds or was additionally paying Beggs and Pfister to refrain from bidding and to aid the syndicate and its successors in interest in obtaining the property without competition is to be judged by the contract they made at the time rather than by their subsequent protestations. In the contract Beggs and Pfister gave two things: First, 401 of the 1922 bonds and 530 of the underlying bonds; and second, their agreement that they and their associates "shall, to the extent of their power and influence and information, in every reasonable way, aid and assist the purchasers in becoming the purchasers of the Chicago & Milwaukee Electric Railroad property (both divisions) and in making effective their plan of reorganization," and in consideration thereof the purchasers gave in money and in undertakings to pay \$1,122,636. Before this contract went into effect, the Assisting Syndicate apportioned the consideration by obtaining a contract from the Wisconsin Committee that the Assisting Syndicate should be liable for only 65 cents on the dollar of the 401 bonds (which was approximately their value tested both by market price and the worth of the property) and that the Wisconsin Committee should be liable for the excess above that amount. How does the consideration stand when so apportioned by the Assisting Syndicate? Subtracting \$538,244 (the highest value of the underlying bonds, and accrued interest) and \$260,650 (the amount apportioned to the 401 bonds of 1922) leaves \$323,742 as the amount apportioned by the Assisting Syndicate to the other element of the Beggs and Pfister contract, namely, their agreement not only to refrain from bidding but also to use their power and influence and information in aiding the purchasers of their bonds to suppress competition. In percentages these figures mean that 145 per cent. of the face of the 401 bonds was paid, 65 per cent. for the bonds and 80 per cent. for absence and influence.

A further contention in this connection is made that the \$323,742 was paid to end litigation. This is but another way of denying that that sum was paid for the absence and influence of Beggs and Pfister, and, as such, is answered by reverting to the only possible meaning of the written bargain and by considering that in fact the outcome of

the sale corresponded exactly with that meaning, namely, the property was struck off to appellants without competition, and not only were Beggs and Pfister absent but through their influence the Illinois Committee had disappeared. Nevertheless we proceed to examine the foreclosure issues in this Illinois case. The trustee filed its bill to foreclose a defaulted mortgage. Neither the Illinois Company nor any of its stockholders was attempting to deny the facts in the bill or the trustee's right to an immediate decree of foreclosure sale. No holder of Illinois bonds was protesting to the trustee or to the court that he had any other or different rights under the mortgage than the other holders of outstanding Illinois bonds. So neither between mortgagor and mortgagee nor between the beneficiaries of the mortgage was there anything to litigate or to delay the decree. Principal and interest of the Wisconsin bonds were guaranteed by the Illinois Company. On behalf of the holders of Wisconsin bonds a general creditor's claim was filed against the Illinois Company on that account. That claim was no defense to the bill for foreclosure and sale; it would attach only to the surplus that otherwise would be returned to the mortgagor; and, since there can be no surplus unless the property shall sell for \$6,000,000, it is asking too much to have us believe that any part of the \$323,742 was paid to quiet that demand. We find no foreclosure issue to litigate but this: On behalf of the holders of Wisconsin bonds a claim was made that the West Line was built in whole or in part with proceeds from the Wisconsin bonds. If the fact were so found, the issue would be whether the equity of the Wisconsin bondholders was superior to the equity of the Illinois mortgagees. The determination of that issue needed not to delay the order of sale. When there remains no issue between the original parties and an intervener claims title or lien or equity in a relatively small part of the property, experience has generally taught courts of equity not to delay the main case on account of such an intervention, but to order a sale at which the small part shall be sold separately and allow the intervener's claim to attach to the proceeds. And that was exactly what was done in this case. So the only matter to litigate remains in court. And so the delay cannot be attributed to what was obtained in court. It will be noticed that the reserved issue was between Illinois bondholders as such, and Wisconsin bondholders as such. But outside that issue, outside the Illinois court, outside any interest of Illinois bondholders as such, there was a situation to which the Assisting Syndicate was giving attention. When the receivership in this Illinois case began and for some time afterwards, the persons who later came into the Assisting Syndicate were tremendously interested in the \$10,000,000 issue of Wisconsin bonds and only trivially in the Illinois bonds. If they had chosen to protect their interests as Illinois bondholders as such and on an equality with Illinois bondholders who had no other interest or motive than to share equally the benefits of the Illinois mortgage, they could have done so by depositing their bonds with the Illinois Committee, which had been organized for the protection of all Illinois bondholders in an equality of benefits and with authority to bid and apply the bonds on the purchase price. If the Illinois property should

fall into the hands of a purchaser in the equal interest of all Illinois bondholders, and the same result should come about in Wisconsin, then the ultimate value of the Wisconsin bonds would depend on the outcome of negotiations between the two purchasers respecting a lease or a consolidation. Manifestly the Assisting Syndicate thought an additional worth could be injected into the Wisconsin bonds by opposing a reorganization of the Illinois property in the equal interest of all Illinois bondholders. And therefore the Assisting Syndicate strove to keep Illinois bonds out of the hands of the Illinois Committee and to get them into their own. At this point the impending competition was between the Illinois Committee and the Assisting Syndicate. Then Beggs and Pfister came upon the scene. If they should become purchasers of the Illinois property they evidently believed they could turn it over to advantage either to the purchaser of the Wisconsin property or to the Milwaukee Traction Company. The Illinois Committee, brought to a standstill by the Assisting Syndicate, formed an alliance with Beggs and Pfister. In this situation Beggs and Pfister were trying to get an order of sale. Why the delay? Not because the case was not as ripe for the decree as it was later, but because the Assisting Syndicate was not ready for the sale under the decree, was not willing to face an equally strong competitor. Examination of the issues in court and what was going on out of court, instead of putting a different face on the contract, only accentuates its meaning.

Appellants say that, although the issue respecting the West Line was not ended in court, it was by a provision in their reorganization agreement to the effect that if appellants should be confirmed as purchasers of the Wisconsin property and also of the Illinois property, then appellants should be judges of the issue. Plainly the issue is not settled. At most, the provision is a conditional substitution of appellants as judges for the judges appointed by law. An indispensable condition is that appellants be confirmed as purchasers of the Illinois property. And when we inquire how they were to become purchasers, we are at once brought back to the \$323,742 for the absence and influence of Beggs and Pfister. But even if appellants, by becoming the purchasers, should enter upon their judgeships, they could determine the issue only as between the Illinois and Wisconsin bondholders whose bonds were in their hands. Nondepositing Illinois bondholders, on the question of distribution, would have the right to insist that the court decide whether the proceeds from the sale of the West Line are subject to the alleged claim of the Wisconsin bondholders. Therefore we cannot find that any part of the 80 per cent. premium on the 401 bonds was paid to end the only issue in court.

Although the Beggs and Pfister contract plainly covers two elements of bargain, and although the Assisting Syndicate apportioned 65 cents on the dollar to the 401 bonds, it is claimed that the remainder of the consideration, \$323,742, is not to be attributed to the remaining element of the bargain, but to a reimbursement of Beggs and Pfister for services, expenses, and interest on money expended in and about their purchase of the bonds. Beggs and Pfister made no profit, the insistence is, therefore the \$323,742 cannot be applied to the second ele-

ment of the contract, but must be wholly and exclusively counted as a part of the purchase price of the 401 bonds. First, the services, expenses and interest in excess of the value of the security were rendered and incurred, in our judgment, not in the purchase of the bonds which were quoted in the market at the price the Assisting Syndicate apportioned to them, but in furthering the enterprise of Beggs and Pfister as intending bidders; second, there is no finding or evidence that the \$323,742 represents an actual outlay or a fair estimate of the value of services and the amount of expenses paid or incurred; third, it seems to us scarcely accurate to say there was no profit, when, affirmatively, Beggs and Pfister received interest on bonds in a foreclosure suit that was not collectible in the suit, and when, negatively, they were saved from losses that neither the market nor the property behind the bonds would bear; and finally we deem it immaterial whether the Assisting Syndicate was merely making Beggs and Pfister whole or was paying them an enormous profit, when the only motive we perceive in the surroundings is the **very** consideration stated in the contract.

That appellants with open eyes stepped into the shoes of the Assisting Syndicate seems to us very clear. The Wisconsin Committee took over the obligation, and therefore the benefit, of the \$323,742 part of the Beggs and Pfister contract. When appellants became the Reorganization Committee that was to bid, the Assisting Syndicate and the Wisconsin Committee did not deposit their Illinois bonds as individual holders of Illinois bonds were required to and did deposit theirs, but they bargained with appellants that they would give appellants control of their Illinois bonds if appellants, among other things hereafter considered, would assume the obligation and take the advantages of the existing arrangements. It is unnecessary to weigh the inferences of fact that might be drawn from the record to show that appellants, as intelligent men, with eight out of ten of them taken from previous committees, must have had actual knowledge of every circumstance we have stated; the contents of the papers put in their hands are enough.

\$4,500,000 was the value of the Illinois property as found by the court. Detailed estimates of competent engineers, some of the highest valuers being employed by appellants, varied from \$3,800,000 to \$5,600,000. As the trial judge heard the witnesses in open court, we are in no position to question his finding of value. Subtracting prior liens from the lowest valuation leaves at least \$2,600,000 as the value of the Illinois bonds in suit, or 65 cents on the dollar.

From this review we conclude that the court was right in the ultimate finding that the solitary bid was inadequate and that it was solitary on account of suppression of competition.

[5] Against the decision that equity would not tolerate a confirmation of the sale as made by the master, appellant's strong insistence is that the rule in respect to chilling applies only to intending bidders who have no lien or interest in the property. No authority of which we are cognizant goes to that extent. If that were the test, an intending bidder who found competitors in the field with cash in hand could learn how much they wanted for withdrawing and say, "Go get a lien

and then we can consummate our plan without possibility of interference by the court." Decisions are numerous that an owner of a lien, as an incident of his ownership, has the right to sell his lien; that another lienor has as full a right as any one to purchase; that the natural effect is to remove the seller from the field of competition; and that an agreement which expresses the effect that would have followed without the agreement is innocuous. The line is drawn as well as anywhere in one of the cases relied on by appellants (*De Baun v. Brand*, 61 N. J. Law, 624, 41 Atl. 958):

"On the other hand, the mere possession of a right to protect one's own interest will not be permitted to cloak a violation of the rule under color of such right. Between these two exhibitions of the law lies its true application, which in the nature of things must often turn upon a question of fact."

In legal effect, we believe, Beggs and Pfister were always outsiders. They were confessedly such when, the receivership being under way, they first conceived the plan of becoming purchasers of the Illinois property. Their action began, and continued until they sold out, as a movement, not to protect an existing interest, but to acquire an interest to aid them as intending bidders. When Beggs and Pfister and the Illinois Committee, on the one hand, and the Assisting Syndicate, on the other, were confronting each other as practically equal antagonists, each at a sale was prepared to pay less than half the purchase price in tokens (bonds usable only as advance receipts for their distributive shares) and would have been compelled to produce more than half in money. In the light of the law we see no difference between buying off an intending bidder who has all his money in hand and one who has converted a part of his money into counters.

[6] Another aspect of the matter supports our conviction that the court did equity in refusing to confirm the sale as made by the master. At execution sales and at foreclosure sales of ordinary farms or town lots, the general public may in fact be interested as intending bidders because of their separate financial ability to purchase. It was in the consideration of such sales that the ancient and familiar rule arose. But in modern times, when vast railroad and industrial enterprises are financed by selling millions of bonds payable to bearer through the world's exchanges, a different class of sales has appeared. Courts have had to recognize that separate individual ability is not equal to the purchase and rehabilitation of a broken-down railroad. "Reorganization" has become familiar. This means, usually, that the equity of the stockholders, if any ever existed in actual value, has vanished; that the property virtually belongs in equity to the bondholders; and that, if the bondholders will combine for the mutual protection of their equal interest, they will have a practical monopoly of the bidding. This last is so because, if all the bondholders are in the combination, it is utterly immaterial to them whether they bid the full amount of the decree or a sum that will pay only one cent on the dollar of their bonds; and therefore, by creating that masterful situation, they can force any outside combination to offer the full amount of the decree without danger or expense to themselves. Most commonly the controversy over the sale arises when there are nonassenting bondhold-

ers. When such a controversy is on, the chancellor in our opinion not only has the right but owes the duty of being vigilant to see, on the one hand, that a dissenter be not permitted to create a maneuvering value in his bonds by opposing confirmation, and, on the other, that the majority does not use its power, unique in sales of this class, to oppress a helpless minority. Mr. Justice Brewer, in *Ballentyne v. Smith*, 205 U. S. 285, 27 Sup. Ct. 527, 51 L. Ed. 803, said:

"That a court of equity owes a duty to the creditors seeking its assistance in subjecting property to the payment of debts, to see that the property brings something like its true value in order that to the extent of that value the debts secured upon the property may be paid; that it owes to them something more than to merely take care that the forms of law are complied with, and that the purchaser is guilty of no fraudulent act."

In *Starkweather v. Jenner*, 216 U. S. 524, 30 Sup. Ct. 382, 54 L. Ed. 602, 17 Ann. Cas. 1167, the right of a representative of the majority of co-owners to become the purchaser is recognized, provided, among other conditions, "he took no undue or unfair advantage of his co-owners." If, in *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931, an outside combination, in competition with the reorganization committee, had been confirmed as the purchaser at \$61,500,000, we can hardly conceive that Boyd would have been permitted to go behind the sale. But, because the purchaser had created the masterful situation of controlling the sale, because the purchaser was not a stranger but the virtual owner of the property exposed for sale, neither the principle of the "stability of judicial sales" nor "compliance with the forms of law" nor the intent to commit "no fraudulent act" was sufficient to stop a court of equity from inquiring whether an "undue or unfair advantage" had been taken. Courts of equity should be deemed no less powerful to-day than when the first chancellor looked to his conscience for guidance, to make fair dealing between man and man the test. And from what other source came, or could come, the recognized practice, in sales of this class, of the court's ascertaining in advance of sale the minimum value of the property and thereupon fixing a minimum selling price?

When a nondepositing bondholder objects to confirmation solely on the ground that the reorganization committee's bid, though not grossly inadequate, was substantially short of the fair value, the answer is that his co-owners of the common mortgage and the common decree offered him the opportunity to deposit his bonds and to share equally with them the benefits of the purchase. But, in sales of this class, we never have observed or heard of a case where the minority were turned away without having been given by the majority a fair opportunity to share equally with them the benefits of the purchase—where, for example, 95 per cent. of the bondholders of a vast railroad or industrial enterprise have combined and then shut the door upon the scattered 5 per cent. And no just distinction can be drawn, we believe, whether the door be shut or unconscionable conditions of entrance be imposed.

A reorganization plan is somewhat like an insurance policy or a bill of lading, against which there is no protection except through legis-

lative control of the insurance and railroad companies' offerings. The solitary and distant bondholder must accept the organization plan or let it alone, as it is written. When the unitary property of a single company of the kind in question is to be reorganized, the persons who assume or accept the committee, realizing the equality of all bondholders and recognizing that no bondholder has any right to preferential treatment, usually offer a plan that will give the common owners of the mortgage equal benefits through the foreclosure, usually become nothing but the agency through which the bondholders act for their mutual protection. In such a reorganization, if a bondholder does not come through the foreclosure as well off as any other bondholder, it is his own fault. In the case at bar, the Reorganization Committee was not a mere agency for appellee and her fellow Illinois bondholders; under sweeping powers, to be exercised "at its sole discretion," it could buy bonds, take up claims of subordinate right, allow compensation to pre-existing committees and assume their contracts, and do anything and everything it saw fit to do, whether specified or not. Preferential treatment of Illinois bondholders, who were acting in the primary interest of their Wisconsin bonds, was accorded in many ways. The Assisting Syndicate did not deposit its Illinois bonds as appellee was expected to do. Appellants, as has already been pointed out, assumed the contract of Beggs and Pfister. By the reorganization plan the 401 bonds were not only to stand for the same pro rata share of new bonds which appellee was offered, but the sellers were additionally to receive \$323,742 in money; and the Assisting Syndicate, for bringing about this situation, was to have \$795,500 of the stock of the reorganized company. Creditors, with subordinate rights, were promised \$12,500 cash, \$63,600 in the bonds, and \$24,400 in the stock of the new company. Compensation and expenses, not only of the Illinois Committee, but of the Wisconsin Committee as well, were assumed. Thus the Illinois property, which in equity belonged to the Illinois bondholders in equal right under the mortgage and under the foreclosure decree, would, in the hands of appellant, be loaded down with premiums, bonuses, services, expenses, etc., with which neither appellee nor any other Illinois bondholder as such had any concern. Therefore no inequity was chargeable to appellee in asking the court to open a door of fair opportunity.

No matter what the plan, it does not matter whether the committee bids much or little if all the bondholders are in. Here, some \$160,000 of bonds were outstanding. And the temptation to use the monopoly of bidding for the purpose of recouping partially the outside expenses and losses of the majority at the expense of the minority seems to have been too strong.

Our conclusion at this point is that the court was warranted in refusing to confirm the sale as made by the master.

[7] When the court had determined to vacate the sale as made by the master, what was to be done? In the case of an original sale the statute seems to be mandatory as to the method. But when a court of equity finds that it cannot confirm a sale as made by its master, we are inclined to believe that the course approved in *Blanks v. Farmers'*

Loan & Trust Co., 122 Fed. 849, 59 C. C. A. 59, wherein 24 increasing bids were received in open court and the bidding was continued until every bidder had reached his limit, is permissible. That course, however, was not taken by the court in this instance. Instead of receiving Griffiths' proposition to start bidding at a resale at \$2,100,000 and his deposit of \$210,000 in money, as a bid and a qualification at a sale in court, the court took them as evidence that appellants' bid was substantially short of the fair value of the property and as an assurance that a resale, wherever and whenever held, would be started at \$2,100,000. Nor did appellants follow the procedure in the Blanks Case. They never raised Griffiths' offer. There was no competitive bidding in court. They wrongly assumed that their preferential position as purchasers continued after the court had set aside the master's sale. To attain a standing thereafter they should have asked to have the bidding open in court and should have overbid Griffiths. At any bidding Griffiths' money would be as good as appellants. A court will not look into the conduct of prospective bidders as such; what it wants is bids. The question is whether the method of trying out bidders approved in the Blanks Case was the only one that the court could order. We think not. A discretion in balancing the advantages of a readvertised public sale against the trying out of the proposed bidders then in court, was involved. If the court should hereafter consider that probably no other bidders than Griffiths and appellants would appear at a public sale and thereupon should choose to modify the decree of resale so as to try out the two bidders in open court, we should consider that a matter within the court's discretion. But we have no right to reverse except for error of fact or law, no right to control the court's discretionary choice of one or the other of two permissible methods.

The decree is:

Affirmed.

SEAMAN, Circuit Judge (concurring). The agreement with Beggs and Pfister, mentioned in the foregoing opinion, was obviously made not only for the purchase of their bonds but for the express purpose of preventing them from becoming bidders at the foreclosure sale of the Illinois lines. It was made at the instance and for the benefit of the so-called "Assisting Syndicate," as owners of a large share of the bonds resting alone on the Wisconsin line, to save their interests therein from jeopardy through an independent purchase of the Illinois lines, which was threatened by Beggs and Pfister for annexation to a rival Wisconsin line. So, whatever may have been the benefits of such arrangement to preserve unity of the two mortgaged lines upon foreclosure sale, it may rightly be held that such suppression of a prospective bidder for the Illinois line was prejudicial to the interests of nonassenting holders of bonds applicable alone to the Illinois line. I believe it to be well recognized that reorganizations on the part of bondholders are needful and legitimate means for the purpose of purchasing the mortgaged property at foreclosure sales; that no bondholder can be brought into such reorganization without his consent; that bonds may be purchased of a nonassenting bondholder for the purpose

(express or implied) of foreclosing his objections or attempts to interfere with the reorganization plans; that equality in prices so paid is not, generally speaking, an essential requirement in such transaction; and that suppression of competition, either for reorganization or for the purposes of the sale, which may arise in such purchases or arrangements, neither disqualifies the purchasers to become bidders at the sale, nor, per se, invalidates the sale. Accordingly, in judicial sales of railroad properties these several elements are frequently involved, resulting in a single bid much below the estimated actual value of the properties, and the sale thereupon may rightly be confirmed by the court.

I concur, nevertheless, in each proposition of the opinion for affirmance of the decree appealed from, although I have hesitated over the tenability of the objection founded on the Beggs and Pfister transaction. It cannot be doubted, however, that the trial court proceeded within its authority and duty for the protection of all interests involved, to ascertain whether the foreclosure sale was accomplished equitably, with no unfair advantage taken as against the nonassenting bondholders. Thus, when the transaction with Beggs and Pfister was plainly presented in the character above stated, I am satisfied that confirmation of the sale was rightly withheld, pending the further inquiry whether injury resulted in an unfair bid by the single bidder at the sale; and that the finding of inadequacy and unfairness thereupon should not be disturbed.

Whether the interest of all parties may not be best subserved by reopening the hearing for bidding in open court without the delay of resale by the master is matter entirely within the judicial discretion of the trial court, as I believe; but, if the provision for resale by the master were otherwise open to review in this court, the record furnishes no ground therefor, as well remarked in the opinion for affirmance.

KAUFMAN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 17, 1914.)

No. 184.

1. BANKRUPTCY (§ 494*)—CONCEALMENT OF ASSETS—NATURE OF OFFENSE.

Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), provides that a person shall be punished by imprisonment for not to exceed two years on conviction of having knowingly and fraudulently concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy. Cr. Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [U. S. Comp. St. Supp. 1911, p. 1686]) § 332, declares that whoever commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, demands, induces, or procures its commission, is a principal, and section 335 provides that all offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. *Held*, that an indictment charging the president and manager of a bankrupt corporation

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

with knowingly and fraudulently aiding and abetting the concealment of its assets charged a felony.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 911; Dec. Dig. § 494.*]

2. BANKRUPTCY (§ 492*)—OFFENSES—AIDERS AND ABETTORS—CONVICTION OF PRINCIPAL.

Under Cr. Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [U. S. Comp. St. Supp. 1911, p. 1686]) § 332, providing that all aiders or abettors of any crime are principals, where defendant was charged with knowingly and fraudulently aiding and abetting a bankrupt corporation, of which he was president and general manager, to conceal its assets from its trustee, it was not necessary that the corporation should be first convicted before the conviction of accused.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 492.*]

3. BANKRUPTCY (§ 492*)—OFFENSES—CONCEALMENT OF ASSETS—LIABILITY OF CORPORATION.

A bankrupt corporation is capable of committing the offense of knowingly and fraudulently concealing its property from its trustee in violation of Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 492.*]

4. BANKRUPTCY (§ 492*)—CONCEALMENT OF ASSETS.

Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), providing that a person shall be punished, etc., on conviction of the offense of having knowingly and fraudulently concealed, while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy, applies only to one who has been adjudicated a bankrupt, and not to one guilty of aiding and abetting the bankrupt in knowingly and fraudulently concealing its assets.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 492.*]

5. BANKRUPTCY (§ 485*)—OFFENSES—"CONCEALMENT" OF ASSETS.

Where an alleged concealment of assets of a bankrupt corporation began before the appointment of a trustee and continued after such appointment, it constituted a concealment from him, within Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), making such concealment a felony.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 906, 908; Dec. Dig. § 485.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1377-1384.]

6. WITNESSES (§ 201*)—PRIVILEGE—ATTORNEY.

Where accused was charged with aiding and abetting a bankrupt corporation, of which he was president and manager, to conceal its assets from its trustee, evidence of defendant's attorney that he was retained by defendant as attorney for the corporation, and also to represent defendant individually, was not objectionable as privileged.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 754, 755; Dec. Dig. § 201.*]

7. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REASONABLE DOUBT.

Where the court's charge was explicit and fair, and covered all the aspects of the case requiring that all the facts must be proved against defendant beyond a reasonable doubt, and defined reasonable doubt in the language of defendant's counsel, it was not error to refuse a charge that if on the whole case the jury should find that the evidence was evenly balanced, or they were unable to determine where the truth lay, that

created a reasonable doubt, and defendant would be entitled to an acquittal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

8. BANKRUPTCY (§ 495*)—CONCEALMENT OF ASSETS—EVIDENCE.

In a prosecution of the president and manager of a bankrupt corporation for aiding and abetting the concealment of its assets from its trustee, the fact that there was no evidence that defendant was holding the moneys under an agreement with the bankrupt to do with them what it requested did not impair the government's case.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 912; Dec. Dig. § 495.*]

9. BANKRUPTCY (§ 495*)—ASSETS—CONCEALMENT FROM TRUSTEE—EVIDENCE.

In a prosecution of the president and manager of a bankrupt corporation for aiding and abetting the concealment of its assets from its trustee, evidence *held* to sustain a conviction.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 912; Dec. Dig. § 495.*]

In Error to the District Court of the United States for the Southern District of New York.

Henry Kaufman was convicted of aiding and abetting the Daisy Shirt Company, a bankrupt corporation, to conceal its assets from its trustee, and he brings error. Affirmed.

The plaintiff in error, Henry Kaufman, hereinafter referred to as the "defendant," was president of the Daisy Shirt Company, a corporation organized under the laws of the state of New York, and was in charge of the company. This company was engaged in the manufacture and sale of shirts and had its principal place of business in the city of New York. On November 5, 1910, an involuntary petition in bankruptcy was filed against the company and it was duly adjudicated a bankrupt. The evidence discloses that between October 24 and November 2, 1910, Kaufman assigned a large portion of the outstanding accounts of the company to the Federal Finance Company for \$2,718.15. He assigned other accounts to one Silverstone for \$900. He sold to other parties a large quantity of merchandise belonging to the company receiving altogether \$12,653.72. A large part of this was paid to him in cash and some of it in checks which he cashed. On or about November 3d, a few days before the company was thrown into bankruptcy, Kaufman left New York for California, stopping at Montreal on his way where he remained a month. He was arrested in California and brought from there to New York to answer an indictment charging him with aiding and abetting a bankrupt corporation to conceal its assets. He never turned over any of the money he had received as hereinbefore set forth. The defendant undertook to account for the money which he had received before leaving for California by claiming that he had paid certain specified amounts to his wife, his sister, his brother, his father, his mother-in-law, and to certain other persons including \$495 to his attorney.

The defendant's testimony was that he had invested \$16,000 in the business, which was inadequate for the demands made upon it; that it became necessary to borrow money, and the defendant secured a loan of \$5,000 from the Madison Trust Company, which he put into the treasury of the corporation; that he raised \$1,200 on his mother-in-law's jewels, which sum was deposited in the bank account of the corporation, as well as \$875 on life insurance belonging to her, likewise paid to the corporation; that his sister loaned the company \$2,400 in various amounts; that his father paid \$2,500 to avoid foreclosure of mortgage assigned to the Franklin Trust Company as security for its loan to the corporation; that he pledged his wife's jewels with the Provident Loan Association for \$1,600, which went into the treasury of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

corporation; that he borrowed \$400 from one Gutkin. He testified that things were going very badly with the corporation and that great pressure was brought to bear on him to pay the debts thus incurred; that he yielded to these demands and paid from the moneys received upon the assignment of the outstanding accounts and sale of merchandise sums aggregating \$11,438, part of which went to merchandise creditors also. The other witnesses for the defense corroborated his statements to some extent.

Aaron William Levy, of New York City, for plaintiff in error.
H. Snowden Marshall, U. S. Atty., and Roger B. Wood, Asst. U. S. Atty., both of New York City.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The plaintiff in error who was the defendant below has been convicted of the crime of having aided and abetted the Daisy Shirt Company in concealing its assets in violation of section 29b of the Bankruptcy Act. He was not charged with having concealed the assets of the company from the trustee in bankruptcy. The indictment charged the Daisy Shirt Company with having concealed its assets from its duly qualified trustee in bankruptcy to an amount exceeding \$5,000, and further charged that the defendant "under the circumstances aforesaid did knowingly and fraudulently cause, procure, aid and abet, the Daisy Shirt Company while the said Daisy Shirt Company was a bankrupt as aforesaid, knowingly and fraudulently to conceal in the manner and form aforesaid, from William P. Myhan, the duly qualified trustee in bankruptcy of the said Daisy Shirt Company, the aforesaid sums of money and the aforesaid property belonging to the estate in bankruptcy of the said Daisy Shirt Company."

The provision of section 29b of the Bankruptcy Act reads as follows:

"A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy."

The Criminal Code in section 332 provides that:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

The federal courts have such criminal jurisdiction only as is given by act of Congress. *Jones v. United States*, 137 U. S. 202-211, 11 Sup. Ct. 80, 34 L. Ed. 691. The defendant was indicted as a principal under section 332 of the Criminal Code, and the case was tried on that theory.

[1, 2] The offense of concealing the assets from the trustee in bankruptcy is a felony as one committing the offense may be punished by imprisonment for more than one year. Section 335 of the Penal Laws, Act March 4, 1909. In the case of felonies the common law recognized the distinction of principals and accessories, a distinction it refused to apply to persons participating in treason and in misdemeanors. In the case of treason and misdemeanors all persons

who were guilty at all were punishable as principals and indictable as such. In the case of felonies one who aided and abetted the principal, but was absent when the crime was committed, or who after the crime was committed assisted the perpetrator, was simply an accessory. And according to the common law an accessory could not be tried before the conviction of the principal. But under section 332 of the Criminal Code of the United States all abettors of any crime are made principals. It is not necessary, therefore, that a bankrupt corporation should first be convicted before bringing to trial one charged with aiding and abetting in the concealment of its assets from a trustee in bankruptcy.

[3] It is undoubtedly the case that decisions and dicta can be found denying that a corporation can be indicted. Lord Holt is reported as having said that "a corporation is not indictable, but the particular members of it are." Anonymous, 12 Mod. 559. But it is a well-established principle of modern jurisprudence that an indictment will lie against a corporation, although there are some crimes, as treason, or felony, or breach of the peace, in respect of which it is agreed that an indictment could not be maintained against it, and it has been held that where a statute prescribes fine and imprisonment it is not applicable to a corporation because a corporation cannot be imprisoned. *United States v. Braun & Fitts* (D. C.) 158 Fed. 456. But in *Cohen v. United States*, 157 Fed. 651, 85 C. C. A. 113 (1907), this court decided that a bankrupt corporation was capable of committing the criminal offense of knowingly or fraudulently concealing its property from its trustee defined and made punishable by the Bankruptcy Act, and that persons who conspire to cause a corporation to commit such an offense are indictable for the conspiracy, and that it is immaterial that the corporation is not or cannot be indicted as one of the conspirators. We know of no reason why we should not adhere to the opinion we then expressed. We are compelled therefore to disregard the defendant's contention that, if the corporation could not be convicted of the offense described in section 29b of the Bankruptcy Act, he could not be convicted of aiding and abetting in the commission of such an offense. There is no distinction in principle between the *Cohen* Case, *supra*, and the case at bar. The fact that in the *Cohen* Case the indictment was for conspiracy under section 5440 of the Revised Statutes, while in this case the indictment is based on a concealment of assets, is a distinction without a difference so far as the principle involved is concerned.

[4] It may be conceded that defendant could not be convicted under section 29b of the Bankruptcy Act. That section applies only to one who has "knowingly or fraudulently concealed while a bankrupt or after his discharge." As the defendant is not alleged ever to have been a bankrupt the section is without application to him. It was held in *Field v. United States*, 137 Fed. 6, 69 C. C. A. 568, that the present or past bankruptcy of the person accused was an indispensable element of the offense created by that section. The defendant, however, is mistaken in supposing that the principle announced in the *Field* Case is so far applicable to his case as to require this court to

set aside his conviction. He loses sight of the fact that his own conviction is not under section 29b of the Bankruptcy Act which was under discussion in the Field Case, but is under section 332 of the Criminal Code.

[5] The offense with which the defendant is charged is that he aided and abetted the Daisy Shirt Company while the said company was a bankrupt knowingly and fraudulently to conceal from the duly qualified trustee property belonging to the estate in bankruptcy. The concealment must be a concealment from the trustee. In *re Adams* (D. C.) 171 Fed. 599. In the case at bar the funds were taken and the concealment began before the appointment of the trustee. But if the concealment which began before the appointment of the trustee continued after the appointment was made, and there was evidence in this case showing that it did, it constituted concealment from him. This we decided in the *Cohen Case*, *supra*.

[6] The defendant took the stand and testified in his own behalf. It is urged upon us that error was committed at the trial in the admission of certain evidence. The defendant's attorney was permitted to say:

"I was retained by Mr. Kaufman (the defendant) as attorney for the Daisy Shirt Company, and also to represent him individually."

It was objected that this evidence was calculated to bias or prejudice the defendant in the eyes of the jury. We see no valid objection to the admission of the testimony. If the attorney was retained by the defendant to represent him personally in the bankruptcy proceedings, the fact cannot be regarded as privileged. It was necessary for the witness to give this testimony before he could claim his privilege as to communications which passed between him and the attorney about which he was asked and which were excluded upon the theory that they were privileged. Whether any error was committed in refusing to allow the communications which may have passed between the defendant and his counsel in respect to the commission of a crime or a fraud, the legal adviser being ignorant of the purpose for which the advice was wanted, is not before us. But it may be remarked in passing that it has been held in England that a communication made in furtherance of any criminal or fraudulent purpose is not privileged. *Queen v. Cox*, 14 Q. B. II, 153. And the English rule appears to have been regarded with favor in the Supreme Court of the United States in *Alexander v. United States*, 138 U. S. 353, 11 Sup. Ct. 350, 34 L. Ed. 954, the rule being limited to cases where the party is tried for the crime in furtherance of which the communication was made, although the attorney declared in the case at bar that he had been retained by the defendant, the defendant while on the stand positively denied that he had been so retained. In view of his testimony on that point, we fail to see what right he has to raise the question of privilege at all. He cannot blow hot and cold at the same time. But irrespective of his right to raise the question, there is nothing in the point which he seeks to make.

[7] The defendant predicates error upon a refusal to charge—"that if upon the whole case the jury should find that the evidence is evenly

balanced, or that they are unable to determine where the truth lies, then that would create a reasonable doubt, and the defendant is entitled to an acquittal." The charge was a full, clear, explicit, and fair one, covering all the aspects of the case. The instructions upon the law were sufficiently distinct and precise. On the subject of reasonable doubt the jury was charged as follows:

"Now, in this, as in all other criminal cases, all of the facts must be proved against the defendant beyond a reasonable doubt, which is, as Mr. McIntyre (the defendant's counsel) told you. That does not mean that you should look around to see what remote or unreasonable theory you can imagine that might throw it out. If every suggestion which is not obviously fictitious is excluded from your mind, so that your minds are settled that the man is guilty, then you bring a verdict against him. It is only in case you shall have some doubt, for which you can give a sensible reason, that you are to bring in a verdict of guilty."

What Mr. McIntyre had told the jury about "reasonable doubt" does not appear in the record. If he thought that what he said to the jury on the subject, which the court adopted and supplemented, was not adequate, he should have had what he said on that subject incorporated into the record for our information. The accused was entitled to have the jury instructed that the prosecution must prove the charge against him beyond a reasonable doubt. Some courts have declared that it is not necessary for the trial judge to define or explain the words "reasonable doubt." *State v. Davis*, 48 Kan. 1, 28 Pac. 1092; *State v. Reed*, 62 Me. 129; *State v. Robinson*, 117 Mo. 649, 23 S. W. 1066. The Supreme Court of the United States, in *Miles v. United States*, 103 U. S. 304, 312 (26 L. Ed. 481), said "Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." And the same court, speaking through Mr. Justice Brewer, in *Dunbar v. United States*, 156 U. S. 185, 199, 15 Sup. Ct. 325, 39 L. Ed. 390 (1894), referred approvingly to what was said in the *Miles* Case. We are not now expressing any opinion upon whether the trial judge is or is not bound to define a reasonable doubt. But we fail to discover after what had already been said upon the subject any reason why the court should have enlarged upon it by complying with the request of counsel to charge in the words requested. The subject had already been adequately covered.

[8] There was no evidence that Kaufman was holding the moneys under an agreement with the bankrupt to do with them what it asked. Of course, if there had been such evidence, it would have been important in establishing the guilt of the defendant. But the absence of such evidence does not impair the government's case, for it is not at all important whether the defendant in taking and concealing the assets was concealing them on behalf of the bankrupt or for himself. The offense consists in concealing from the trustee any of the property belonging to the bankrupt. What may be the purpose of the concealment and who is to benefit by it does not enter into the matter. The wrong that is being punished is the withholding from the trustee, and therefore from the creditors, property to which they are entitled.

[9] There is no error of law and the evidence abundantly supports

the verdict of the jury. The jury has found under instructions of the court that the assets were secreted under a general scheme and that the defendant aided and abetted the bankrupt corporation in the concealment of its assets from its trustee in bankruptcy. The defendant admitted he had taken the moneys and that he had never turned over a dollar to the trustee. His claim that he paid \$400 to one Kuntz on a debt due to the latter from the corporation was denied by Kuntz. Neither his wife, nor his mother-in-law nor his brother were called to corroborate him in the story he told as to payments made to them in payment of debts due to them likewise from the corporation. His sister took the stand to corroborate him as to payments made to her by him, but her testimony was properly characterized by the trial judge as extraordinary and was evidently not believed by the jury. As soon as he obtained the money of the bankrupt, he left the United States without informing any one where he was going. He did not even wait to surrender the lease to his apartment or to look after the storage of his furniture. He never communicated with the trustee, nor did he in any way assist in straightening out the affairs of the bankrupt corporation of which he was president and general manager. The case is a particularly flagrant one, and the majority of the court discover no reason for reversing the judgment.

Judgment affirmed.

UNITED STATES FIDELITY & GUARANTY CO. v. FRENCH MUT. GEN. SOCIETY OF MUT. INS. AGAINST THEFT.

(Circuit Court of Appeals, Fourth Circuit. February 3, 1914.)

No. 1186.

1. INSURANCE (§ 683*)—REINSURANCE—LIABILITY OF REINSURER.

An insurer against loss from theft to the extent of three-fourths of the loss was reinsured by plaintiff for five years for the excess over 250,000 francs, for which it might become liable on account of any one embezzlement. It was agreed that plaintiff should procure reinsurance for 90 per cent. of the risk, and the reinsurers were to countersign the policy and accept its articles, though plaintiff remained liable to the original insurer. The gross premium paid by the original insurer was divided in proportion to the percentage of their several risks among the various insurers, one of whom was defendant, which reinsured two-tenths of plaintiff's risk. Defendant received its proportionate share of the gross premiums for three years, its policy being canceled at the end of three years by consent, subject to losses incurred prior to that time, and the share of the risk reinsured by it was reinsured for the rest of the five years by another company for the same annual premium. An employé of insured embezzled sums, three-fourths of which at the date of such cancellation aggregated less than 250,000 francs, but during the period of plaintiff's liability aggregated more than that amount. *Held*, that defendant was not liable for its proportionate share of the amount embezzled before the cancellation, as there being no excess over 250,000 francs, neither it nor plaintiff was liable at the date of the cancellation, and no subsequent embezzlement could charge defendant with liability, and its liability did not depend upon the extent of the liability of the other reinsurers, or whether they were liable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1816; Dec. Dig. § 683.*]

2. CONTRACTS (§ 152*)—CONSTRUCTION—UNANTICIPATED CONTINGENCIES.

Where the parties to a contract fail to provide for a contingency which afterwards happens because of their failure to contemplate its possibility, the agreement must be interpreted as written, and the language employed given its natural and commonly understood meaning.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 732, 733, 738; Dec. Dig. § 152.*]

3. PRINCIPAL AND SURETY (§ 59*)—LIABILITY OF SURETY.

The liability of a surety cannot be enlarged by implication.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.*]

Woods, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Action by the French Mutual General Society of Mutual Insurance Against Theft against the United States Fidelity & Guaranty Company. Judgment for plaintiff (203 Fed. 558), and defendant brings error. Reversed and remanded.

J. Kemp Bartlett, of Baltimore, Md. (Edgar Allan Poe, L. B. Keene Claggett and R. Howard Bland, all of Baltimore, Md., on the brief), for plaintiff in error.

Hyland P. Stewart, of Baltimore, Md. (Warren A. Stewart, of Baltimore, Md., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. [1] The defendant in error, hereinafter called the plaintiff, is a French corporation engaged in the business denoted by its name. The Societe d'Assurance Mutuelle des Agents de Change de Paris, called for brevity the Brokers' Society, is likewise a body corporate of France whose members, some 70 in number, are exchange brokers in Paris. This Brokers' Society insured each of its members against three-fourths of the loss, not exceeding in any one case 1,333,333 francs, or a maximum insurance of 1,000,000 francs, occasioned by the theft or embezzlement of his employés. It sought to protect itself from excessive losses by reinsurance against any liability exceeding in a single case 250,000 francs; and, accordingly, on March 13, 1903, the plaintiff, by a policy of that date, reinsured the Brokers' Society for five years against the excess over a quarter of a million francs, and not exceeding three-quarters of a million, for which the latter might become liable on account of any one embezzlement. It was agreed, however, that 90 per cent. or more of the risk to be assumed by plaintiff should be reinsured in at least three other companies approved by the Brokers' Society, and this appears to have been of the essence of the contract between these parties.

At the end of the five years covered by the policy it was to be deemed renewed unless either party had given six months previous notice, by registered mail, of a contrary desire. The premium to be paid was at the rate of 38,000 francs a year. The reinsurers were to coun-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tersign the policy and accept its articles, though the plaintiff remained liable to the Brokers' Society for the full performance of the contract.

The plaintiff in error, hereinafter called the defendant, became, on the date named, one of the reinsuring companies, taking two-tenths of the plaintiff's risk. The annual consideration received by defendant was 7,600 francs, less 10 per cent. retained by the plaintiff. Four other companies, in varying proportions, reinsured in the aggregate seven-tenths of the risk. The headquarters of plaintiff were at Paris, of the defendant at Baltimore, Md., of the other reinsurers at Munich, Zurich, Vienna, and Brussels, respectively. About January 1, 1906, the Vienna company was allowed to cancel its policy as of that date, and a Berlin corporation became its successor.

In the early part of 1906, as appears, the defendant decided to wind up its business in France and to cancel so far as it could its outstanding risks in that country. At its request the plaintiff consented to a cancellation of the reinsurance in question, and accordingly on January 19, 1906, it was agreed that the defendant's contract should terminate as of March 13, 1906, which would be precisely three years after its execution. The cancellation was made and accepted—

"subject to losses incurred prior to said date (March 13, 1906) in case they be known and declared afterwards in conformity to the conditions of the contract between the plaintiff and the Brokers' Society."

The defendant received and retained three full premiums for the three years that its reinsurance contract was in force. It appears that the same Berlin company, which had already taken over the share of risk originally reinsured by the Vienna company, became the reinsurer in defendant's place, and for the same annual premium became bound from the date of defendant's retirement for two-tenths of the plaintiff's risk. It also appears that on March 13, 1907, the Brussels company was allowed to withdraw and the plaintiff itself assumed the $2\frac{1}{2}$ per cent. of risk previously carried by that company.

On March 18, or 19, 1907, it was discovered that an employé of one of the members of the Brokers' Society had embezzled large sums from his employer, and had committed suicide. The aggregate amount of his defalcation was ascertained later to be 669,274.90 francs. Of this sum the employer himself lost one-fourth, which was not insured at all, amounting to 167,318.72 francs, the Brokers' Society lost 250,000 francs, which was not reinsured, and the plaintiff became liable for the balance of 251,956.18 francs.

It was found possible to determine with accuracy the date at which each particular sum had been taken by the dishonest employé, and was therefore ascertained that 301,185.90 francs were embezzled during the three years that defendant was one of the reinsurers, while 368,089 francs were taken between that date and March of the following year. For a time after the defalcation was discovered plaintiff expected to recover a salvage of 35,000 francs, and therefore admitted immediate liability for only 216,956.18 francs, or 32.4166 per cent. of the broker's total loss; and this amount was paid to the Brokers' Society on November 26, 1907.

The method of adjustment with the reinsuring companies which plaintiff adopted was to hold each group of insurers liable as a whole for 32.4166 per cent. of the amount embezzled during the time such group remained unchanged, and then to apportion the sum so ascertained among the insurers in proportion to the share of the risk which each of them had assumed for that period. Thus, the amount embezzled during the time that defendant was one of the insurers was 301,185.90 francs, and one-fifth of 32.4166 per cent. of that sum is 19,526.84 francs, which was the amount that plaintiff in the first instance demanded of defendant. The latter denied its liability and refused to make any contribution. The claim for salvage was finally settled by a credit of 15,000 francs, and the Brokers' Society was accordingly paid an additional 20,000 francs on February 19, 1912, which was after the commencement of this suit; and thereupon plaintiff demanded of defendant the further sum of 1,776 francs as its share of this 20,000 francs.

At the close of the trial, upon the facts above summarized, the defendant prayed the court, in substance, to rule that under the true construction of the reinsurance contract between the plaintiff and defendant, and the cancellation agreement afterwards executed by them, the plaintiff was not entitled to recover unless the court sitting as a jury should find that the sums taken by the embezzling employé between March 13, 1903, and March 13, 1906, amounted in the aggregate to more than 333,333 francs. The refusal of the court to grant this prayer is assigned as error, and presents the principal question to be determined.

The plaintiff contends that the uninsured portion of the loss, namely, one-fourth of the total, plus 250,000 francs, should be deducted once for all from the total loss when ascertained, and as of the date of its ascertainment, and that each successive reinsurer should benefit by such deduction in proportion to the amount embezzled during the time it was on the policy. It is argued that the obligation originally assumed by plaintiff to the Brokers' Society was undivided in point of time, that when a loss was discovered the broker's one-fourth was to be determined as of that date, and it was then that the 250,000 francs were to be met by the Brokers' Society, and that such deductions were not and could not be made until the entire loss became known. As the cancellation agreement did not discharge the defendant from liability in any and all events, it still remained bound for losses incurred prior to March 13, 1906, in case they became known and were declared before the expiration of the five-year period covered by plaintiff's policy. From plaintiff's standpoint, therefore, the defendant as to such losses remained liable to the same extent that the company taking its place became liable for losses subsequently occurring, with the same right to share in the benefit of deductions of the amounts for which the broker and the Brokers' Society were liable; and in this connection the fact is emphasized that when its contract was canceled defendant retained the full premiums for the time during which it was on the policy.

As we understand it, the theory advanced is that defendant and the

other reinsurers became in effect parties to the original agreement between plaintiff and the Brokers' Society; that the moneys taken by the employé from time to time during a period of years, until the theft was finally discovered, constitute only one embezzlement; that the dishonest acts cannot be divided in time or legal effect, and are all covered by plaintiff's policy; that the purpose of plaintiff in reinsuring with defendant was to be protected to the extent of one-fifth of any loss that might happen while defendant was on the reinsurance; and that as defendant was a reinsurer for three years of the period during which the successive thefts occurred, and received its proportionate share of the gross premiums for such three years, it should be held liable for its proportionate share of the entire loss afterwards ascertained. Special stress is placed upon the asserted intention of all the parties that plaintiff should be fully reinsured, except as to about 10 per cent. of its undertaking, during the entire period of five years, that when cancellation was permitted in any case another reinsurer was at once to take the place of the one retiring, and that every one concerned acted upon the assumption that the risk assumed by a reinsurer for the last two years was no greater than the risk of the reinsurer for the first three years. And from this reasoning, without amplifying the argument, it is deduced that the entire loss, as it was finally determined, should be distributed in equitable proportions among those who, at one time or another, in varying percentages, had undertaken to protect the plaintiff, to the extent stated, against its admitted liability for the whole sum covered by its policy. This was substantially the view taken by the trial court, and judgment was accordingly ordered for the full amount of the plaintiff's claim. The learned judge in his opinion says:

"The first of the three possible theories of adjusting the loss among successive reinsurers, therefore, seems to have been that which was in contemplation of the parties. It is a perfectly simple and logical theory. It requires nothing further than the assumption that the parties intended that the sum to be borne by the broker himself and by the Brokers' Society should not be deducted until the total loss was ascertained, and then from the total loss. Obviously that is the only time at which the broker's one-fourth could, as against him, be calculated.

"To my mind as applied to the facts of this case, it is far the most equitable of the three possible theories. It contravenes no positive rule of law. So far as I am aware, there is not a single authority opposed to it, although it is equally true that there is none in its favor."

We are constrained to reject this theory for reasons which appear to us convincing. This is an action at law, and the defendant's liability is measured and confined by its written agreement. For aught we can see, many of the facts above recited furnish no aid to the proper construction of that agreement. In other words, the question would remain the same if these facts were eliminated. For example, the defendant had nothing to do with the requirement of the Brokers' Society that plaintiff reinsure nine-tenths of its risk, and nothing to do with the number or choice of reinsurers. Nor are the nature and extent of defendant's undertaking affected by the fact—assuming it to be a fact—that it countersigned the original policy, and thereby or otherwise ac-

cepted its provisions. Independent of any promise to do so, the plaintiff would have been free to reinsure the whole or any part of its risk, and could place such reinsurance with companies of its own selection, and upon such terms as might be agreed upon with them. Furthermore, the fact that another reinsurer was secured when defendant's withdrawal became effective, whether in fulfillment of plaintiff's obligations to the Brokers' Society in that regard or for any other reason, and that such reinsurer took the same percentage of risk and received the same relative share of the gross premium, has no perceptible bearing upon the defendant's liability. To this it may be added that the circumstance that the gross premium paid by the Brokers' Society, or so much of it as was not retained by plaintiff, was divided among the various reinsurers in proportion to the percentage of their several risks is quite immaterial. In short, there was no privity between defendant and the other reinsuring companies, whether those originally bound or those that came in afterwards. True, they all had like contract relations with the plaintiff, but each of them was wholly independent of the others. It results that the liability of defendant does not depend in the least upon the extent to which the Berlin Company became liable, or whether it became liable at all. To state the proposition in another way, we do not perceive that the question presented differs in any respect or degree from the question that would be presented if plaintiff had made exactly the same contract with the defendant, and canceled it on the same conditions, without placing other reinsurance at any time, and without being under obligation to do so.

The controlling facts then are simply these: Plaintiff insured the Brokers' Society for five years from March 13, 1903, against any loss exceeding 250,000 francs, and not more than 1,000,000 francs, for which the latter might be liable to any of its members. The risk thus assumed by the plaintiff, to the extent of one-fifth, was reinsured with defendant for the same period. By written agreement between them this reinsurance was canceled on the 13th of March, 1906, subject to losses incurred prior to that date. No one then knew or suspected that anything had occurred to make the plaintiff liable under the terms of its policy. It turned out afterwards that between March 13, 1903, and March 18 or 19, 1907, and at various times between those dates, a dishonest employé had stolen an aggregate of some 669,000 francs. It was ascertained that about 301,000 francs were taken prior to March 13, 1906, and some 368,000 francs after that date. The entire loss was "known and declared" before the five-year period of insurance expired, and the plaintiff was therefore concededly liable to the Brokers' Society for three-fourths of the entire sum embezzled, less 250,000 francs.

The controversy thus reduces itself to the question of what liability the defendant remained under, when the cancellation of its reinsurance took effect on March 13, 1906, by reason of the fact that such cancellation was "subject to losses incurred prior to said date." To our minds this appears a plain provision, the meaning of which is not obscure or ambiguous. The obvious purpose of the cancellation was to discharge

the defendant from all liability or responsibility for future embezzlements covered by plaintiff's policy. If anything had previously happened for which the plaintiff was then liable to the Brokers' Society, the defendant continued bound to the extent of its indemnity; but if nothing had occurred up to that time for which the plaintiff was obligated, it is certainly difficult to see how anything that afterwards took place could operate to charge the defendant with liability.

To hold that subsequent losses had the effect of imposing an obligation which did not exist when defendant's contract was annulled is to give to the agreement then made a construction which measurably defeats the object of defendant in seeking release from its engagement. The condition or reservation of the cancellation agreement related wholly and by express terms to what had already occurred, and cannot, in our judgment, be fairly construed to cover losses resulting from subsequent thefts. It is conceded that the amount embezzled prior to March 13, 1906, was only about 301,000 francs, and for the loss of that amount the plaintiff was not liable to the Brokers' Society, because such a loss was not covered by its policy. The plaintiff of course was liable for defalcations before as well as after defendant's release, if those losses constituted a single embezzlement and amounted altogether to more than 333,333 francs, but the defendant was bound only for losses prior to March 13, 1906, and that liability could not be increased or affected by thefts thereafter committed. This seems to us the construction required by the language and purpose of the cancellation agreement, and we cannot do otherwise than construe it accordingly.

[2, 3] It was urged in argument, and the point was somewhat dwelt upon by the learned District Judge, that the parties could not have intended by the words they used to decide the present dispute in advance and in favor of defendant. We suggest that it would perhaps be more correct to say that they had no intention at all respecting the matter now in controversy. In other words, this is one of those cases where the parties to a contract failed to provide for a contingency which afterwards happened because at the time the contract was made it did not occur to either of them that such a contingency would or could happen. We must therefore interpret the agreement as it was written, and give to the language employed its natural and commonly understood meaning. Clearly the defendant was a mere surety, and it is well settled that liability in such cases cannot be enlarged by implication. The plaintiff was at liberty to hold the defendant for the full five years of its contract. It could refuse a release altogether or allow it upon conditions which would have bound the defendant to contribute for such a loss as was actually suffered. It saw fit to cancel the defendant's contract of reinsurance on a certain date, subject only to prior losses, and except as to those losses it has no legal claim against the defendant.

Much the same may be said of the contention that the defendant is equitably bound to contribute, in proportion to the time it was on the policy and its percentage of the risk, to the amount which plaintiff has

been compelled to pay, and this view is reflected in the opinion of the learned Judge presiding at the trial. It is true that the defendant received its agreed share of the gross premium for three years, but it carried its share of the risk during that period, and then simply had the good fortune to get released before any loss occurred for which the plaintiff was liable. The result may be that the plaintiff must bear a loss against which it supposed itself protected, but if it inadvertently made a bad bargain, the courts cannot be called upon to save it from the consequences. In a word, we perceive no grounds for deciding the question here presented in accordance with the assumed or asserted equities to which we have referred. In our judgment the plaintiff has no cause of action because it was under no liability to the Brokers' Society at the time of defendant's release, and the latter cannot be held responsible for what afterwards transpired.

It seems fitting to add that the question here involved is mainly one of first impressions. Counsel on both sides concede that no precedent has been found in the reported cases, and our own researches have been equally fruitless. We can only say, after careful consideration, that we are unable to accept the conclusion of the court below, for the reasons above outlined. It follows that the judgment must be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

WOODS, Circuit Judge (dissenting). I am unable to concur in the reasoning and conclusion of the majority opinion, because, in the settlement of the insurance, it gives to the defendant, as a reinsurer as of the date of the cancellation of its policy, the entire benefit of the required deduction of one-fourth of the risk carried by the insured employer and of the 250,000 francs carried by the original insurer, the Brokers' Society, whereas, construing all the contracts together, it seems to me clear that these deductions should be made for the proportionate benefit of all the reinsurers at the date of the ascertainment of the entire loss. Even if the latter construction of the contract be regarded doubtful, it should be preferred, since it produces a fair equality of burden, while giving the defendant the benefit of the entire deductions results in an inequality of burden, which could not have been in contemplation either when the defendant's contract was made or when it was canceled.

Elaboration is not attempted because it would be mere repetition of the full and strong reasoning of the District Judge.

DASHER v. HOCKING MINING CO.

(Circuit Court of Appeals, Sixth Circuit. April 7, 1914.)

No. 2436.

1. MASTER AND SERVANT (§ 118*)—INJURIES TO SERVANT—SAFE PLACE TO WORK—MINES.

The rule that a master owes to a servant the nondelegable duty to exercise reasonable care to furnish the servant a reasonably safe place to work applies to mining operations.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. § 118.*]

2. MASTER AND SERVANT (§ 205*)—SAFE PLACE TO WORK—DUTY TO FURNISH—PRESUMPTION OF PERFORMANCE.

Where a master is bound to exercise reasonable care to furnish his servant a safe place to work, the servant may act on the presumption that the duty has been performed, unless he knows, or by the exercise of reasonable care could have known, of the defect and danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547-549; Dec. Dig. § 205.*]

3. MASTER AND SERVANT (§§ 103, 107*)—SAFE PLACE TO WORK—DUTY TO PROVIDE.

A master's general obligation to provide a safe place to work does not apply where the servant is engaged in making, or is by express custom or contract bound to make, the place safe himself; or where he is engaged in "making his own place," and where the character of the work is such that the condition of the place as respects safety necessarily changes as the work progresses and by reason of such work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 175, 199-202, 212, 254, 255; Dec. Dig. §§ 103, 107.*]

4. MASTER AND SERVANT (§ 107*)—DANGEROUS PLACE—DUTY OF MASTER.

Whenever the place where a servant's work is being done ceases to be one which the employé makes for himself, as an incident to his work, and the work does not necessarily change the character of the place as respects safety, the obligation of reasonable care to keep the place safe rests primarily on the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.*]

5. MASTER AND SERVANT (§§ 286, 289*)—INJURIES TO SERVANT—MINING—SAFE PLACE TO WORK.

Where plaintiff, an electrical wire hanger and general repair man, was requested by his foreman to go inside the mine and assist in taking out certain bottom coal, and while so engaged was injured by the fall of a pot of slate from the roof of the room where he was engaged, whether the working place was under plaintiff's control so as to impose on him the duty to prop the roof as required by Rev. St. Ohio 1908, § 6871, whether defendant was negligent in failing to provide plaintiff with a safe place to work, and whether plaintiff was guilty of contributory negligence were for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050, 1089, 1090, 1092-1132; Dec. Dig. §§ 286, 289.*]

In Error to the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by John J. Dasher against the Hocking Mining Company. Judgment for defendant, and plaintiff brings error. Reversed, and new trial ordered.

T. E. Powell, of Columbus, Ohio, for plaintiff in error.

E. J. Jones and Grosvenor, Jones & Worstell, all of Athens, Ohio, for defendant in error.

Before KNAPPEN and DENISON, Circuit Judges, and SANFORD, District Judge.

KNAPPEN, Circuit Judge. Plaintiff brought suit to recover for injuries suffered by him while engaged with another workman in taking out "bottom" coal in an entry of defendant's mine, the injury being caused by the fall from the roof of a "pot" of slate or soapstone weighing several hundred pounds. The defendant was alleged to be negligent in failing to prop up or support the roof of the mine in any way.

Section 6871 of the Revised Statutes of Ohio, then in force, provided that:

"Any miner or other person, employed in any mine governed by the statute, who intentionally and willfully neglects or refuses to securely prop the roof of any working place under his control, * * * for fifteen feet back from the face of his working place, * * * shall be fined not less than fifty dollars, or imprisoned in the county jail not more than thirty days, or both. The owner, agent, or operator of every coal mine shall keep a supply of timber constantly on hand, and shall deliver the same to the working place of the miner, and no miner shall be held responsible for accidents which may occur in mines where the provisions of this section have not been complied with by the owner, agent, or operator thereof."

The Supreme Court of Ohio has held that the statutory policy established by section 6871 and related sections imposes the duty to prop the roof of a "room" upon the miner in control thereof; that this duty cannot be shifted to another; and that failure to observe the duty defeats recovery (*Coal & Mining Co. v. Administrator of Clay*, 51 Ohio St. 542, 555, 38 N. E. 610, 25 L. R. A. 848; *Coal Co. v. Donley*, 73 Ohio St. 298, 302, 76 N. E. 945); and that, if two miners are equally "in control," the fact that one is distinguished as "timberman" does not relieve the other of liability (*Coal, etc., Co. v. Administrator of Clay*, supra, 51 Ohio St. at pages 542, 556, 38 N. E. 610, 25 L. R. A. 848). The state Supreme Court has, however, held that the statute does not apply to "entries"; that, notwithstanding the statute, it is the duty of the owner or the operator to furnish reasonably safe entries for ingress and egress of employes; and that the miners may presume that this duty has been performed (*Wellston Coal Co. v. Smith*, 65 Ohio St. 70, 82, 61 N. E. 143, 55 L. R. A. 99, 87 Am. St. Rep. 547; *Davis v. Turner*, 69 Ohio St. 102, 119, 68 N. E. 819).

At the conclusion of the testimony, the District Court held that, as matter of law, the place where plaintiff was at work was not an "entry," but was a "room"; that the room was under plaintiff's control, within the meaning of the statute; that the place of the accident was within 15 feet from the face of the coal; that it was accordingly the plaintiff's duty to prop the roof, and he having thus disobeyed the

statute could not recover. It was also held that even if the statute did not apply, and the case were to be governed by the common law, the plaintiff was shown by the record to be guilty of contributory negligence, as matter of law. Verdict was accordingly directed and judgment entered for defendant. The correctness of this direction is the important question presented for review.

Turning first to the relative duties of the parties in the absence of statute: The evidence construed most favorably to plaintiff, as it must be on motion to direct verdict, would sustain findings of fact substantially as follows: In carrying forward the entry the cutting had been done by a machine operated by the company, and the "shoot-ing down," loading, and removal done by the "fillers," whose work (which was done by the ton) had been completed, as respects the extension in question, at least a few days previous to the accident. The machine does not cut quite down to the underlying fire clay; when the thickness of coal left is not more than four inches it is the duty of the fillers to remove it, when the thickness is greater the company has to do it. The "bottom" coal in this case was 12 to 15 inches thick, and had to be removed before the machine could be used in further extending the entry. Plaintiff had been for about a year in defendant's employ, working by the day as electrical wire hanger and general repairman. He had had considerable experience, at intervals extending over a number of years, in various kinds of coal-mining work, although mining seems not to have been his principal business. He had never done any mining for the defendant company or in the mine in question. On the morning of the accident, the mine foreman (who was overseer of all inside mining operations) met plaintiff near the mouth of the mine, ascertained that he had probably nothing to do that day, and asked how he would like to go with one Andrews to take out bottom coal in the entry in question. Plaintiff assented. The foreman, Andrews, and plaintiff went together into the entry, where the foreman pointed out the coal which he directed to be taken up, suggesting that the best way to get it out was to first cut a trench on each side of the entry through to the fire clay, and then take out the intervening bottom by sledge and wedge. The foreman remained until the work of cutting the trenches was well under way and then left, telling Andrews, "when you get this done, come down to the mouth of this entry," but giving no further instructions to plaintiff. The foreman did not return until after the accident. After plaintiff and Andrews had worked an hour or more, the "pot" fell and struck plaintiff. Andrews' ordinary employment was that of timberman, whose duties are to "take down loose slate if he finds it or timber it up if he finds it needs to be timbered." In the regular process of mining the posting and timbering up is done before the coal is shot down. The entry at the place where the work was being done was not timbered, no suggestion of timbering was made, nor was there testimony of any custom that those taking out bottom coal were to assume the duty of timbering. Plaintiff was permitted to show that when bottom coal is being taken out more than 15 or 16 feet back from where mining had been going on the overseer should test the

roof, and in case of danger timber it up; but, under the view of the statute taken by the court, was not allowed to make a showing on this subject as to the 15 feet immediately back of the mining face. Plaintiff testified that the foreman made no test of the roof and said nothing on the subject; that plaintiff was depending upon the foreman to tell him if there was danger; that plaintiff had no knowledge that the roof was not safe. Andrews testified that, so far as he saw no examination of the roof was made by the foreman; that it looked to him (Andrews) to be safe; and that he made no test except by looking at it, and "never thought to make an examination." The foreman testified that he examined the roof with his eye and with his hand; that it sounded solid; that its appearance was smooth and nothing unusual that he could detect. The principal, if not the only, light available was naturally that afforded by the "bank" or cap lamps. There was testimony, on the one side, that taking out the bottom coal would not have, and on the other side that it might have, a tendency to loosen the pot, which, however, it seems to have been agreed, would fall anyway whenever air got in around it; but it was not disputed that the work of taking out the bottom would have no tendency to cause slate to fall that otherwise would be safe. There was testimony that the existence of a pot could not always be discovered by inspection or sounding. There was, however, testimony to the contrary; and the miner who operated the machine which cut the coal in the place in question testified that when he did his work the roof appeared seamy and inclined to be "potty" at the place of the accident, that it was cracked and he thought it unsafe; and, further, that there was indication that the machine had cut through a claybank, and that the top is always bad and more or less dangerous on either side of such a bank.

[1] Considering the case with reference alone to common-law duties, we think it clear that the court would not have been justified in directing verdict for defendant. No general rule is better established than that the employer owes to the employé the nondelegable duty to exercise reasonable care to furnish the employé a reasonably safe place to work. This rule applies to mining operations, as illustrated by several decisions of this court. *Big Brushy Coal, etc., Co. v. Williams*, 176 Fed. 529, 99 C. C. A. 102; *Tennessee Copper Co. v. Gaddy*, 207 Fed. 297, 125 C. C. A. 41; *Big Hill Coal Co. v. Clutts*, 208 Fed. 524, 125 C. C. A. 526. Indeed, the peculiarly dangerous conditions under which mining operations are carried on make the duty of providing a safe place to work unusually pertinent, for, the more hazardous the employment, the greater should be the care. *Schlacker v. Mining Co.*, 89 Mich. 253, 262, 50 N. W. 839.

[2] Where there exists this obligation on the part of the employer, the employé may properly act upon the presumption that the duty has been performed, and is not guilty of contributory negligence in so doing unless he knows, or by the exercise of reasonable care and prudence should have known, of the defect and danger. *Choctaw, O. & G. Ry. Co. v. McDade*, 191 U. S. 64, 68, 24 Sup. Ct. 24, 48 L. Ed. 96; *Union Pacific R. Co. v. Jarvi* (C. C. A. 8) 53 Fed. 65, 69, 3 C. C.

A. 433; *United States Smelting Co. v. Parry* (C. C. A. 8) 166 Fed. 407, 410, 92 C. C. A. 159.

[3] This general obligation resting upon the master with respect to providing a safe place to work has, however, no application to cases where (a) the employé is engaged in making, or it is by express custom or contract his duty to make, the place safe; or (b) where the employé is engaged in "making his own place," and where the character of the work is such that the condition of the place as respects safety necessarily changes as the work progresses, and by reason of such work. The reason of this latter exception is that it would be impracticable, if not impossible, for a master in such case to look out for the safety of the employé while operations of the nature stated are being carried on. *Coal, etc., Co. v. Adm'r of Clay*, supra, 51 Ohio St. at pages 557, 558, 38 N. E. 610, 25 L. R. A. 848; *Petaja v. Aurora Iron Mining Co.*, 106 Mich. 463, 468, 470, 471, 66 N. W. 951, 32 L. R. A. 435, 58 Am. St. Rep. 505; *Strepanski v. Grand Rapids Plaster Co.*, 162 Mich. 696, 127 N. W. 706. This exception has special application to the work of cutting down and blasting coal, where the character of the place is constantly changing, and where therefore the employé may properly be said to be making his own place to work. And it is because of this consideration that, in the absence of statute, the question of liability or nonliability of the employer has frequently been made to turn upon the question whether the place of the accident was an "entry," used only for passage to and fro, or, on the other hand, a "room" which was being used by the employé. But in the absence of statute, the distinction as applied to the question of relative duty we are considering is not alone between an entry used merely as a passageway, and a room as being a place where work of any kind is being done.

[4] Whenever the place where the work is being done ceases to be one which the employé makes for himself, as an incident to his work, and the work being done does not necessarily change the character of the place as respects safety, the obligation of reasonable care to keep the place safe rests primarily upon the employer. *Coal, etc., Co. v. Adm'r of Clay*, 51 Ohio St. supra, at pages 557, 558, 38 N. E. 610, 25 L. R. A. 848; *Western Coal & Min. Co. v. Ingraham* (C. C. A. 8th Cir.) 70 Fed. 219, 223, 17 C. C. A. 71; *Western Investment Co. v. McFarland* (C. C. A. 8th Cir.) 166 Fed. 76, 78, 91 C. C. A. 504; *Highland Boy Gold Min. Co. v. Pouch* (C. C. A. 8th Cir.) 124 Fed. 148, 151, 61 C. C. A. 40; *Ashland Coal, etc., Co. v. Wallace*, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207.

In the *McFarland Case*, supra, the decedent, while shoveling out ore, was killed by the falling of rock and slate from the roof, which seems to have been previously held in place by the accumulated body of ore; the fall resulting from the removal of the support thereby occasioned. It was held that the doctrine of a safe place to work was applicable, for the reason that the decedent "was not employed to do work which necessarily changed the character of the place for safety. The evidence discloses no conscious employment of that kind." There, in fact, the work seems to have changed the character

of the place for safety, but the character of that kind of work did not necessarily have that effect, but in the given case did so only because of the support before in fact given by the body of ore which was being shoveled away. In *Highland Boy Gold Min. Co. v. Pouch*, supra, the plaintiff, who operated a drilling machine, was injured by falling rock and timbers, by reason of the caving in of the stope in which the machine was about to be operated. The doctrine of a safe place to work was there also held applicable. It is true that the stope which caved in was said by the court to be "in a certain sense a completed chamber, underground, through which men were expected to pass, and in which they were required to work"; but one of the grounds of decision was that "the plaintiff's injuries were not occasioned by any work which he was doing which made the place insecure." The case was distinguished from one which would be presented had plaintiff been injured while drilling and blasting by the fall of the rock in an unfinished part of the stope where he was at work. In *Ashland Coal, etc., Co. v. Wallace*, supra, the plaintiff, while laying a switch track in an entry, was hurt by falling slate from the roof. He was thus using the entry not as a place of passage, but as a place to work. The rule requiring the employer to exercise reasonable care to provide a safe place to work was held applicable.

[5] In the instant case, whether the work in which plaintiff was engaged contributed at all to the fall of the pot is at best problematical; at the least, it cannot be said, as beyond dispute, that plaintiff's work necessarily made the place unsafe, as tending to cause the fall of the pot; if, indeed, there was sufficient evidence to justify submitting that question to the jury. Moreover, if plaintiff's testimony were believed, there was on his part no conscious employment in work of a class necessarily tending to cause a fall of material from the roof. The question of defendant's negligence was thus for the jury, and so, we think, was the question whether plaintiff was contributorily negligent. Taking into account that the drilling, blasting, and filling had been done, the more or less obscure evidences of the existence of a pot, the right to rely upon the foreman to make reasonable inspection and to take reasonable precautions to prevent injury, and the lack of proof of any contract or custom requiring one doing work of the class in question to look out for his own safety, it was properly a question for the jury whether the plaintiff failed to exercise the care for his own protection which an ordinarily prudent and intelligent workman in the same circumstances would have employed; and this conclusion is not overthrown by the fact that Andrews, while stating that the roof looked to him to be safe and that he never thought of making an examination, added that perhaps it was carelessness on his part. Nor does it follow that, if the overseer was negligent, plaintiff must also have been; for the degree of care required of the employer and employé in particular cases is frequently, if not generally, different, in view of the primary obligation resting upon the employer, and the right of the employé measurably to act upon the presumption that the employer has performed his duty.

Returning then to the statute: Unless the working place in ques-

tion was under plaintiff's "control," the statute obviously has no application. We think the learned judge who presided below erred in holding that, as matter of law, plaintiff was in such control. Conceding that, if plaintiff and Andrews were jointly in control of the place, plaintiff would not be exonerated from the statutory duty by the fact that Andrews was the timberman, we think the question of actual control is, under the statute, primarily one of fact; in other words, we do not construe the statute as meaning that every person employed in a mine for any purpose is in control of the room in which he is employed. We have been cited to no decisions of the Supreme Court of Ohio asserting such doctrine; and in *Coal, etc., Co. v. Adm'r of Clay*, *supra*, and in *Ohio & P. Coal Co. v. Simpson* (affirmed in 86 Ohio St. 310, 99 N. E. 1131), the question of control seems to have been treated as one of fact.

The case of *Ashland Coal, etc., Co. v. Wallace*, *supra*, involved a statute of Kentucky, which imposed a fine on "any person employed in any mine governed by this statute, who intentionally or willfully neglects or refuses to securely prop the roof of any working place under his control." The Court of Appeals of Kentucky construed this statute as "specially intended to refer to those persons actually engaged as miners, in taking out coal, and thereby removing the natural props of the roof, and that it has no application to persons who are specially employed, as was the plaintiff in this case, to perform duties which had no connection in any way with the weakening or removal of these natural supports." We do not decide whether the distinctively criminal Ohio statute should be similarly construed, as plaintiff in error has not raised the question. As the case must be tried again, we content ourselves with saying that taking into account the nature of plaintiff's usual employment at the mine, the circumstances under which he was assigned to this particular work, the extent to which the room had already been completed, the specific directions given by the foreman, and the latter's connection with the work, the defense that plaintiff was in control of the room in the statutory sense presented, at the most, a question of fact for the jury.

In view of these conclusions, we find it unnecessary to discuss the other questions which have been argued.

The judgment of the District Court is reversed, with costs, and a new trial ordered.

NASHVILLE INTERURBAN RY. v. BARNUM.

(Circuit Court of Appeals, Second Circuit. March 11, 1914.)

No. 120.

1. COURTS (§§ 405, 424*)—DECISIONS REVIEWABLE—JUDICIAL CHARACTER OF TRIBUNAL.

Under Rev. St. U. S. § 649 (U. S. Comp. St. 1901, p. 525), authorizing the trial of issues of fact in a Circuit Court without a jury when the parties so stipulate in writing, and Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1167 [U. S. Comp. St. Supp. 1911, p. 243]) § 291, providing that when in any law any reference is made to or any power conferred upon

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the Circuit Courts, such reference shall be deemed to refer to and confer such power upon the District Courts, the District Courts may try issues of fact without a jury when the parties waive a jury trial, notwithstanding Rev. St. U. S. § 566 (U. S. Comp. St. 1901, p. 461), requiring the trial of issues of fact in such courts except in equity cases, etc., to be by jury, since though in form the Judicial Code abolished the Circuit Courts, it in fact merged them with the District Courts, and transferred all the machinery for disposing of business possessed by the Circuit Courts to the District Courts, and hence the rule that a trial in the District Court without a jury by consent amounts to an arbitration and cannot be reviewed no longer applies.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097-1099, 1101, 1103, 1119, 1125-1129; Dec. Dig. §§ 405, 424.*]

2. APPEAL AND ERROR (§ 1010*)—REVIEW—QUESTIONS OF FACT.

Under Rev. St. U. S. § 649 (U. S. Comp. St. 1901, p. 525), providing that the finding of the court on a trial without a jury shall have the same effect as a verdict, where there is competent evidence to support a finding of fact, it is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

3. TRIAL (§ 395*)—FINDINGS—FORM.

Findings that plaintiff had not shown by a preponderance of proof facts, the burden of proving which was on plaintiff, while inartificial and not directly stating the ultimate facts, were sufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 927-934, 939; Dec. Dig. § 395.*]

4. APPEAL AND ERROR (§ 1008*)—REVIEW—QUESTIONS OF FACT.

The trial court's refusal to find other facts is as conclusive on appeal as its findings; the error, if any, consisting in its failure to give sufficient weight to the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. § 1008.*]

5. WITNESSES (§ 331½*)—IMPEACHMENT—PARTICULAR ACTS.

Letters written by a witness, not relating to the issues involved, were not admissible to impeach his credibility, as extrinsic testimony to particular acts is inadmissible.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 331½.*]

6. WITNESSES (§ 330*)—CROSS-EXAMINATION—SCOPE—DISCRETION OF COURT.

It is within the discretion of the trial court to restrict the scope of cross-examination as to matters wholly unconnected with the case, and claimed to be relevant only as affecting the witness' credibility.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1106-1108; Dec. Dig. § 330.*]

In Error to the District Court of the United States for the Southern District of New York.

Writ of error to review a judgment entered in the District Court for the Southern District of New York. Affirmed.

The plaintiff is a corporation organized under the laws of the state of Tennessee. The defendant is a resident of the city and state of New York and president of Lawrence Barnum & Co., a corporation organized under the laws of the state of New York. The case was tried by the District Judge sitting without a jury, pursuant to a written stipulation signed by the plaintiff and the defendant. An attempt by the plaintiff to review the judgment by notice of appeal resulted in an order of this court, entered on November 20, 1913, dismissing the appeal.

The Nashville Interurban Railway had projected a line of railway out of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the city of Nashville, Tenn., and had entered into a contract with the Central Construction Company for its construction. On March 20, 1907, the officers of these companies met in New York City with the defendant, who was and is the president of Lawrence Barnum & Co., and entered with him into certain agreements on behalf of their respective corporations. The railway company was represented by its president, H. H. Mayberry, and the construction company by its president, Judge Pitts. Two agreements were signed by these corporations; the signatures being affixed by their respective presidents. One of these was called an underwriting agreement, the other a collateral agreement.

The contention of the plaintiff was as follows: That the defendant was told that there were 15 directors of these two companies, but that only 5 of them had any financial interest, and that the financial interests in the companies were held by these 5 and by 1 outside man who was not a director of either company, the names of these 6 gentlemen being given, viz., Pitts, Mayberry, Baxter, Landis, and the two Franks, one of whom was, and one not, a director. The defendant stated that he would be satisfied if the guaranty provided for in the collateral agreement for the performance of certain features thereof should be signed by these six men, and he was assured by Mayberry that without doubt he (Mayberry) could get them to sign it.

On the 20th of March the parties negotiating the transaction signed the papers and executed the notes, and handed to defendant a draft for \$37,500, which was the amount of his commission, payable in cash. Mayberry took the carbon copy of the underwriting agreement and the original copy of the collateral contract and left with defendant the carbon copy of the collateral contract and the original of the underwriting agreement, together with the notes and draft. The contentions of the plaintiff were: That the papers were deposited with him personally, and not as representing Barnum & Co., and that Mayberry was to proceed at once to procure the signatures of the four interested parties, who were absent, and upon doing so that the contracts were to be exchanged and the deal go into effect; that the draft defendant was at liberty to have cashed, and in case of miscarriage, the money was to be returned along with the other papers; that there was a miscarriage, and that Mayberry was never able to obtain the signatures of the other directors, so that the papers never became effective.

The defendant's contentions were as follows: That he told Pitts and Mayberry that he would accept their guaranty alone as satisfactory, and that the papers went into effect at once; that Mayberry was told that he was at liberty to obtain the guaranty of the other four persons interested, and that if their guaranty was obtained, the defendant agreed that he would exchange the papers, otherwise the matter stood as final in its then form; that an immediate delivery of the papers was made, and that Lawrence Barnum & Co. is entitled to retain the \$37,500 and the notes (aggregating altogether \$150,000) for services rendered in lending its credit by signing the underwriting agreement.

Dallas Flannagan, of New York City (Martin W. Littleton and Dallas Flannagan, both of New York City, of counsel), for plaintiff in error.

Hornblower, Miller & Potter, of New York City (William B. Hornblower, Charles A. Boston, George S. Hornblower, and Frank B. Washburn, all of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The plaintiff in this case claims to have deposited in escrow with the defendant a sight draft for \$37,500. It admits that defendant was authorized to collect the proceeds of the draft at once, but asserts that he was to hold the amount when collected on the same terms and

conditions, and subject to the same escrow agreement, as certain other papers and contracts deposited by it with defendant. The defendant, however, turned the money over to Lawrence Barnum & Co., and that corporation is still in possession thereof. The terms and conditions of the escrow agreement not having been complied with as understood by the plaintiff, the action was instituted to recover the amount of the draft. The defendant claims that in turning over the draft to Lawrence Barnum & Co. he was acting in accordance with the original agreement. This case was tried to the court without a jury. There was a special finding of facts, accompanied by a conclusion of law, and upon these there was a judgment for defendant, dismissing the complaint with costs. The plaintiff took exceptions to the findings and also excepted to the conclusion of law on the ground that the findings of fact did not sustain the conclusion of law.

[1] We are confronted with the question of the power of this court to consider the findings of fact made by the court below.

The Revised Statutes, § 566, provided as to the District Courts, as follows:

"The trial of issues of fact in the District Courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury."

It will be conceded that the District Courts were originally without authority to decide a question of fact without a jury. Whenever they undertook to do so by consent of parties waiving a jury, the proceeding was not judicial in its nature, but amounted to an arbitration. And in such case the court's action was not subject to re-examination in an appellate court.

Mr. Justice Taney, speaking for the court in 1858 in *Campbell v. Boyreau*, 21 How. 223, 226 (16 L. Ed. 96), stated the law on this subject, and the reason for it, as follows:

"The finding of issues of fact by the court upon the evidence is altogether unknown to a common-law court, and cannot be recognized as a judicial act. Such questions are exclusively within the province of the jury; and if, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator. And this court, therefore, cannot regard the facts so found as judicially determined in the court below, nor examine the questions of law, as if those facts had been conclusively determined by a jury or settled by the admission of the parties. Nor can any exception be taken to an opinion of the court upon the admission or rejection of testimony, or upon any other question of law which may grow out of the evidence, unless a jury was actually impaneled, and the exception reserved while they were still at the bar. The statute which gives the exception in a trial at common law gives it only in such cases. And as this court cannot regard the facts found by the judge as having been judicially determined in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an appellate tribunal."

The Supreme Court has recently announced the same doctrine in *Campbell v. United States*, 224 U. S. 99, 105, 32 Sup. Ct. 398, 56 L. Ed. 684 (1911).

But the Revised Statutes provided as to the Circuit Courts as follows:

"Sec. 648. The trial of issues of fact in the Circuit Courts shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, and by the next section."

"Sec. 649. Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court, upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

It thus appears that as respects the Circuit Courts, express provision was made for a written waiver of a jury. In those courts when a jury was waived by written stipulation and the case was tried to the court, the proceeding remained judicial, not being converted into an arbitration. This left the findings of fact by the trial judge to be dealt with on writ of error in the same manner as the findings of a jury would be.

And when the Circuit Courts were abolished it was provided as follows:

"Wherever, in any law not embraced within this act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this act, be deemed and held to refer to, and to confer such power or impose such duty upon, the district courts." Section 291 of the Judicial Code.

Although in form the Judicial Code abolished the Circuit Courts and turned their business over to the District Courts, it seems to us that what Congress intended was a merger of the Circuit Courts into the District Courts, and that in transferring to the District Courts the business of the Circuit Courts, there was given to the District Courts, under the section of the Judicial Code above quoted, all the machinery for disposing of its business which the Circuit Courts possessed. We are unable to understand that section in any other way. It is also illuminative of this intent that Congress did not repeal the particular section which provided for trial by the Circuit Courts under written stipulation. If the intention had been that thereafter all cases tried in the District Courts, whether original or transferred, should be tried only under the old District Court system, the section became obsolete and was without any reason for its retention. We are therefore forced to the conclusion that the present case must be treated by us precisely as it would have been treated had the trial taken place in the old Circuit Court under the practice which Congress had once approved for that court and which it has never disapproved.

[2] We must therefore accord to findings of fact, in a case tried to the court without a jury, there being a stipulation in writing waiving the jury, the same effect as we would give to a verdict. As said by Mr. Justice Miller in *Bassett v. United States* (1869) 9 Wall. 38, 40 (19 L. Ed. 548):

"When a court sits in place of a jury and finds the facts this court cannot review that finding. If there is any error in such case, shown by the record, in admitting or rejecting testimony, it can be reviewed here. But when the

court, by permission of the parties, takes the place of the jury, its finding of facts is conclusive, precisely as if a jury had found them by verdict."

We may, of course, look into the record to discover whether there is competent evidence to support the finding. And we may look into it to find whether the court erred in the conclusion of law deduced by it from the facts found, and we may review errors alleged to have been committed as to the admission and rejection of testimony when the action of the court in this respect has been duly excepted to, and the right to question the same has been preserved on the record. But farther than that we have no right to go. *Young v. Amy*, 171 U. S. 179, 18 Sup. Ct. 802, 43 L. Ed. 127 (1898).

[3] The court made seven findings of fact in the case at bar, and the most important of these are the second and fourth which read as follows:

"(2) That the plaintiff has not shown by a preponderance of proof that it was agreed between the plaintiff and defendant that the collateral contract and underwriting should be delivered to the defendant upon condition that they should be redelivered by the defendant to the plaintiff in case the said guaranty was not procured by the plaintiff."

"(4) That it was agreed that the draft should be cashed, but that the plaintiff has not shown by a preponderance of proof that it was agreed that the defendant should procure the proceeds to be turned over by him, and by him to be turned over to the plaintiff, if the guaranty above mentioned was not procured."

Counsel for plaintiff insists that the above findings are not ultimate findings of fact at all. It must be admitted that the findings are rather inartificial for the findings of a trial court. The findings do not directly state the ultimate facts. But they do state the net result of the evidence as to the facts. The words, "by a preponderance of proof," used in the findings, may be disregarded as mere surplusage. The findings are that the agreements which are the subject of the two findings were not proved. We do not believe that any valid distinction exists between the formal sufficiency of a finding that there is no proof and of a finding that there is not enough proof to preponderate over opposing proof. In *Stanley v. Supervisors of Albany* (1887) 121 U. S. 535, 547, 7 Sup. Ct. 1234, 1237 (30 L. Ed. 1000) the principal finding of the court was:

"That the plaintiff has failed to establish the allegations in said complaint, that the several assessments," etc.

Mr. Justice Field, referring to this finding, says "the court below specially found the negative" of plaintiff's allegations. But this form of the finding did not prevent the court from affirming the judgment. In a recent case in the New York Court of Appeals a finding began, "There is no proof that," and another began, "There is no evidence that," and the court unanimously overruled the exceptions to the findings. The court said:

"The quoted findings are, therefore, findings that the plaintiff has failed to establish that branch of his case."

It pointed out that:

"A finding that there is no evidence is radically different from an affirmative finding which merely recites evidence, but contains no conclusion of fact." *Ryan v. Franklin*, 199 N. Y. 347, 92 N. E. 673.

We do not, therefore, attach importance to the fact that findings 2 and 4 are negative in form. We also are satisfied that there is evidence in the record which supports the findings. Whether this court would have made the same findings from the evidence is not at all the question, and is wholly immaterial.

In a case in the Supreme Court in 1842 Mr. Justice Story, speaking for the court, declared:

"We have no authority, as an appellate court, upon a writ of error, to revise the evidence in the court below, in order to ascertain whether the judge rightly interpreted the evidence or drew right conclusions from it. That is the proper province of the jury, or of the judge himself, if the trial by jury is waived, and it is submitted to his personal decision." *Hyde v. Booraem*, 16 Pet. 169, 176 (10 L. Ed. 925).

The real questions which are presented to this court seem to arise out of objections made on behalf of the plaintiff to the determination of the facts in the court below. As that determination, however, is not reviewable, there is nothing this court can do but affirm the judgment. For if we must accept the findings, the conclusion of law which the court reached from the findings is one that is clearly justified.

[4] We are not only concluded by the findings of fact but are equally concluded by a refusal to find other facts. *Stanley v. Supervisors of Albany*, supra. A refusal to find other facts, if error at all, is an error committed in not giving sufficient weight to the evidence offered. And this court is as much concluded as respects the one kind of error as it is in respect to the other.

[5] Objection was made to the refusal of the trial court to admit in evidence the letters addressed by one of the witnesses to his wife, and also those written by him to another woman. The letters in question did not relate in any way to the issues involved, but were offered solely for the purpose of impeaching the credibility of the witness. The court was unquestionably right in excluding the letters. Extrinsic testimony to particular acts is universally conceded to be inadmissible. And the principle is so well established that no discussion of it is necessary. 2 *Wigmore on Evidence* §§ 977-988.

[6] Objection was also made to the refusal of the court to allow the cross-examination of the witness in respect to his conduct in certain particulars wholly unconnected with the case in hand, and which was claimed to be relevant only as affecting his credibility. The action of the court in restricting the cross-examination of the witness in the manner it did was within the trial court's discretion. The leading case on this subject in this country is that of *Third Great Western Turnpike Co. v. Loomis*, 32 N. Y. 127, 88 Am. Dec. 311 (1865). The reasons for the rule which denies to counsel the latitude upon cross-examination which counsel in this case are contending for are admirably set forth

in the New York case. To recognize the existence of such a right in counsel the New York court said would—

"embody in our system of jurisprudence a rule fraught with infinite mischief. It will subject every witness who, in obedience to the mandate of the law, enters a court of justice to testify on an issue in which he has no concern to irresponsible accusation and inquisition in respect to every transaction of his life. * * * Questions of this nature can be determined nowhere more safely or more justly, than in the tribunal before which the examination is conducted. * * * A question, which is alike degrading to answer or decline to answer, should never be put, unless, in the judgment of the court, it is likely to promote the ends of justice. A rule which would license indiscriminate assaults on private character under the forms of law would contribute little to the development of truth, and still less to the furtherance of justice."

Judgment affirmed.

TRIVETTE v. CHESAPEAKE & O. R. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. April 7, 1914.)

No. 2420.

1. REMOVAL OF CAUSES (§ 49*)—JOINDER OF DEFENDANTS—SEPARABLE CONTROVERSY.

Under the Kentucky law, where a person is killed by the alleged negligent operation of a railroad train, the engineer may be properly joined as a defendant with the corporation, and, if so joined in good faith, solely on the ground of the responsibility of the railroad company for the act of the engineer, a separable controversy is not presented, though no concurrent act of negligence is expressly charged.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 95-99; Dec. Dig. § 49*.]

2. REMOVAL OF CAUSES (§ 107*)—JOINDER OF DEFENDANTS—FRAUD—ISSUES.

Where plaintiff joined a resident citizen with a nonresident corporation as defendants, and, after removal by the nonresident, plaintiff in the federal court formally denied fraudulent joinder, the burden of proof thereof was on defendants, and in the absence of such proof the question of fraudulent joinder was out of the case.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 225-232, 234; Dec. Dig. § 107*.]

3. REMOVAL OF CAUSES (§ 50*)—JOINDER OF DEFENDANTS—SEPARABLE CONTROVERSY.

Plaintiff sued in a state court a nonresident railroad company and a resident defendant engineer of a train by which plaintiff's decedent was killed, alleging that the railroad company was negligent in providing a dangerous approach for the public to the depot and platform where decedent was killed and that the engineer was negligent in operating the train, but the petition did not charge that the injury was caused by the joint or concurring operation of such negligent acts. *Held*, that the negligence relating to the means of access to the railway station and platform presented a separable controversy which was removable by the railroad company to the federal courts.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 100; Dec. Dig. § 50*.]

Removal of causes, separable controversy, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valleytown Mineral Co.*, 35 C. C. A. 155; *Pollitz v. Wabash R. Co.*, 100 C. C. A. 4.]

4. RAILROADS (§ 300*)—CROSSINGS—OPERATION OF TRAINS—CARE REQUIRED.

Where a railroad company maintained a crossing leading to its depot, the railroad company was bound to exercise reasonable care in the operation of its trains over such crossing for the benefit of licensees crossing the tracks on their way to the depot on any business, whether for railroad purposes or not.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 955; Dec. Dig. § 300.*]

5 RAILROADS (§ 350*)—CROSSING ACCIDENT — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where defendant railroad company maintained a crossing by which alone its depot platform could be approached, and decedent, while crossing the track to the platform, was struck and killed by an extra train approaching at a high rate of speed, evidence held to require submission of defendant's negligence and decedent's contributory negligence to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

In Error to the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Action by E. E. Trivette, as administrator of the estate of Albert Huffman, deceased, against the Chesapeake & Ohio Railroad Company and another. Judgment for defendants, and plaintiff brings error. Reversed, and new trial ordered.

A. E. Auxier, of Pikeville, Ky., for plaintiff in error.

Worthington, Cochran & Browning, of Maysville, Ky., for defendants in error.

Before KNAPPEN and DENISON, Circuit Judges, and SANFORD, District Judge.

KNAPPEN, Circuit Judge. Plaintiff, a citizen of Kentucky, brought suit in a court of that state against the company and its locomotive engineer for the negligent killing of the intestate. The railroad is a Virginia corporation; the individual defendant is a citizen of Kentucky. The suit was removed to the federal court by reason of diversity of citizenship of the parties, upon a petition alleging a separable controversy and fraudulent joinder of the individual defendant for the purpose of preventing removal. A motion to remand the suit to the state court was denied. At the conclusion of the trial upon the merits, verdict was directed, and judgment entered, for defendants. The assignments of error challenge: (a) The refusal to remand; (b) the direction of verdict. The petition alleges negligence in two respects: (a) On the part of the railroad company in providing an approach for the public to the depot and platform only over and by way of the track in front thereof, and in failing to provide steps at either end of the platform; (b) on the part of the engineer in the manner of operating the train.

1. The refusal to remand.

[1, 2] As respects the alleged negligence in the operation of the train: According to the settled law of Kentucky, the engineer was properly joinable as defendant with the corporation. Winston's Adm'r

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

v. Ill. Central R. R. Co., 111 Ky. 954, 957, 65 S. W. 13, 55 L. R. A. 603; Cincinnati, N. O. & T. P. R. R. Co. v. Bohon, 200 U. S. 221, 223, 26 Sup. Ct. 166, 50 L. Ed. 448, 4 Ann. Cas. 1152; Enos v. Kentucky Distilleries, etc., Co. (C. C. A. 6th Cir.) 189 Fed. 342, 346, 111 C. C. A. 74. And when so joined in good faith, solely upon the ground of the responsibility of the principal for the act of the servant, though not expressly charged with any concurrent act of negligence, a separable controversy is not presented. Alabama Gt. Southern Ry. v. Thompson, 201 U. S. 206, 212, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147. Unless therefore the engineer was fraudulently made defendant, to prevent removal, no separable controversy was presented as to that particular cause of action. In the federal court, plaintiff formally denied fraudulent joinder; the issue thus raised was not tried; and as the burden of proof was, by plaintiff's denial, placed upon defendants (Hunter v. Ill. Central R. Co. [C. C. A. 6th Cir.] 188 Fed. 645, 649, 110 C. C. A. 459; Enos v. Kentucky Distilleries, etc., Co., supra, 189 Fed. at page 345, 111 C. C. A. 74), the question of fraudulent joinder is out of the case, and was disregarded by the court below in passing upon the motion to remand.

[3] It is clear that the engineer is neither charged nor concerned with the alleged negligence relating to the means of access to the railway station and platform. As to this ground of negligence, therefore, a separable controversy existed, which was removable to the federal court, unless the negligence in operating the train and the negligence with respect to the depot and platform are sufficiently alleged to have concurred in producing the accident. Nichols v. Chesapeake & Ohio R. Co. (C. C. A. 6th Cir.) 195 Fed. 913, 915, 115 C. C. A. 601. If, however, such joint action and concurrence are sufficiently alleged, the case was not removable. Chicago, R. I. & P. R. Co. v. Dowell, 229 U. S. 102, 111, 33 Sup. Ct. 684, 57 L. Ed. 1090. It does not follow from the fact that the railroad is alleged to be negligent with respect to the approaches to the depot and platform, and the company and its engineer charged to be negligent with respect to the operation of the train, that a concurring action of the two alleged classes of negligence is charged. To illustrate the distinction: In Nichols v. Chesapeake & Ohio R. Co., supra (where a charge of negligence against the railroad company and its engineer, based upon the latter's negligent operation, was joined with a charge that the railroad company had violated the safety appliance statute), Judge Denison said:

"Different rights of action may, it is true, often be joined in one suit, but this does not make them inseparable. The existence of the 'separable controversy' right of removal presupposes that it may be found joined in one action with another controversy."

On the other hand, in Willard v. Chicago, B. & Q. R. Co., 165 Fed. 181, 183 [91 C. C. A. 215] (involving an action against lessor and lessee railroad companies), Judge Seaman said:

"The cause presented in the state court by the declaration was joint, expressly charging joint negligence and liability—plainly tendering no issue of several negligence, and not provable for several liability—so that the controversy was not removable on such election of plea, in the absence of un-

mistakable proof of bad faith in the joinder, as a fraud upon the court and parties."

Whether there was a joint liability or not is to be determined upon the averments of the plaintiff's statement of his cause of action. *Chicago, R. I. & P. R. Co. v. Dowell*, supra, 229 U. S. 111, 113, 33 Sup. Ct. 684, 57 L. Ed. 1090. The controlling question then is: Does the plaintiff's petition, fairly construed, allege that the negligent operation of the train and the negligent maintenance of depot and platform concurred in, and co-operated toward, producing the injury? In nearly, if not quite, all of the leading cases in the Supreme Court, where the defendants were not charged with each act of negligence alleged, and where the right to remove was denied on the ground that no separable controversy existed, it appears from the opinion that the injury was alleged to be caused by the joint or concurring operation of the various negligent acts. Thus, in *Wecker v. National Enameling Co.*, 204 U. S. 176, 179, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757, the complaint charged the joint negligence of the corporation and the individual defendants, and averred that plaintiff's injuries were the result thereof. In *Illinois Central R. Co. v. Sheegog*, 215 U. S. 308, 320, 30 Sup. Ct. 101, 54 L. Ed. 208, it was charged that the various acts of negligence "all together jointly caused said wreck, and killed the plaintiff's intestate." In *Chicago, R. I. & P. R. Co. v. Dowell*, supra, it was charged that:

"Each and every act of omission and commission of the defendants and of each of them as above, were the joint, proximate and concurrent cause of said injury, and each of said acts of the said defendants materially, concurrently and jointly contributed to the injuries of said plaintiff."

In *Enos v. Kentucky Distilleries, etc., Co.*, supra, decided by this court, the defendants were alleged to be jointly and concurrently negligent. In *American Bridge Co. v. Hunt* (C. C. A. 6th Cir.) 130 Fed. 302, 305, 64 C. C. A. 548, where the existence of a separable controversy was denied, the corporation was charged with negligence in retaining a defective crane, and with intrusting its management to an unskilled and incompetent servant. The latter was alleged "to be negligent in operating the same in that he permitted said floor beam to swing against said other beams," and thereby to fall against other beams. The present Mr. Justice Lurton said:

"Thus we have the negligence of the company in respect to its duty in furnishing a reasonably safe appliance and competent fellow servants, concurring with the negligence of the defendant Calvin Guthrie in the management of a defective crane, to bring about the injury to the decedent."

The charge of concurrent negligence seems to have been predicated upon an averment that the defect in the machine was such as to make it uncontrollable, not by a competent and skillful servant, but by the operator, who was alleged not to have sufficient skill and experience for the purpose.

Does the petition in the instant case allege joint and concurrent negligence, either by express characterization or by natural implication arising from the statement of the way in which the accident happened? It alleged that the depot was constructed "on slanting

ground," with a platform between the depot and the track which was on a fill "on the slanting ground," the platform extending to the end and about 16 inches above the tops of the ties, its edge being so near the rails "that a train of cars passing would strike any one on the ties between the nearest rail and the edge of the platform." The railway company was charged with negligence in failing to provide steps at either end of the platform for public access to the platform and depot, and in negligently providing as a means of approach thereto, for such public use, an open way over its lot alongside the depot and ends of the platform, thence up the side of the fill onto the ties, thence a necessary turn towards the platform and a sheer step up of 16 inches to the top of the same, the latter being alleged to be too high at all points except the side bordering the track for any one to step up onto it from the ground. It is further alleged that the train in question was so negligently operated that it struck decedent while going to the depot on lawful business with the railway company's employé, and after he had gone over the route stated, up the side of the fill and onto the ties, and had made the necessary turn and was in the act of stepping from the ties onto the platform "up the elevation of 16 inches"; and that decedent died from the effect of the injuries suffered from the collision.

While, according to this statement, the accident would not have happened but for the negligent operation of the train, there is neither allegation nor necessary inference that it would not have happened but for the character of the approach provided to the depot and platform. We recognize that, if a charge of concurrent and co-operative negligence seems intended, a separable controversy does not result from the fact that separate causes of action might have been maintained, or that a separate defense might defeat a joint recovery (*Powers v. Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, 96-97, 18 Sup. Ct. 264, 42 L. Ed. 673; *Chicago, B. & Q. Ry. Co. v. Willard*, 220 U. S. 413, 425, 31 Sup. Ct. 460, 55 L. Ed. 521); nor because of the rule in Kentucky that where several negligencies are alleged recovery may be had if any one of them is proven.

The question presented is a close one, and depends entirely upon the construction to be put upon the petition. The District Judge construed it as not intended to charge joint negligence; and this construction should not be overthrown in the absence of "clear conviction" of error. *Chicago Junction Ry. Co. v. King*, 222 U. S. 222, 32 Sup. Ct. 79, 56 L. Ed. 173; *Seaboard Air Line v. Moore*, 228 U. S. 433, 435, 33 Sup. Ct. 580, 57 L. Ed. 907; *Louisville & Nashville R. Co. v. Lankford* (C. C. A. 6th Cir.) 209 Fed. 321, 325, 126 C. C. A. 247. We are not so convinced, and the amendment, made after the denial of the motion to remand, was not so marked as, in our opinion, to demand a different construction than placed upon the original petition. We are thus constrained to hold the case removable.

2. The direction of verdict.

[4] It appeared that for about a month before the accident the deceased had been delivering, twice a week, butter and milk to one of defendant's passenger conductors on arrival of the train at this depot;

and at other times during that period he had gone to the depot to receive back from the conductor the vessels in which the produce had been delivered, and to receive pay therefor; and that this course had been followed with the knowledge and acquiescence, and in some respects the assistance, of the station agent. It further appeared that at the time of the accident the deceased was on his way to the depot to meet this conductor on the business stated, and that the train was due to arrive about 25 to 30 minutes later; that, just as the deceased was stepping from the ties onto the platform, he was struck and killed by defendant's special train, consisting of an engine and one car, which, according to the testimony given, was running at a high rate of speed and without the blowing of whistle until just as the deceased was struck. The direction of verdict is defended upon the ground not only that the deceased was contributorily negligent in crossing the track without due care for his own safety, but that, as he was not going to the depot on railroad business, defendant owed him no duty with respect to the operation of the train except to refrain from wanton or intentional injury.

Assuming, for the sake of argument, that defendant owed the deceased no duty with respect to the method of access to the depot, it by no means follows that the duty of ordinary care did not exist as respects the operation of trains over the spot in question; for it appeared that the only way provided for reaching the depot platform was by way of the track crossing in question. Had the crossing been one not leading to the depot, but merely one which the public had been by the railway company long permitted to use, the company would be charged with the duty to exercise in the running of its trains ordinary care toward those using the crossing, and whose presence there was reasonably to be anticipated. *Felton v. Aubrey* (C. C. A. 6th Cir.) 74 Fed. 350, 358, 20 C. C. A. 436; *Tutt v. Illinois Central R. Co.* (C. C. A. 6th Cir.) 104 Fed. 741, 744, 44 C. C. A. 320; *New York, N. H. & H. R. Co. v. Kmetz* (C. C. A. 2d Cir.) 193 Fed. 603, 606, 113 C. C. A. 471. In the *Aubrey* and *Tutt* Cases the distinction between an obligation to maintain a crossing safe in itself and the duty to exercise reasonable care to avoid injury, through the operation of its trains, to licensees whose presence might reasonably be anticipated is pointed out. The fact that the crossing was one leading to defendant's public depot, instead of one having no connection therewith, surely cannot be thought to lessen defendant's obligation in the running of its trains thereover to use care commensurate with the situation. The fact, therefore, that the business of deceased was not with the railroad company, but with its train employé, is not controlling. The duty of reasonable care would extend to a licensee crossing the tracks on the way to the depot upon any business, whether for railroad purposes or not. See *Northern Pacific R. Co. v. Curtz* (C. C. A. 9th Cir.) 196 Fed. 367, 369, 116 C. C. A. 403; and, as further bearing upon the duty owing a licensee, see the decisions of this court in *Ellsworth v. Metheney*, 104 Fed. 119, 122, 44 C. C. A. 484, 51 L. R. A. 389, and *Murch Bros. Construction Co. v. Johnson*, 203 Fed. 1, 5, 121 C. C. A. 353.

[5] There was testimony of one witness, who lived in sight of the depot and railroad track, that the train was running faster than any train she had ever seen; and there was testimony tending to show that no whistle was blown until just as the deceased was struck; also, that the place of the accident was within clear view of the engineer as far back as the curve later referred to. This testimony tended to show negligence on defendant's part, and verdict should not have been directed in its favor unless the evidence of contributory negligence, as matter of law, was clear.

Upon the record, we think the question of contributory negligence was one of fact for the jury. The deceased was about 70 years of age, although the evidence indicated that his sight and hearing were not impaired. True, the testimony was that the train could have been seen from the crossing in question from the time it rounded the curve, which was said to be from 100 to 150 yards from the depot; but if the train were running 60 miles an hour, as the jury might well have found, it would have required but a trifle over 5 seconds for the train to pass from the curve to the point where the collision occurred; and, if the curve were but 100 yards away, less than 4 seconds would be required. There is no affirmative testimony as to whether or not deceased looked in the direction of the curve before crossing the track; for while two witnesses testified to watching the decedent, the one from the time the train rounded the curve, the other from some later period, neither was asked by either party whether the deceased looked in the direction of the curve. In the absence of evidence on the subject, it would be presumed that the deceased exercised due care to the extent of looking and listening for an approaching train. *Baltimore & P. R. Co. v. Landrigan*, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262; *Rothe v. Penna. Co.* (C. C. A. 6th Cir.) 195 Fed. 21, 26, 114 C. C. A. 627; *Pittsburgh, C., C. & St. L. R. Co. v. Scherer* (C. C. A. 6th Cir.) 205 Fed. 356, 359, 123 C. C. A. 484. Of course, if it is clear that had he seasonably looked he must have seen the train in time to avoid collision, he would be held contributorily negligent because he would, in such case, be held affected by the information which his senses, if used, would have furnished him.

In view of the testimony as to the speed of the train, that it was a special, that no regular train was then due, that the deceased had to come up the embankment before reaching the track, the intervention, at the most, of but a few seconds between the possible discovery of the train and the collision, and the lack of evidence as to whether, while engaged in stepping upon the platform, the position of deceased would have been such as to have offered a view of the rapidly approaching train, it cannot well be said, as matter of law, from the present record, that the deceased in the exercise of due care knew or should have known of the danger in time to escape the collision.

The judgment of the District Court is accordingly reversed with cost, and a new trial ordered.

ESCANABA MFG. CO. v. O'DONNELL

(Circuit Court of Appeals, Sixth Circuit. April 7, 1914.)

No. 2,437.

1. NEGLIGENCE (§ 51*)—DANGEROUS PREMISES—LICENSEES—CHILDREN—CARE REQUIRED.

Defendant operated a wood manufacturing plant in a city and maintained on its property an ash pile on which the firemen dumped ashes from the boiler room every day. Plaintiff, a child of 10, with other children who lived in the neighborhood, was in the habit of coming on defendant's premises and picking up chips and other waste wood scattered near the ash pile. On the morning of plaintiff's injury, ashes had been wheeled out as usual, and the upper surface had cooled and whitened and did not look dangerous, but underneath the ashes were still hot. Plaintiff, barefooted, undertook to walk over them in leaving defendant's premises, sank into the hot ashes, and was burned. *Held* that, though plaintiff was but a licensee, defendant, having knowledge of the fact that children were permitted to play on or about the ash pile, was bound to guard the pile or give warning of the danger.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 64; Dec. Dig. § 51.*]

2. NEGLIGENCE (§ 136*)—DANGEROUS PREMISES—REASONABLE CARE—QUESTION FOR JURY.

Where a child of 10 while passing over an ash pile on defendant's premises, in accordance with a license to enter, sank into the ashes and was burned, whether defendant was negligent in handling the ashes was for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

3. TRIAL (§ 194*)—INSTRUCTIONS—PROVINCE OF JURY—CONTRIBUTORY NEGLIGENCE.

Plaintiff, a child of 10, with certain companions entered defendant's engine room and was directed by the engineer to leave the premises and go home. He took them to the door, pointed out a roadway which would take them off defendant's grounds, and told them to follow a path. The driveway ran past and along an ash pile over which was a short cut off defendant's premises toward plaintiff's home. Plaintiff testified that there was a path leading from the driveway over the ashes in her direction, and that she thought she was following instructions when she left the driveway and took the path. As she was passing over the ashes, she sank into them, and was burned. The court charged that, if after plaintiff received the engineer's instruction she left the path and went over the ash pile, she would be negligent and could not recover. *Held*, that the true theory of such submission was that, if the "path" which she was directed to follow meant only the driveway along the ash pile, then to do what she did would be negligence, but, if the engineer's direction meant or was received to mean that she should follow the supposed path across the ashes, then she would not be negligent unless she left the path and went on trackless ashes on either side, and hence the giving of such instruction did not require a finding that plaintiff was negligent as a matter of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

In Error to the District Court of the United States for the Northern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by Leona O'Donnell, by John L. Loell, her next friend, against the Escanaba Manufacturing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

A. H. Ryall, of Escanaba, Mich. (G. R. Empson, of Gladstone, Mich., of counsel), for plaintiff in error.

H. J. Rushton, of Escanaba, Mich. (N. C. Spencer, of Escanaba, Mich., of counsel), for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. The plaintiff below was, at the time of the accident, a girl 10 years of age. The manufacturing company, with its plant and storage space, occupied some 20 acres of ground in the city of Escanaba. Every day its firemen wheeled out the ashes from the boiler room and dumped them on its ash pile. This pile was approximately circular, 50 feet in diameter, and varying in shape and in height as the ashes accumulated or as they were occasionally taken away by cars on the adjacent railroad track. On the morning of this particular day, ashes had been wheeled out as usual, and, also as usual, the upper surface of the fresh ashes had cooled and whitened and did not look dangerous, while beneath the surface they were still very hot. The little girl, barefooted, undertook to walk over them, sank into the hot ashes, and was burned. For the resulting damages, this action was brought.

The case must, for most purposes, now be considered from the viewpoint of plaintiff's evidence and the most favorable inferences that can reasonably be drawn therefrom, and it should be noted that the girl was not a trespasser upon the general premises; the company's utmost contention is that she was a mere licensee. The factory was a wood-working plant, and fragments of wood of different kinds were continually scattered in all parts of the grounds. The neighborhood children, and this little girl among them, were in the habit of coming on the premises with baskets and picking up chips and other waste wood. This was with the knowledge and approval of the company; indeed, it was not without benefit to the company, for its own labor of keeping its premises properly clean was somewhat diminished. More or less of such waste wood was to be found upon the part of the premises lying alongside this ash pile, and the evidence of custom and acquiescence must be considered as extending to that precise locality. The girl's presence on the general premises and in this immediate locality was therefore fully justified. In addition, she testified that, as they were so picking up wood, the children were in the habit of playing on this ash pile, which formed a sort of a hill alongside their woodpicking ground, and that the company's manager frequently saw them playing there and had made no objection, but instead had seemed to approve by asking them if they were having a good time, and such questions as that.

[1] The trial court submitted the case to the jury, a verdict for the girl was found, and the defendant company brings error. The chief complaint is that the case should not have been submitted, because the

company was under no obligation to the girl, either to keep this place safe for her to walk upon or to warn her of the hidden danger. The plaintiff's counsel insisted that she was upon the ash pile by invitation; the defendant urged that the testimony tended to show nothing more than a license; and it is charged that it was error to submit the case on the mistaken theory, and to charge, as the court did:

"If the defendant permitted children to play or to be upon the ash heap, it was its duty either to put up some guard or warning, or to give a warning to the children of the danger that there existed, because a person cannot invite another into danger without becoming liable."

This charge put upon the defendant the same burden of duty toward plaintiff as if it had expressly invited her; and, because of the distinction usually drawn between the owner's liability for injury to one who is on his premises merely by permission and his liability to one who is there by invitation, it follows that the charge was erroneous, unless the supposed conduct of defendant was tantamount to an invitation, or unless, under the special facts of this case, the usual distinction in measure of duty did not exist.

The charge, as a whole, including other parts not quoted, did not impose upon defendant the duty to guard or warn merely because plaintiff had been, on one occasion, permitted to play there; it required the jury to find that this playing had been accustomed and habitual, and in substance the stated duty was based on the hypothesis that the ash pile had, with the defendant's acquiescence, become the children's playground. With reference to a child of this age, both in the effect upon her mind and in the resulting exposure to peril, we are not sure that there is real difference between the kind and extent of acquiescence above recited and an express invitation; but we think the case may well be decided without touching that question. In *Ellsworth v. Metheney*, 104 Fed. 119, 121, 44 C. C. A. 484, 51 L. R. A. 389, Judge (now Mr. Justice) Day, speaking for this court, had occasion to consider and apply the rule of liability for injury to a licensee, and it was held that where the owner of the premises, knowing the customary use by the licensees, installs or permits a new danger not so obvious as to carry its own warning, and does not guard against or give notice of this new danger, he is subject to the same rule of liability which the Supreme Court, in *Bennett v. Railroad Co.*, 102 U. S. 577, 26 L. Ed. 235, had declared applicable in case of invitation, and which this court, in *Felton v. Aubrey*, 74 Fed. 350, 359, 20 C. C. A. 436, had approved in a case of customary use under license accompanied by the creation of a new peril. We have recently applied the same rule under other circumstances, in *Murch Co. v. Johnson*, 203 Fed. 1, 121 C. C. A. 353 (and see *De Haven v. Hennessey* [C. C. A. 6] 137 Fed. 472, 476, 69 C. C. A. 620, and *Trivette v. C. & O. Ry. Co.*, 212 Fed. 641, 129 C. C. A. 177, opinion this day filed).

It is true that the danger from the hot ashes was not a new peril in exactly the same sense as the danger involved in *Ellsworth v. Metheney* or *Murch v. Johnson*; but we see no satisfactory distinction in principle. A similar danger had been created and had passed

away the day before, and so of each prior day; but yet the danger which did the harm was temporary, it would not have existed at the moment of injury, unless it had been newly created; and, when we come to consider such a situation with reference to children customarily permitted to play on the ash pile, we are satisfied that, in the language of Judge Day, "sound morals and just treatment demand that the licensee shall have notice of the new danger which he is likely to encounter in using the premises."

The form of the charge is criticised because the questions whether the danger was a new one and was not appreciated by the plaintiff were not left to the jury. These conditions might well have been included by the judge in the hypothesis he put to the jury; but neither by request nor exception was attention called to this precise point, and the counsel and the court probably joined in assuming that the plaintiff neither understood nor was bound to understand this concealed danger, and that the jury would take the instruction as referring to that character of danger.

Several decisions of the Michigan Supreme Court, resulting adversely to the claims of children for injuries suffered on premises where they were playing, have been brought to our attention, and we are urged to say that the question involved here relates to the rights of a licensee upon real estate and so is a matter of local law upon which we should follow the state decisions. However this may be, we do not find that there is any settled rule in Michigan in conflict with that adopted by the trial court in this case. *Hargreaves v. Deacon*, 25 Mich. 2, *Formall v. Standard Oil Co.*, 127 Mich. 496, 86 N. W. 946, and *Ryan v. Tower*, 128 Mich. 463, 87 N. W. 644, 15 L. R. A. 310, 92 Am. St. Rep. 481, depend more or less upon the contributory negligence of the parents, the absence of any permission of defendant to be upon the premises, or lack of evidence that the children were customarily allowed to be upon the dangerous part of the premises as distinguished from merely using a path through other parts. While these cases and others tend to establish a narrow rule of liability, Judge Cooley's opinion in *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154, treats of facts very closely analogous to those here involved, and he declares, we think, a rule wholly consistent with the submission to the jury and the recovery in the instant case.

[2] We have concluded there was evidence to sustain a finding of duty resting on defendant; we think there was also some basis for finding a breach of this duty. It will not do to say that, merely because the ashes were deposited on this day in the regular and ordinary way, such conduct could involve no negligence. The fact that children of this age were permitted to play on this ash pile was one of the conditions to be remembered in determining whether the employes used due care in depositing the ashes as they did. The defendant's employes were bound to keep in mind when they deposited the ashes that children might not understand or remember how dangerous apparently harmless ashes might be; and, when once it is assumed that defendant expected the ash pile to be used for a children's playground,

it is clear to us that the question of reasonable care in handling hot ashes thereon was a question for the jury.

[3] There is one other question requiring attention: Shortly before the accident, the girl and her companions had been found in the engine room, and had been told, by the engineer, to leave the premises and go home. He took them to the door, pointed out the roadway or driveway which would take them off the grounds, and told them to follow the path. This driveway ran past and alongside the ash pile, and to turn from the roadway across the ash pile would have been a short cut off the premises toward the girl's home. She says there was a path leading from the driveway up through the ashes, in her desired direction, and that she thought she was following instructions when she left the driveway and took this path, but, in fact, it led her into trouble. At the defendant's request, the judge charged the jury that if, after she received this instruction, she left the path and went upon the ash pile, she was guilty of contributory negligence and could not recover. The defendant now urges that she confessedly did the thing which was declared to be, and which was, contributory negligence, and so that no question of fact was left. We do not think the instruction was so intended. The true theory of submission was that if the "path" which she was directed to follow meant only the driveway alongside the ash pile, then to do what she did would be negligence; but if this direction meant, or if as given to and received by this child it could mean, for her to follow the supposed path across the ashes, then she would not be negligent, unless she left that path and went out upon trackless ashes on either side. This, we think, was the fair meaning of the instructions, and this last thing she says she did not do. Her contributory negligence was not beyond dispute.

The whole case came down to the simple issue whether defendant should have known that the girl was likely to be upon the ash pile with defendant's implied permission, and, if so, whether it exercised reasonable prudence to prevent injury to her. If the verdict did not do justice, it is because it was against the weight of the evidence. That it was, seems to have been the opinion of the District Judge; but the only remedy in such case is an appeal to the discretion of the court for a new trial; and that appeal, apparently, was not made.

The judgment must be affirmed, with costs.

ODELL MFG. CO. v. TIBBETTS.

(Circuit Court of Appeals, First Circuit. March 12, 1914.)

No. 1044.

1. MASTER AND SERVANT (§§ 286, 289*)—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where decedent, a servant in defendant's factory, was found dying, with his left arm and neck broken, near an unprotected shaft, but no one saw the accident, and there was no proof as to the precise way in which it occurred, the questions of defendant's negligence and decedent's con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tributary negligence were for the jury. *Griffin v. Overman Wheel Co.*, 61 Fed. 568, 571, 9 C. C. A. 542, applied.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050, 1089, 1090, 1092-1132; Dec. Dig. §§ 286, 289.*]

2. APPEAL AND ERROR (§ 242*) — MISCONDUCT OF COUNSEL — OBJECTIONS — PRESENTATION TO TRIAL COURT.

Objections to certain statements of counsel in argument cannot be reviewed, where it does not appear that the trial court took any action, or was requested to take action, with reference thereto. *Crumpton v. United States*, 138 U. S. 361, 11 Sup. Ct. 355, 34 L. Ed. 958, applied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1417-1425; Dec. Dig. § 242.*]

3. COURTS (§ 356*)—MOTION FOR NEW TRIAL—DENIAL—REVIEW.

Since, under the federal practice, the trial judge has special authority to grant a new trial, on account of matters of conflict of evidence, a federal appellate tribunal will not reverse an order denying a new trial on such ground except in an extreme case.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356.*]

4. TRIAL (§ 256*)—INSTRUCTIONS—SPECIFIC INSTRUCTIONS—DUTY TO REQUEST.

Where decedent, an employé in defendant's paper mill, was killed by an unprotected shaft, and it was claimed that shortly before defendant's superintendent had promised decedent to protect the shaft, and the court charged that it was for the jury to determine whether the delay between the promise and the accident was reasonable or unreasonable, and, if unreasonable, they should find for defendant, it was defendant's duty, if it desired more specific instructions on such subject, to request them.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

5. MASTER AND SERVANT (§ 221*) — INJURIES TO SERVANT — DANGEROUS MACHINERY—PROMISE TO GUARD—EFFECT.

Where an employé is especially engaged to work near an unguarded shaft, and is promised by the master that the shaft will be guarded, the master's engagement may be regarded as a protection to the employé until there is some express or otherwise specific change in the relation of the parties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 638-640, 642-645; Dec. Dig. § 221.*]

In Error to the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Action by Mary J. Tibbetts, as administratrix of the estate of Frank Tibbetts, deceased, against the Odell Manufacturing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

George F. Morris, of Lancaster, N. H. (Drew, Shurtleff, Morris & Oakes, all of Lancaster, N. H., on the brief), for plaintiff in error.

Robert C. Murchie, of Concord, N. H. (Alexander Murchie and Hollis & Murchie, all of Concord, N. H., on the brief), for defendant in error.

Before PUTNAM, DODGE, and BINGHAM, JJ.

PUTNAM, Circuit Judge. The facts of this case so far as they are not in dispute, and, beyond that, so far as, for the purposes of this

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

writ of error, we are bound to accept the position of the plaintiff in error, are as follows:

"This is an action brought by Mary J. Tibbetts, administratrix of the estate of Frank Tibbetts, against the Odell Manufacturing Company, to recover damages for causing the death of deceased on the 5th day of October, 1911. There was a trial, resulting in a verdict for the plaintiff for \$5,250.

"The Odell Manufacturing Company owns and operates a paper mill. In its mill is what is known as a screen room, which is separated into two parts; one part containing screens and the other digesters. The portion of the room containing the digesters is separated from the screen room proper by a plank dam, so called, in the testimony, rising eight inches above the floor. Around and under the screens the floor is always wet. More or less water and stock (wet pulp) spatters from the screens.

"The screens are in the form of large boxes standing on raised metal frames. Motion is transmitted to them by means of a shaft and knocker blocks underneath the boxes. Power is applied by a quarter-turn belt running from an overhead shaft and pulley to a pulley on the screen shaft, which shaft is located under the screen boxes. The latter pulley is $22\frac{3}{8}$ inches from the frame of the screen. The width of the rim of the pulley is about 9 inches, and the belt about $7\frac{1}{2}$ inches. The bearing of the screen shaft is between the pulley and the frame of the screen about 5 or 6 inches inside of the inner side of the rim of the pulley. The dam between the screen room and the digester room is 5 feet and 2 inches from the outer rim of the pulley. The diameter of the pulley is 22 inches, and the rim is raised 4 inches above the floor. The screen near which the accident occurred was a corner screen in the screen room proper, and there is a walk between it and the south wall of the room. There are windows in the room at that point, so that the light is 'first-class.' There was more or less water and stock on the floor between the dam and the pulley at the time of the accident.

"To pass from the digester room between the screen and the wall a person would step over the dam in front of the screen and turn to the right, then again a little to the left, and straight ahead. In going through this walk one would pass the pulley first, then between the frame of the screen and the wall. The pulley revolved toward the wall.

"Tibbetts, the deceased, was a man 59 years of age, and had worked for the Odell Manufacturing Company in the screen room about 12 years. At the time of his death he was a screen repairer. His duties were to oil the screens, make minor repairs on them, such as could be made by one man, and keep the floor picked up and cleaned. If there was any small job of repairing to do in the room it was his duty to look after it.

"The accident happened about 4:30 p. m. on October 5, 1911. In the southwest corner of that portion of the room occupied by the digesters is a toilet. Just prior to the accident one Silsby was occupied painting the toilet, and one Patrick happened along there. While the two men were talking, Tibbetts, the deceased, came along with his oil can in his hand. The three talked a few minutes, when the men separated. Tibbetts started toward the screen driven by the pulley. This pulley was about 30 feet distant from the toilet room and in plain view. In going to his work from near the toilet room Tibbetts walked straight towards the pulley. He could not help seeing it all the time. In a minute or a minute and a half, Silsby heard a noise like something hitting the floor. When he went out he found Tibbetts lying on the floor on his left side, his feet toward the wall, and head toward a pump which is to the right of the pulley as he approached it. He was lying between the dam and pulley. His left arm and neck were broken. He was unconscious, and died within a few moments."

Aside from the above, there are no facts on which we can base a theory how the accident occurred.

It is not disputed that the mill was constructed with a guard so far protecting the pulley that, if it had been in place, the accident involved here would not have happened. It was out of place; and it had entire-

ly disappeared for some time. Under the circumstances, however, it is not necessary for us to undertake to trace it. It is not disputed that it was primarily the duty of the defendant to have this guard in place, and that if it had been in place the accident which occurred would not have happened.

It is also apparent that, on the face of the case, it was to a certain extent the duty of the deceased to restore the guard; but it is not shown that it was his duty to replace it if it had entirely disappeared. It is, however, also evident that if he had any duty in reference thereto it was suspended by the conversation with Moore, hereinafter referred to.

[1] Various theories were suggested by the defendant as to the manner in which the accident did in fact occur; but it may be said that it came about by Tibbetts coming in contact with the pulley, and that he would not have come in contact with it if the guard had been in place. Beyond this, under these circumstances, there being a lack of any real support to any theory as to the precise way in which the accident occurred which the court can recognize, as relieving the defendant, the practical application of the rules as to the proof of efficient negligence on the part of the defendant, and of contributory negligence on the part of Tibbetts, governs the case in favor of the plaintiff according to the practical results of *Griffin v. Overman Wheel Co.*, 61 Fed. 568, 571, 9 C. C. A. 542, decided by this court on April 5, 1894, and of *Southern Pac. Co. v. De Valle da Costa*, 190 Fed. 689, 700, 111 C. C. A. 417, decided by us on October 4, 1911. Inasmuch, therefore, and especially as, under the peculiar rules of the federal court, it rests on the defendant to prove negligence on the part of the injured employé, the position is not such that we can uphold the motion of the defendant to direct a verdict in its favor which was submitted to the District Court, either on the alleged ground of lack of proof of efficient negligence on the part of the defendant or of proof of contributory negligence on the part of the deceased. This very much narrows down the positions of the defendant in this court on the propositions to which we will call attention.

[2] Complaint is made that the counsel for the plaintiff made certain statements in his argument to the jury which call for a new trial. While the statements were hardly to be approved, it is not clear that they were of a character which, at any rate, would afford ground for exception, while it is clear that whatever objections the defendant had were not followed up. There is nothing in the record on this point except merely that the defendant excepted, or to show that the matter was submitted to the court in any proper form, or that the court regarded the observations of counsel as harmful, while in ordinary cases like this it must appear that the trial court took some action, or was asked to take some. *Crompton v. U. S.*, 138 U. S. 361, 364, 11 Sup. Ct. 355, 34 L. Ed. 958; *Toledo R. Co. v. Howe*, 191 Fed. 776, 786, 112 C. C. A. 262; *Devine v. Chicago, etc., R. Co.*, 194 Fed. 861, 114 C. C. A. 607.

Aside from what we have referred to, we do not find that there is any question presented in the record which requires our consideration except what arose as follows:

[3] It may have been that it was the duty of Tibbetts to have replaced the guard, so that it may have been that the accident was the result of his own negligence in not replacing it. It is also plain that, on the face of the case, Tibbetts walked into the dangers with his eyes open, and knowing fully what they were. Whatever doubt there may be of any presumed negligence in not replacing the guard, both that and the point of assumed risk were met by the evidence of one Moore, who testified that before the accident occurred he heard a conversation between Tibbetts and one Marshall, who appears to have been the defendant's "master mechanic," and as to whom it is not disputed that he had sufficient authority in the premises. The defendant discredits the entire testimony of Moore; but a motion to the trial judge for a new trial was made, among other reasons, on that account, and the motion was denied. In the federal practice the trial judge has especial authority with reference to new trials on account of mere matters of conflict of testimony. He hears the witness, and observes his manner, and can form an opinion with reference to his truthfulness, which no appellate tribunal can do. Therefore it would be an extreme case where a federal appellate tribunal would feel authorized, under such circumstances, to overrule a determination of the trial judge of the kind described.

Aside from that, the circumstances affecting the testimony of Moore are in no way of such a conclusive character that an appellate court could set aside the finding of a jury based thereon, even though it might think that if it held the place of the trial judge it would have done so. Therefore we must accept the testimony of Moore as given by him. He said that he heard a conversation between Tibbetts and Marshall a while before the accident occurred. He does not positively fix the length of the intervening period. "Well," he says, "it was only just a few days or so." He had previously said that it was the week before Tibbetts was killed. That was as well as he could locate it; and, in any event, his attempt to locate it was confused, so that it would be impossible for us to determine on this record how long before the accident the conversation occurred.

The conversation he reports as follows:

"Well, Tibbetts said that he should put his coat and hat on and go home if that guard was not put back there; and Dan [meaning Marshall] said: 'You keep your hat on. I will have that guard put right back there.'"

As reported by Moore, that was the end of the conversation. This went to the jury, and the jury found that the conversation as reported by Moore was correct. The only thing, further, we have in the record concerning the matter is an extract from the charge of the judge to the jury on this point, covering two full printed pages, and closing as follows:

"To these instructions the defendant duly and seasonably excepted."

It is not denied that the portion of the charge excepted to was correct so far as the general rules regarding the effect of the conversation between Marshall and Tibbetts is concerned. The court charged, although not so pointedly as it might have done, that it was for the jury

to determine whether the delay between the conversation and the accident was a reasonable or an unreasonable delay under the rules with reference to the effect of a notice of the need of repairs to obviate a dangerous condition of things. What the court said wound up as follows:

"If you find that this inducement was held out to him by the company or its agents, and you find it was a reasonable thing for him to go forward there as he did, and he was injured by reason of the defect, then he would be entitled to recover, and there would be no arbitrary rule of law which would hold him to an assumption of the risk."

[4] It will be noticed that in this charge there was no comment on the length of time that had elapsed, nor was the jury expressly directed even to ascertain what the length of time was, nor the details of the evidence brought to their attention to enable them to do so. The charge generally was correct; and the only point now brought to our attention is that it was insufficient on the proposition as to what the jury might or might not find to be a reasonable time under the rules. That this is one of the class of the cases where, in the federal practice, the determination of what is a reasonable time is ordinarily for the jury cannot be disputed; and if the defendant had desired more specific instructions, or to bring to the attention of the court or jury the question which it now seeks to bring to our attention, it should have been more specific; and so this general exception to two pages of a charge substantially correct cannot be availed of.

[5] Moreover, this was not an ordinary case; but, as the record stands, there was an absolute promise on the part of the defendant in engaging Tibbetts to remain at work, and in agreeing to safeguard the place in case he did. It must be accepted to be true that on this question there are many elements interposing as to what is a reasonable time, as, for example, where the hazard is imminent, a reasonable time would ordinarily be very short, while, as probably was the case here, if the hazard is not imminent, it would be naturally protracted; and while in a case like a repair which can be done in a few moments, a reasonable time would be very brief, in a case where a guard was to be supplied as apparently was the fact here, it might also again be protracted. Yet, further, where an employé is especially engaged to work, notwithstanding a particular defect, coupled with a promise that the defect will be remedied, the engagement relating thereto might well be supposed to stand as a protection to the employé until there was some express, or some otherwise specific, change in the relations of the parties. All such things are generally for the jury and not for the court, especially not for the appellate court.

Many topics were discussed at the bar; but we think that we have disposed of those which are essential, and, indeed, of all the propositions raised by the assignment of errors which were finally insisted on.

The judgment of the District Court is affirmed, with interest; and the defendant in error recovers her costs of appeal.

COGDILL v. WHITING MFG. CO.

(Circuit Court of Appeals, Fourth Circuit. February 12, 1914.)

No. 1172.

1. COURTS (§ 352*)—PRACTICE OF STATE COURTS—MOTION FOR NONSUIT—MOTION FOR VERDICT.

Where a motion had been made to instruct a verdict for defendant at the close of plaintiff's testimony, it was then too late for plaintiff to take a voluntary nonsuit, though such practice might be authorized in the state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 926-932; Dec. Dig. § 352.*]

2. MASTER AND SERVANT (§ 159*)—DEATH OF SERVANT—DEFENSES—FELLOW SERVANT—NEGLIGENCE—COMPLIANCE WITH NONDELEGABLE DUTY.

Defendant may not avail itself of the defense of negligence of a fellow servant if it is in default in performing a nondelegable duty to furnish decedent with a safe place to work, and such failure resulted in decedent's injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 318-325; Dec. Dig. § 159.*]

3. MASTER AND SERVANT (§§ 286, 289*)—DEATH OF SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

In an action for death of plaintiff's intestate by being struck by a log, alleged to have been negligently hauled by means of a cable attached to a steam winch, evidence *held* to require submission of the question of defendant's negligence and decedent's contributory negligence to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050, 1089, 1092-1132; Dec. Dig. §§ 286, 289.*]

4. MASTER AND SERVANT (§ 185*)—DEATH OF SERVANT—FELLOW SERVANT.

Whether a superior is a fellow servant or a vice principal does not depend on the mere fact that the negligent superior servant has control over and occupies a superior position to that in which an injured servant is employed, but rather on whether the negligent servant is clothed with control and management of a distinct department and not a mere separate piece of work in one of the branches of service in a department.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.]

5. MASTER AND SERVANT (§ 287*)—DEATH OF SERVANT—NEGLIGENCE—FELLOW SERVANT OR VICE PRINCIPAL—QUESTION FOR JURY.

Where decedent, an employé in a gang constructing a bridge, was struck and killed by a log which was being moved by a steam winch, alleged to have resulted from the negligence of the superintendent in failing to give proper signals to shut off the power when the log stalled, and it appeared that the superintendent had general charge of the erection of the bridge, giving orders as to when, how, and where the service of the men should be performed and when steam should be applied and shut off from the winch, whether he was a fellow servant or a vice principal was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1034, 1045, 1051, 1052, 1054-1067; Dec. Dig. § 287.*]

In Error to the District Court of the United States for the Western District of North Carolina, at Asheville; James E. Boyd, Judge.

Action by J. W. Cogdill, as administrator of C. W. Cogdill, deceased, against the Whiting Manufacturing Company. Judgment for defendant, and plaintiff brings error. Reversed.

The plaintiff in error instituted this action in the superior court of Swain county, N. C., and the same was by appropriate proceedings removed by the defendant in error, a nonresident corporation, into the United States District Court for the Western District of North Carolina.

The case, as shown by the plaintiff's testimony, the defendant introducing none, briefly is: That on the 24th day of January, 1911, plaintiff's intestate, C. W. Cogdill, was in the employ of the defendant as one of a force of 25 or 30 men engaged in preparing timbers for the construction of a low water bridge, some 400 yards long, across the Little Tennessee river, between the counties of Swain and Graham, in said state; that, in order to remove the timbers that were being placed in the trestle of the work, a machine known as a skidder was used. The steam engine which furnished the power was located on one side of the river, and the skidder on the other; there was a large cable run across the river on which a carriage ran attached to tongs, the tongs and carriage being connected by wire ropes. The method was to hitch the tongs in the log, and pull the same until it reached a point immediately under the cable, when it was lifted and transferred across the river. Prior to transferring the logs to the cribbing, which was being built to support the bridge and trestle, the logs were peeled, and it was part of the duty of plaintiff's intestate to assist in peeling the logs, and, when so peeled, to hook the tongs in them, when they would be pulled to the cable and transferred to the position in which they were needed. That, on the day he was killed, plaintiff's intestate had been engaged, with other hands, in peeling logs. A log was peeled, the tongs hitched to the center of it, and a signal given to the engineer to pull. That after steam was applied, and the log moved some 50 or 60 feet, the front end caught against another log, and the engine, continuing to pull on the cable, lifted the rear end of the log, causing it to rise up 6 or 7 feet from the ground, when it deflected, swung against the plaintiff's intestate, and killed him. That Claud Day, on the day of the happening of the accident, was superintendent in charge of the work for the defendant company, and had full control and authority over plaintiff's intestate, and all persons engaged in the work, with full power to employ and discharge them. That one McLaughlin was operating the engine used in the work. That Day gave directions by signal to the engineer when to start and stop the engine, and on this occasion gave the signal to go ahead. That several minutes elapsed after the log hung, during which the pulling on the same continued. That there was no obstruction between Day and the engineer, and nothing to prevent him from giving instructions to the engineer to shut off steam, and that, upon the deflecting of the log, the accident happened immediately.

The plaintiff averred that by reason of the negligence of the defendant in error in failing to furnish plaintiff's intestate a safe place in which to work, and with suitable tools, machinery, and appliances, and because of the negligence of said Day in failing to discharge his duties under the circumstances, and in negligently discharging his duties, his intestate lost his life, all of which the defendant by its plea controverted, and insisted in argument that the plaintiff lost his life by his own negligence and want of care.

Issue being joined upon the pleadings, a jury was impaneled; and upon the conclusion of the plaintiff's testimony, the presiding judge intimating that the plaintiff's intestate and Claud Day, the defendant's representative in charge of the work, were fellow servants, the defendant moved to instruct a verdict for the defendant, whereupon the plaintiff asked leave to enter a nonsuit, which motion the court overruled, and thereupon sustained the defendant's motion for a verdict for the defendant, and directed the jury so to return their verdict, which being done, judgment was entered thereon, from which action the writ of error herein was sued out.

Julius C. Martin, of Asheville, N. C. (Frye & Frye, of Bryson City, N. C., and Martin, Rollins & Wright, of Asheville, N. C., on the brief), for plaintiff in error.

Alf. S. Barnard, of Asheville, N. C., for defendant in error.

Before PRITCHARD, Circuit Judge, and WADDILL and CONNOR, District Judges.

WADDILL, District Judge (after stating the facts as above). The assignments of error present for the consideration of the court but two questions: Whether the plaintiff had the right to take a voluntary nonsuit; and whether the court erred in directing the jury to find a verdict in favor of the defendant company, and entering judgment thereon. These assignments will be considered in the order named.

[1] First. Whatever may be the right of the plaintiff under the laws of North Carolina to take a voluntary nonsuit at the stage that the motion was interposed in the court below, such does not exist in the federal courts, even in cases arising in that state. In the case of *Hunt v. McNamee*, 141 Fed. 293, 72 C. C. A. 441 (to which, with the authorities therein cited, reference is especially made), a writ of error sued out from the Western district of North Carolina, this court gave much consideration to the question, and under the ruling and decision therein reached, from which we see no reason to depart, the plaintiff in error was clearly not entitled to enter a voluntary nonsuit, and hence this assignment is without merit.

[2, 3] Second. This assignment presents for consideration the correctness of the ruling of the court below in holding that the plaintiff's intestate and Claud Day were fellow servants, and in instructing, upon the evidence adduced, a verdict for the defendant in error, and entering judgment thereon. The plaintiff averred that the defendant failed to furnish his intestate with a safe place to work, and with safe, suitable, and proper instrumentalities with which to perform his labor. Upon the plaintiff establishing this contention, the fact of whether or not his intestate and Claud Day were fellow servants would be immaterial, since the defendant could not avail itself of the defense of negligence of a fellow servant, if it was in default in complying with one of the nonassignable duties and obligations imposed upon it. This question, however, as well as that of whether or not the plaintiff's intestate and Day were fellow servants, can only be determined from the evidence, and upon a careful consideration of the same, as shown by the statement above, we are unable to concur with the view of the lower court, either that the deceased and Claud Day were fellow servants, or that a verdict should have been instructed for the defendant. On the contrary, it is well recognized that the subjects of negligence and contributory negligence are mixed questions of law and fact, and should have been submitted to the jury to determine whether the disaster that befell plaintiff's intestate was caused by the defendant's want of due care or the intestate's contributory negligence.

[4] Whether the plaintiff's intestate and Claud Day are fellow servants, it is true is a question of law, determinable upon the facts ad-

duced, and, under our view, they are not fellow servants. Few subjects have received greater consideration at the hands of the courts of last resort, state and federal, than this; and it is well recognized, certainly under the decisions of the Supreme Court of the United States (*Northern Pacific R. R. Co. v. Peterson*, 162 U. S. 346, 355, 357, 16 Sup. Ct. 843, 40 L. Ed. 994; *Santa Fé Pacific R. R. Co. v. Holmes*, 202 U. S. 438, 26 Sup. Ct. 676, 50 L. Ed. 1094; *Turner v. Lumber Co.*, 119 N. C. 387, 26 S. E. 23; *Wade v. Contracting Co.*, 149 N. C. 177, 62 S. E. 919; *Hipp v. Fiber Co.*, 152 N. C. 745, 68 S. E. 215; *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. 232; *Labatt on Master and Servant*, §§ 574, 575) that the rule of the nonliability of a master is not founded upon the mere fact that the servant guilty of neglect had control over, and was of superior position to that occupied by, the servant who was injured by his negligence, but the true rule as stated in *Northern Pacific R. R. Co. v. Peterson*, supra, 162 U. S. 355, 16 Sup. Ct. 846, 40 L. Ed. 994, is:

"That in order to form an exception to the general rule of nonliability the person whose neglect caused the injury must be 'one who was clothed with the control and management of a distinct department, and not a mere separate piece of work in one of the branches of service in the department.' This distinction is a plain one, and not subject to any great embarrassment in determining the fact in any particular case."

[5] In that case it was held that a section foreman of an extra gang of laborers, 13 in number, engaged in putting in ties and assisting in keeping in repair three sections of a road, with power to hire and discharge the hands, and aiding and assisting the regular gang of workmen on each section as occasion demanded, was not such a superintendent of a separate department, nor a person in control of such a distinct branch of the work of the master, as would render the master liable to a coemployé for his neglect, and that he was in fact, as well as in law, a mere fellow workman. That case, however, and other like cases, applying to different sets of employés in the common and general conduct of a railroad company's business, in our opinion decides nothing contrary to the views herein expressed. This is not a case of a person doing a separate piece of work in one of the branches of the service in a department, but is one distinct and single business within itself. The master was engaged in the construction of a bridge 400 yards long, across a river, with 25 or 30 men employed, a steam engine on one side of the river, and logs to be used in connection with the construction of the bridge, on the other side, the same to be moved by steam power; and the entire work was under the general direction and supervision of a single head, namely, Claud Day, who superintended the erection of the bridge, giving orders what the men should do, when, how, and where the service should be performed, and when steam should be applied and shut off, giving the latter orders by signal and direction from across the river to the engineer. A non-resident corporation was engaged in this enterprise, which required the exercise of skill and judgment in the performance of a delicate, dangerous, and important undertaking, in which the lives of many persons were constantly jeopardized; and to say that there was no direct-

ing head on the ground, or some person of responsibility employed in connection with the business, who could speak for and on behalf of the master, would be to carry the doctrine of fellow servant to an extent dangerous in the extreme. If Day was not a fellow servant with plaintiff's intestate, then there can be no doubt of the error of the lower court in taking the case from the jury, as in that event, assuming the appliances and premises to have been safe and sufficient, it would clearly turn upon the correct solution of whether the injury arose to the plaintiff's intestate because of his want of proper care, or negligence and omission on the part of Day, seasonably to have anticipated the danger of the plaintiff's intestate and others, arising from the constant forcing by steam of the end of one log against other logs in the line or within the track of the one being pulled at the time. He should have known that the way was clear for the log to move before giving the signal to the engineer to start, and he was in a position, and saw, upon this undisputed testimony, the obstruction to the log's progress, and its failure to go forward, and hence should have signaled to the engineer, alone under his control, and at least 500 yards away, to cut off steam. These questions of whether the disaster was brought about from the failure and omission of this superintendent to perform his work or the failure of plaintiff's intestate himself to exercise proper care to avoid the danger were facts for the jury to pass on, and upon the correct determination of the same the right of recovery depended, and the court should not have withdrawn them from their consideration.

It follows from what has been said that the decision of the lower court should be reversed, and it is so ordered, at the cost of the defendant in error.

Reversed.

EASTMAN et al. v. ARMSTRONG-BYRD MUSIC CO.

(Circuit Court of Appeals, Eighth Circuit. February 23, 1914.)

No. 3897.

1. LOTTERIES (§ 3*)—ELEMENTS.

The three elements of a lottery are: First, prize; second, consideration; and, third, chance.

[Ed. Note.—For other cases, see Lotteries, Cent. Dig. § 3; Dec. Dig. § 3.*

For other definitions, see Words and Phrases, vol. 5, pp. 4245-4252; vol. 8, pp. 7710, 7711.]

2. POST OFFICE (§ 34*) — MISUSE OF MAILS — LOTTERY — PIANO ADVERTISING SCHEME—GIFT ENTERPRISE.

Complainant advertised to give away one piano and to sell two others at what appeared to be less than half their retail value to persons who would solve a 15-square puzzle, declaring in the advertisement that there was positively no lot or chance connected with the solving of the problem, which was a contest of skill, and that the neatest correct solution would be awarded the piano, and the other awards would be distributed in or-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

der of merit. The majority of the answers were filled out on the regular advertisement; some were on separate papers; and a number were unique in design, some being on burnt wood, some in the shape of pillows with the problem worked out in embroidery, etc. The unique designs exceeded the 105 entitled to special awards, and the judges made the special awards all on this class of answers; the first five being given the prizes promised, and each of the next hundred were awarded a voucher good for \$117 on the purchase of a piano from complainants before a specified date. To each of the other contestants an award was made of a voucher for \$105. *Held*, that such scheme was not a lottery, within Pen. Code, § 213 (Act March 4, 1909, c. 321, 35 Stat. 1129 [U. S. Comp. St. Supp. 1911, p. 1652]), prohibiting the use of the mails in the furtherance of any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part on lots or chance, etc.; the term "chance" being construed in connection with the word "lot" and with the words "lottery, gift enterprise, or similar scheme," under the maxim "noscitur a sociis."

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 54; Dec. Dig. § 34.*]

Nonmailable matter, see notes to *Southern Ry. Co. v. Shaw*, 30 C. C. A. 79; *McCarthy v. United States*, 110 C. C. A. 548.]

3. POST OFFICE (§ 34*)—MISUSE OF MAILS—FRAUD.

That complainant advertised to give away one piano valued at \$350 and to sell other similar pianos at a reduction of \$105 and more to persons sending in the neatest correct answers to a 15-square puzzle, and that the pianos so advertised and sold cost complainant at wholesale only \$130, so that, if sold at retail for \$350, complainant would make a profit of 170 per cent., did not, in the absence of further explanation, show such fraud as would preclude complainant from an injunction to restrain the postmaster from excluding complainant's correspondence with persons answering advertisements from the mails.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 54; Dec. Dig. § 34.*]

Hook, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Suit in equity by the Armstrong-Byrd Music Company, a corporation, against H. G. Eastman, as postmaster of Oklahoma City, Okl., and others. Decree for complainant, and defendants appeal. Affirmed.

Isaac D. Taylor, Asst. U. S. Atty., of Guthrie, Okl. (Homer N. Boardman, U. S. Atty., of Oklahoma City, Okl., on the brief), for appellants.

Frank M. Lowe, of Kansas City, Mo., for appellee.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

SMITH, Circuit Judge. This was a suit in equity by the Armstrong-Byrd Music Company, a corporation engaged in the purchase and sale of pianos and other musical instruments at Oklahoma City, Okl., against H. G. Eastman, the postmaster, and John L. Graham, the assistant postmaster, at said city. An injunction was sought and obtained forbidding the defendants from refusing the plaintiff permission to mail certain letters, and defendants appealed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It appears that the plaintiff widely distributed the following circular:

Free	<div style="border: 2px solid black; padding: 10px; margin: 0 auto; width: 80%;"> <p style="margin: 0;">IF YOU CAN SOLVE THIS PROBLEM</p> </div>	Free
<p>As an advertisement we will give these awards absolutely and unconditionally free to persons sending in the NEATEST Correct Solution of the "FIFTEEN PROBLEM." There is positively no lot or chance connected with the solution of this problem. It is a contest of SKILL. The NEATEST Correct Solution of the problem will be awarded the Piano, and the other awards will be distributed in the order of merit. :-: :-: :-: :-: :-:</p>		
<p style="text-align: center;">FIRST AWARD A BEAUTIFUL UPRIGHT PIANO Value \$350.00</p>	<div style="border: 2px solid black; width: 100px; height: 100px; margin: 0 auto; position: relative;"> <div style="position: absolute; top: 10%; left: 10%; font-size: 2em;">2</div> <div style="position: absolute; top: 40%; left: 40%; font-size: 2em;">5</div> <div style="position: absolute; top: 70%; right: 10%; font-size: 2em;">8</div> </div>	<p style="text-align: center;">FOURTH AWARD A HANDSOME VIOLIN OUTFIT</p>
<p style="text-align: center;">SECOND AWARD A \$350 UPRIGHT PIANO FOR \$125</p>	<p style="text-align: center;">FIFTH AWARD A HANDSOME GUITAR OUTFIT</p>	
<p style="text-align: center;">THIRD AWARD A \$350 UPRIGHT PIANO FOR \$150</p>	<p>And One Hundred Additional Awards to the next one hundred nearest correct solutions. Everybody who sends a correct answer will be awarded.</p>	
<p>DIRECTIONS:—Take the numbers from 1 to 9 inclusive and place them in the squares so that when added together vertically, horizontally, and diagonally, the total will be "FIFTEEN." No number can be used more than one time. Use this or a separate piece of material or paper. Write your name and address plainly. Only one solution will be received from one family.</p> <p>Be sure your solution is correct and make it as neat as possible, for much depends on neatness as well as correctness.</p> <p>The names of the gentlemen who have consented to act as Judges is a guarantee that the awards will be distributed to those who are entitled to them.</p> <p>In case of a tie, the Judges, being unable to decide between any two solutions, each will receive equal awards.</p>		
<p>DONT DELAY, Send in Your Answer Quick, You May Get the Beautiful Piano!</p>		
<p>All answers must be in our store on or before Thursday, May 9th, 1912.</p>		
<p>BRING OR MAIL YOUR SOLUTION TO</p>		
<p>ARMSTRONG-BYRD MUSIC CO. 211 WEST MAIN STREET OKLAHOMA CITY, OKLA.</p>		

It appears that the H. P. Nelson Company, of Chicago, was aiding in this project, and one of its employes, L. M. Chaney, was in actual charge of it and wrote this advertisement. When the time for filing answers had expired, and on or about May 10, 1912, the judges selected to determine the contest met to determine who had furnished the neatest correct solution. These judges consisted of the presidents of two banks and the vice president of a third, all of Oklahoma City. When they assembled, there were about 6,500 answers. Of these the vast majority were filled out on the original advertisement. Some were on separate papers; but a number were very unique in design. Some

were on burnt wood, some in the shape of pillows with the problem worked out in embroidery, and the like. These unique designs exceeded the 105 entitled to special awards, and the judges made the special awards all on this class of answers. The first five were awarded the prizes promised. To each of the next hundred was awarded a voucher in the form of a draft by the H. P. Nelson Company, of Chicago, to Armstrong-Byrd Music Company, for \$117, good only on the purchase price of a new piano until May 25, 1912, and to each of the other contestants a similar award was made of a voucher for \$105. The Armstrong-Byrd Company then desired to mail to each of the contestants notice of the result, but the assistant postmaster, John L. Graham, under instructions from the postmaster, H. G. Eastman, refused to permit the mailing of said letters upon the ground that the entire plan rendered the scheme a lottery and gift enterprise based upon chance or lot under the Criminal Code, § 213, and section 499 of the Postal Laws and Regulations of 1902, as amended.

It appears that, after the adoption of the Penal Code, section 499 of the Postal Laws and Regulations was so amended as to correspond with section 213 of the Penal Code, which is as follows:

"Sec. 213. No letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance; and no lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance; and no check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme; and no newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be deposited in or carried by the mails of the United States, or be delivered by any postmaster or letter carrier. Whoever shall knowingly deposit or cause to be deposited, or shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of the provisions of this section, or shall knowingly deliver or cause to be delivered by mail anything herein forbidden to be carried by mail, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years. Any person violating any provision of this section may be tried and punished either in the district in which the unlawful matter or publication was mailed, or to which it was carried by mail for delivery according to the direction thereon, or in which it was caused to be delivered by mail to the person to whom it was addressed."

[1] It is agreed by the parties that the three elements of a lottery are: First, prize; second, consideration; and, third, chance—and it is conceded by the plaintiff that the first two elements were present. It is, of course, conceded that these prizes were not to be awarded upon lot, but it is claimed that they were to be awarded upon chance, and the sole question arising on the issues is whether there was such an element of it here as to make the scheme a lottery. It must be borne in mind that this law like other laws must be construed in the light of

reason. *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; *United States v. American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663.

Attention is called by the defendant to the fact that section 213 of the Penal Code provides that there shall be excluded from the mails any letter, package, postal card, or circular, concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance.

While it is true that, if the scheme be a lottery, gift enterprise, or similar scheme, it is not necessary that it shall be determined wholly by chance, but if it rests upon a determination in whole or in part by chance it is sufficient, yet it must be first a lottery, gift enterprise, or similar scheme, and even then the word "chance" is not used in its broadest signification. Originally there was considerable controversy as to the legality of life insurance policies because the ability to mature them was dependent upon the number of lapses, and it was contended that, as the number who would thus lapse was a matter wholly of chance, the policies were invalid, but it has uniformly been held otherwise. So the giving of trading stamps, so called, is not a lottery, although the system is dependent on how much the purchaser buys at some future time as to what article he can obtain from a trading company. *State v. Caspare*, 115 Md. 7, 80 Atl. 606; *State v. Felzer*, 115 Md. 7, 80 Atl. 614; *City and County of Denver v. Frueauff*, 39 Colo. 20, 88 Pac. 389, 7 L. R. A. (N. S.) 1131, 12 Ann. Cas. 521; *State v. Shugart*, 138 Ala. 86, 35 South. 28, 100 Am. St. Rep. 17; *Ex parte Drexel*, *Ex parte Holland*, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. (N. S.) 588, 3 Ann. Cas. 878; *Ex parte West*, 147 Cal. 774, 82 Pac. 434; *State v. Dalton*, 22 R. I. 77, 46 Atl. 234, 48 L. R. A. 775, 84 Am. St. Rep. 818; *Young v. Commonwealth*, 101 Va. 853, 45 S. E. 327; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465.

In *McDonald v. Pacific Debenture Co.*, 146 Cal. 667, 80 Pac. 1090, it was held that, where the defendant promised to pay certain debentures in accordance with a given table, the plan had no such element of chance or hazzard as to make it a lottery.

In *Lauder v. Peoria Agricultural & Trotting Society*, 71 Ill. App. 475, it was held that, where the lots in a subdivision were of equal value, one who bought a lot not described, but the exact lot was to be determined by a citizens' committee on fair grounds, the purchaser was bound by the contract.

In *People v. Fallon*, 152 N. Y. 12, 46 N. E. 296, 37 L. R. A. 227, 57 Am. St. Rep. 492, it was held that where parties paid an entrance fee for their horses in a race, and the association from its own funds offered a prize, this was not a lottery. See *Delier v. Plymouth County Agricultural Society*, 57 Iowa, 481, 10 N. W. 872.

In *Quatsoe v. Eggleston*, 42 Or. 315, 71 Pac. 66, where, for the purpose of advertising a certain piano, the plaintiff agreed to furnish 3 of the instruments and 5,000 tickets, one to be given with each 25-cent purchase, each holder to have one vote for each 25-cent ticket thus issued to him for a society, church, school, lodge, or person, and the

3 pianos to go to the 3 receiving the highest number of votes, it was held there was no element of chance. The court said:

"The awarding of the pianos, which are proposed to be given away as an advertisement, is not made by chance or lot, but by the affirmative, conscious act and will of the holders of tickets obtained with goods purchased at the defendant's store."

[2] It thus appears that it is not every conceivable chance which makes a transaction illegal, and that the word "chance," as used in the statute, must be construed in connection with the word "lot" and with the words "lottery, gift enterprise, or similar scheme." The maxim "*noscitur a sociis*" applies, and the meaning of the word "chance" is to be known or explained by its associates. As so construed, there was no element of chance in this scheme or plan. When the judges assembled, the plaintiff gave them a copy of the advertisement and, without any admonition as to how it should be construed, told them to award the prizes in accordance with its terms. The fact, if it be a fact, that the judges misapprehended the technical meaning of the word "chance" would not convert into a lottery that which had no resemblance to a lottery.

In our opinion the postmaster was erroneously advised that this enterprise was a lottery, and none of the authorities cited by the attorneys for the appellant, chiefly *Public Clearing House v. Coyne*, 194 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092, *Brooklyn Daily Eagle v. Voorhies* (C. C.) 181 Fed. 579, *State v. Shorts*, 32 N. J. Law, 398, 90 Am. Dec. 668, *People v. Lavin*, 179 N. Y. 164, 71 N. E. 753, 66 L. R. A. 601, 1 Ann. Cas. 165, and *Stevens v. Cincinnati Times-Star Co.*, 72 Ohio St. 112, 73 N. E. 1058, 106 Am. St. Rep. 586, seem to us to have any weight to the contrary, and the cases cited in the supplement to the brief by Judge Goodwin do not seem in point.

[3] It is contended, however, that outside of the lottery features the transaction was such an illegitimate business enterprise or so tainted with fraud that the matter tendered for mailing in connection therewith should be excluded from the mails upon that ground. It is true that the record apparently shows that pianos at retail are sold at a very large profit. The piano given as the first prize at \$350 cost at wholesale \$130, so that, if it was sold at retail at \$350, it was sold at 170 per cent. profit; but it appears in the testimony of Mr. Armstrong that pianos are usually sold at a profit of about 133 per cent. It further appears that the H. P. Nelson Company, which was conducting the enterprise, sold their \$350 pianos to the plaintiff at \$125, thus allowing 180 per cent. profit. It nowhere appears that these profits were in excess of ordinary retail piano dealers' profits. L. M. Chaney, who was the only witness examined on the subject, swears that the prices charged by the plaintiff were about \$50 to \$70 apiece less than charged by other houses. Enormous as these profits seem, without further explanation, we do not see why the plaintiff's mail should be excluded without excluding the mail of all houses in the United States dealing at retail in pianos. It affirmatively appears that the vouchers given would so reduce the price of a \$225 piano that it would sell at slightly less than cost.

Suffice it to say that the defense that this business was fraudulent is not pleaded, and while freely conceding that, if it conclusively appeared that it was fraudulent, we could not approve the granting of an injunction in furtherance of it, even though the defense was not pleaded, no such showing is made here as to justify the refusal to mail the plaintiff's letters, and much less to justify the refusal to mail them upon the ground that they pertain to a lottery.

In *United States v. Samuel E. Moist*, 231 U. S. 701, 34 Sup. Ct. 255, 58 L. Ed. —, decided on January 5, 1914, some of the questions here involved were sought to be presented to the Supreme Court, but for the reasons there indicated that court failed to pass upon them.

The decree of the District Court is affirmed.

HOOK, Circuit Judge (dissenting). Though the music company may not have been conducting a lottery or gift enterprise, still, if its scheme was clearly fraudulent, the postal authorities were right in denying the use of the mails, though the wrong reason was given at the time. I think it obvious that deception was at the foundation of the scheme, and that it was designed and well calculated to induce general correspondence and an expenditure of time and labor without the compensation or "reward" that would be expected from the wording of the advertisement. Such things are to be judged by their natural effect upon those whose reliance and action are invited, especially when that effect is designed; and we are not called upon to follow the authors into a nice construction of a shrewd arrangement of words. For example, a promise of a fine engraving of Washington may not be made good by a two-cent postage stamp. Here it was said: "Everybody will be rewarded." More than 6,000 persons responded, and, when the time of fulfillment came, the rewards beyond the first 105 were so conditioned as to be practically worthless. There was more than a lack of ethics; there was a defrauding.

"As is manifest, people were to be led into the dealing by the delusive apparatus of a promise known to be false when made." *United States v. Moist*.

The expense, time, and labor of each, though relatively small, are enough for the law to notice.

MALONE et al. v. ALDERDICE et al.

(Circuit Court of Appeals, Eighth Circuit. March 30, 1914.)

No. 4021.

(Syllabus by the Court.)

1. INDIANS (§ 13*)—COMMISSION TO FIVE CIVILIZED TRIBES—JURISDICTION—JUDGMENTS—CONCLUSIVENESS.

The Commission to the Five Civilized Tribes was a quasi judicial tribunal empowered to determine who should be enrolled as citizens and freedmen of those tribes, what lands should be allotted to each, and in what way, and its adjudication of those questions and of every issue of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

law and fact it was necessary for it to determine in order to decide them is conclusive and impervious to collateral attack.

But its decision, recital, or report regarding issues whose determination was not indispensable to enable it to decide who should be enrolled, what land should be allotted to those enrolled, and how, is, in the absence of special legislation such as the Act of May 27, 1908, c. 199, 35 Stat. 313, without judicial or other conclusive effect.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 30; Dec. Dig. § 13.*]

2. INDIANS (§ 13*)—STATUTES (§ 267*)—RETROACTIVE OPERATION—FIVE CIVILIZED TRIBES—ENROLLMENT—RECORD OF AGES.

The Commission had no jurisdiction in making its enrollment of the citizens and freedmen of the tribes to determine and conclusively adjudicate their respective ages.

In the determination of rights which accrued and of the effect of transactions concluded prior to May 27, 1908, the enrollment records of the Commission are not conclusive evidence of the age of any Indian citizen or freedman enrolled thereon.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 30; Dec. Dig. § 13;* *Statutes*, Cent. Dig. §§ 350-359; Dec. Dig. § 267.*]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Action by Lewis B. Malone and J. G. Rafter against J. H. Alderdice and M. Shultise. Judgment for defendants, and plaintiffs appeal. Affirmed.

John B. Campbell, of Muskogee, Okl. (William O. Beall and John B. Meserve, both of Muskogee, Okl., on the brief), for appellants.

Robert J. Boone, of Tulsa, Okl. (George C. Butte and S. H. Lattimore, both of Muskogee, Okl., and John H. Carter, of Tulsa, Okl., on the brief), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and RINER, District Judge.

SANBORN, Circuit Judge. This case presents one question. In the determination of rights which accrued and of the effect of transactions which were concluded prior to May 27, 1908, are the enrollment records of the Commission to the Five Civilized Tribes conclusive evidence of the age of an Indian citizen or freedman recorded thereon? The Act of May 27, 1908, c. 199, § 3, 35 Stat. 313, provides that the enrollment records of the Commissioner to the Five Civilized Tribes "shall hereafter be conclusive evidence as to the age" of any enrolled citizen or freedman of those tribes. Mariah Henderson was such a citizen and the parties to this suit have agreed that these are the material facts in this case: She was a minor when on September 1, 1898, she was enrolled a Creek citizen. The enrollment records show her age to have been eight years at that time. The age of her majority was 18 years, so that according to these records she would have been of age in September, 1908. The fact was that she was of age on and prior to August 13, 1907. The defendants claimed title to lands allotted to her under a deed made by her for a valuable consideration on August 13, 1907, and the plaintiffs under a like deed of the same lands made by her

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on October 8, 1908, for a similar consideration. The plaintiffs contend that, although she was in fact of age when the former deed was made, yet that deed was void because the enrollment records constituted conclusive evidence that she was not 18 years of age prior to September 1, 1908.

[1] The Commission to the Five Civilized Tribes which made the enrollment of their citizens and freedmen was a quasi judicial tribunal empowered to determine who should be enrolled and what lands should be allotted and in what way it should be allotted to every citizen and freedman, and its adjudication of these questions and of every issue of law and fact that it was necessary for it to determine in order to decide these questions is conclusive and impervious to collateral attack. But its determination, recital, or report regarding issues not material to its answers to the questions who should be enrolled and what lands should be allotted to them and how, is, in the absence of special legislation such as the act of May 27, 1908, without judicial or other conclusive effect. *Kimberlin v. Commission to Five Civilized Tribes*, 104 Fed. 653, 662, 44 C. C. A. 109, 118.

The question in this case becomes, therefore, was it material to the answer to those questions for the Commission to decide and adjudge the exact age of Mariah Henderson and when her minority would cease? In support of their argument for an affirmative answer to this question, counsel for the plaintiffs review the acts of Congress of March 3, 1893, c. 209, 27 Stat. 645; of June 10, 1896, c. 398, 29 Stat. 339; of June 28, 1898, c. 517, 30 Stat. 495; of March 1, 1901, c. 676, 31 Stat. 861; and of June 21, 1906, c. 3504, 34 Stat. 340. They challenge our attention to the facts that the allotment of the lands of the tribes was based on the rolls of their citizens and freedmen prepared by the Commission, that section 21 of the Act of June 28, 1898, provided that "said Commission shall make such rolls descriptive of the persons thereon so that they may be thereby identified, and it is authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls" (30 Stat. 503), that the Creek agreement of March 1, 1901, 31 Stat. 861, provided that all citizens living on the 1st day of April, 1890, entitled to be enrolled under section 28 of the Act of June 28, 1898, 30 Stat. 495, and all children born to citizens so entitled to enrollment up to and including the 1st day of July, 1900, and then living should be placed on the rolls made by said Commission, and that the rolls so made when approved by the Secretary of the Interior should be the final rolls of citizenship of said tribe upon which the allotment of all lands and the distribution of all moneys and other property should be made (section 28, 31 Stat. 870), that allotment for any minor might be selected by his father, mother, or guardian in the order named and should not be sold during his minority, that allotments might be selected for prisoners, convicts, and aged and infirm persons by their duly appointed agents and for incompetents by guardians, curators, or suitable persons akin to them (section 4, 31 Stat. 863), that selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons who could not select for themselves might be made in the manner pro-

vided in that act for the selection of their allotments (section 7, 31 Stat. 863), and that the acceptance of deeds of minors and incompetents by persons authorized to select their allotments for them should bind such minors and incompetents to their assent to the allotment and conveyance of all the other lands of the tribe (section 23, 31 Stat. 868), and that the Act of June 21, 1906, provides that a permanent record book of the rolls should be made and that a copy thereof should be recorded in the office of the recorder of each recording district (34 Stat. 340).

Upon these provisions of the act of Congress counsel base the proposition that the adjudication of the age of each citizen, and especially of each minor, was indispensable to the decision of his claim to enrollment. The position is not without persuasive power when a general view of this legislation is taken, but when these statutes are analyzed and the real issue, the question whether or not it was essential to the determination of the issue who should be enrolled that the Commission should adjudge when the minority of each minor would cease, is kept constantly in mind the force of the argument disappears. The provision of the Act of June 28, 1898, that the Commission should make the rolls descriptive of the persons thereon so that they might be identified falls far short of granting jurisdiction to that Commission to adjudge conclusively on what day each minor on those rolls would attain his majority and thus to determine when he could buy, sell and convey property free from the disqualifications of his minority. As well might it be claimed that the Commission's description on its roll of a male as a female would conclusively adjudge that he was without right to marry a woman, or that the recital of the ages of minor heirs as a matter of description in the record in a probate court of the administration and distribution to them of the estate of their ancestor would conclusively adjudge the time when their respective minorities would cease. This was not the purpose or the effect of this provision of the act of 1898. It was limited in object and in result to the making of a description of the persons enrolled for the purpose of their identification and not for the purpose of the final adjudication of the extent and limits of their disqualifications by reason of their respective ages or otherwise.

It is true that it was necessary for the Commission to determine in making its rolls whether or not certain applicants were born before July 1, 1900, but that fact clearly gave it neither excuse nor power to adjudge the limits of the respective minorities of enrolled minors.

[2] It is also true that in making the allotments it was essential to the discharge of its duty that the Commission should decide at the time each citizen or freedman made his selection of his allotment, and also at the time he made his selection of his homestead, whether or not he was a minor in order to determine whether his selection must be made by himself or by another. But it was also indispensable for it to determine at such times in each case and for the same reason whether or not the applicant was a prisoner, a convict, an incompetent, or an aged and infirm person. It was not, however, indispensable to the complete exercise by the Commission of its jurisdiction here, nor had it the power to determine how long after the selection of any minor, pris-

oner, convict, incompetent, or aged and infirm person his disability would continue, and there are two unanswerable reasons why the provisions of the acts of Congress with reference to the allotments failed to give jurisdiction to the Commission conclusively to adjudicate by its enrollment of the citizens and freedmen of these tribes their respective ages and the time limits of the respective minorities of the minors: First, none of those provisions granted jurisdiction to the Commission in making the enrollment to adjudge the ages of the minors, nor was it necessary for that Commission in deciding who were citizens and freedmen to determine anything concerning their ages except that they were born before July 1, 1900; second, none of the provisions regarding the allotments required the Commission to do, or granted it the power to do, more regarding the ages of those enrolled than to determine at the times of his selections whether each allottee was then a minor or otherwise disqualified, and this requisition and power gave it no jurisdiction or authority to adjudge conclusively the extent or limits of their disqualification. And our conclusion is that the Commission to the Five Civilized Tribes had no jurisdiction in making its enrollment of their citizens and freedmen to determine and conclusively adjudge their respective ages. The result is that in the determination of rights which accrued and of the effect of proceedings which were concluded prior to May 27, 1908, the enrollment records of the Commission are not conclusive evidence of the age of any Indian citizen or freedman. *Hegler v. Faulkner*, 153 U. S. 109, 117, 118, 14 Sup. Ct. 779, 38 L. Ed. 653; *Williams v. Joins*, 34 Okl. 733, 126 Pac. 1013, 1015; *Perkins v. Baker* (Okl.) 137 Pac. 661, 663.

The court below was of this opinion, and its decree is affirmed.

THE EXPRESS.

THE S. L. CROSBY.

(Circuit Court of Appeals, Second Circuit. February 10, 1914.)

No. 193.

COLLISION (§ 72*)—STEAMER AND VESSEL AT END OF PIER—EXCESSIVE SPEED IN FOG.

A steamer, which was approaching the Brooklyn piers in East River in a fog for the purpose of tying up, *held* in fault for a collision with a scow in a tow which was already lying at the end of a pier, as is the custom of the port in case of sudden fog, for not proceeding at moderate speed, "having careful regard to the existing circumstances and conditions," as required by article 16 of the Inland Rules (Act June 7, 1897, c. 4, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2880]). The tug in charge of the scow also *held* in fault for failing to give some notice of the presence of her tow, which extended for 300 feet across the ends of three piers, when she heard the fog signals of the approaching steamer.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 102; Dec. Dig. § 72.*]

Collision rules, speed of steamers in fog, see note to *The Niagara*, 28 C. C. A. 532.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in admiralty for collision by Albert Bleakly and others, owners of Scow 74, against the steamer Express, the New York, New Haven & Hartford Railroad Company, claimant, with the steam tug S. L. Crosby, the Cornell Steamboat Company, claimant, impleaded. Decree against the Express alone, and her claimant appeals. Modified.

J. T. Kilbreth, of New York City, for appellant.

James J. Macklin, of New York City (De Lagnel Berier, of New York City, of counsel), for appellees.

Amos Van Etten, of Kingston, N. Y., for the S. L. Crosby.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. December 24, 1910, while the tug S. L. Crosby was proceeding down the East River with three scows in tow tandem, a dense fog arose. The tug hung the tow up at the end of Pier 8 on the Brooklyn shore, where it lay strung out on the ebb tide as far as Pier 10. Subsequently, to make room for a vessel entering the slip between 8 and 9, the tug herself moved to the end of Pier 10 and there made fast. The steamer Express, while rounding the Battery on her way into the East River ran into the same fog and was crowded over by other shipping to the Brooklyn shore, where her master determined to lay up until the weather cleared. She approached the Brooklyn piers diagonally, blowing fog signals as required by law, but did not discover Scow 74 lying at the end of Pier 9 until so close to her that she was unable, by going full speed astern, to avoid collision. The blow was violent enough to do considerable damage to the scow, and those on the Express admit that if she had not struck the scow she would have run into the pier. The libellant filed this libel against the Express to recover the damages sustained by the scow, and the Express brought in the tug Crosby under admiralty rule 59. The District Judge entered a decree in favor of the libellant against the Express, dismissing the petition against the Crosby, with costs.

It is the practice in this harbor for vessels and tows in thick fog to tie up at piers as was done in this case. The only law on the subject of lying at the end of piers is section 879 of the Greater New York Charter (Laws 1901, c. 466), which provides that such vessels may not recover damages for any injury caused them by vessels entering or leaving any adjacent pier. This section does not apply to the situation now under consideration.

We concur with the District Judge in finding the Express at fault for going at too great speed. Article 16 of the Inland Regulations requires vessels in a fog to go at a moderate speed, "having careful regard to the existing circumstances and conditions." These were that in a crowded harbor other vessels would be likely to hang up at the end of piers until the fog cleared away, just as she herself intended to do. The witnesses from the Express testify, as is generally done in similar cases, that she only had just steerage way and could not have

gone slower. Other witnesses state that she was going at a rapid rate, and the injuries to the scow indicate that she could not have been going at dead slow. The District Judge evidently so found, and we see no reason to differ. The rule is salutary, though occasionally involving great hardship, that vessels moving in fog must do so at such a rate as will enable them to stop before striking any vessel which is herself observing the law. *The Umbria*, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053.

We think, however, that the tug Crosby was also at fault. She was still in charge of the tow and bound to protect it. The Inland Regulations provide for no signal to be given by vessels tied up at the end of piers in fog. The measure of duty in such cases would seem to depend upon the general law of negligence. In this case those on the Crosby should have acted with ordinary care according to the circumstances. She had hung up her tow, some 300 feet long, so as to occupy the ends of two piers and obstruct two slips. To give the statutory signals might well confuse vessels navigating in the vicinity. All the master of the Crosby claims to have done was to blow an alarm just as the Express loomed up. He must have known that other vessels would be likely to seek a safe berth at this point, just as he himself had done, and should have been correspondingly watchful. When he heard the signals of the Express approaching he should have given her some timely notice of the presence of the tow. This he might have done by hailing, or by using a megaphone, or by giving repeated taps on his bell or toots of his whistle as an alarm signal. We have imposed some such duty on tugs having charge of tows. *Hughes v. P. R. R.* (D. C.) 93 Fed. 510; *Id.*, 113 Fed. 925, 51 C. C. A. 555; *N. Y. O. & W. R. R. v. Cornell S. B. Co.*, 193 Fed. 380, 113 C. C. A. 306. See, also, *McCaldin Brothers* (D. C.) 117 Fed. 779.

The decree of the court below is modified, and the court directed to enter a decree in favor of the libellant against both vessels, with costs, half costs of the court below and full costs of this court in favor of the Express against the Crosby.

CAMBRIA S. S. CO. v. PITTSBURGH S. S. CO. et al.
(Circuit Court of Appeals, Sixth Circuit. January 6, 1914.)

No. 2386.

COLLISION (§ 130*)—SUITS FOR DAMAGES—INTEREST—RATE.

Where interest is allowed on damages recovered in a suit for collision or other maritime tort which occurred in inland waters within the jurisdiction of a state, the statutory rate of such state should be applied both as to interest on the amount of the recovery before decree and upon the decree.

[Ed. Note.—For other cases, see *Collision*, Cent. Dig. § 284; Dec. Dig. § 130.*]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur C. Denison and Clarence W. Sessions, Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suits for collision by Frank M. Osborne and others, owners of the steamer John W. Moore, and the St. Paul Fire & Marine Insurance Company against the steamer Edward Y. Townsend, the Cambria Steamship Company, claimant, and by the Pittsburgh Steamship Company as owner of the steamer Queen City against the Townsend and the Moore, and by Jerrainy McIntyre, administratrix of the estate of Duncan McIntyre, deceased, against all three vessels. Decree against the Townsend alone (189 Fed. 653), and her claimant appeals. Modified and affirmed.

Brown, Ely & Richards, of Buffalo, N. Y., for Cambria S. S. Co.

H. D. Goulder and F. S. Masten, both of Cleveland, Ohio, for Osborne and others.

F. H. & G. L. Canfield, of Detroit, Mich., for cargo of the Moore.

H. A. Kelley, of Cleveland, Ohio (Hoyt, Dustin, Kelley, McKeegan & Andrews, of Cleveland, Ohio, of counsel), for Pittsburgh S. S. Co.

Frederick L. Leckie, of Cleveland, Ohio, and Roscoe B. Huston, of Detroit, Mich., for Jerrainy McIntyre.

Before WARRINGTON and KNAPPEN, Circuit Judges, and HOLLISTER, District Judge.

WARRINGTON, Circuit Judge. The suit upon which this appeal is based grew out of a collision between the steamer Queen City and the steamer John W. Moore in the Detroit river on October 19, 1907. The final decree was entered July 25, 1912. An interlocutory decree had previously been entered, finding that the damages sustained through such collision, by the colliding steamers, by Jerrainy McIntyre, administratrix of the estate of Duncan McIntyre, deceased, and by the St. Paul Fire & Marine Insurance Company, were occasioned through the sole fault of the steamer Edward Y. Townsend, and making the usual reference to a commissioner to take proofs and ascertain and report the damages. The reasons for the finding and order of reference are stated in the opinion of Judge Denison, who presided at the trial (189 Fed. 653); and his opinion is approved and adopted.

May 17, 1912, upon exceptions to the partial report of the commissioner, the damages awarded to Jerrainy McIntyre, administratrix, were reduced by Judge Angell from \$6,000 to \$4,000, with interest from that date "if such course shall be deemed not inconsistent with law when the decree is entered," but without fixing the rate of interest. The remaining damages, as ultimately allowed, were fixed by stipulations, with interest from specified dates though no rate was named. In the final decree Judge Sessions fixed the rate at 6 per cent. per annum from such dates "until paid." And Judge Tuttle, sitting in the same court, has since then in another case reached the conclusion that the rate allowable upon the items entering into such a decree should be 5 per cent. The *Newaygo* (D. C.) 205 Fed. 178. It is contended for appellant that the entire interest allowed should have been at the rate prescribed by statute of Michigan, to wit, 5 per cent. per annum; while it is insisted for appellees that the usual rate allowed in cases arising in admiralty is 6 per cent. per annum. Hence no question is made touch-

ing the right of the trial court either to have allowed or denied interest; and it must be conceded that it possessed a reasonable discretion in this behalf. See decisions cited in *Thompson Towing & Wrecking Ass'n v. McGregor*, 207 Fed. 209, at page 221, note, 124 C. C. A. 479 (C. C. A. 6th Cir.). Since it was determined actually to allow interest as part of the ascertained damages "until paid," it should be borne in mind that the question concerns the rate that should have been applied both before and upon the decree.

It is apparent that the question did not arise in Judge Denison's consideration of the case. And Judge Sessions appears to have fixed the rate at 6 per cent. because Judge Angell had previously allowed that rate in an unreported case; but Judge Angell seems to have entertained doubt in that case, as also in the present case, touching the allowance of a rate in excess of 5 per cent. Concededly there are admiralty decisions in which the rate of 6 per cent. has been distinctly allowed from the date of loss at least until the date of decree. For example: *The Aleppo*, Fed. Cas. No. 158, 1 Fed. Cas. 342, 347, decided in 1874 by Judge Blatchford, then District Judge; *Dyer v. National Steam Nav. Co.*, Fed. Cas. No. 4,225, 8 Fed. Cas. 207, 210, decided in 1878 by Judge Blatchford when Circuit Judge; *The Mary Eveline*, Fed. Cas. No. 9,212, 16 Fed. Cas. 981, by Mr. Justice Hunt, sitting as Circuit Justice, decided after conference with Judge Blatchford and with his concurrence on the day following the decision in the *Dyer Case*; *The Oregon* (D. C.) 89 Fed. 520, 526. The *Dyer Case*, *supra*, with others, was appealed to the Supreme Court and is reported in the name of *The Scotland*, 105 U. S. 24, 36 (26 L. Ed. 1001), in which Mr. Justice Bradley said: "The rate of interest allowed, 6 per cent. per annum, was the proper rate in such a case." However, in *The New York*, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126, a District Court decree was involved, which had been reversed in this court (82 Fed. 819, 27 C. C. A. 154), and in which, as appears in the record of the case, Judge Swan had allowed interest on an ascertained amount of damages at the rate of 6 per cent. per annum for a definite period prior to his decree. Upon reversal of the decision of this court, the District Court was directed to enter a decree "in conformity with the opinion of this (the Supreme) court, with interest from July 3, 1896 (the date of the decree allowing 6 per cent. interest as stated), until paid, at the same rate per annum that decrees bear in the courts of the state of Michigan." 175 U. S. at 210. In the decree entered pursuant to this mandate, it appears that interest was allowed for a time anterior to the decree; but the rate was not stated, and we are unable to discover it in the record. That decree was affirmed by this court (108 Fed. 102, 47 C. C. A. 232) and by the Supreme Court (sub nom. *The Cone-maugh*, 189 U. S. 363, 23 Sup. Ct. 504, 47 L. Ed. 854); and the **only** question of rate of interest expressly passed upon in these latter decisions was, which of two different statutory rates then existing in Michigan should be allowed on the decree; and the rate of 7 per cent. prescribed as to state judgments and decrees was adjudged to be applicable. It is further to be observed that no interest at all would have been recoverable upon that decree if the court had not expressly allow-

ed it. *The Scotland*, 118 U. S. 507, 519, 6 Sup. Ct. 1174, 30 L. Ed. 153; *Hemmenway v. Fisher*, 20 How. 255, 260, 15 L. Ed. 799; Supreme Court Rule 23, Subd. 4, Appendix p. 1, 133 U. S. (32 Sup. Ct. xi); *Dewhurst's Supreme Court Rules*, p. 122, Rule 23 as it now stands.

Now, in view of the two rates of interest thus approved in the one instance and adopted in the other by the Supreme Court, what is the duty of this court in the instant case? It may be conceded that the exercise of discretionary power was involved in both instances, that is, through the Supreme Court's approval of the discretion exercised by the court below in the first, and through the specific exercise by the Supreme Court of its own discretion in adopting the state rate in the second instance. We are disposed to follow the course adopted in the last instance. The first instance amounts to an approval of the usual 6 per cent. rate where there is no statutory rate that can reasonably be applied; while the second in effect adopts the principle of applying prescribed state rates where the conditions will admit of it. The former illustrates the ordinary conditions attending suits respecting collisions or salvage upon the high seas, and the latter the conditions usually growing out of and involved in suits with respect to similar disasters upon the internal navigable waters. It may be, as respects the latter, a rate lower than that fixed for the decree itself was in practical effect approved with reference to the time for which interest was allowed prior to the decree; but that was due to anomalous statutory conditions then prevailing in Michigan, which (in the absence of stipulation) fixed the rate of interest at 5 per cent. on all obligations other than judgments and decrees, and on the latter the rate of 7 per cent. *The New York*, supra, 108 Fed. 107, 110, 47 C. C. A. 232 (C. C. A. 6th Cir.), affirmed sub nom. *The Conemaugh*, supra, 189 U. S. at 368 to 370, 23 Sup. Ct. 504, 47 L. Ed. 854. This anomaly has since been removed by imposing a uniform rate of 5 per cent. on judgments and decrees and (where not otherwise stipulated) on all other obligations. 2 Howell's Mich. Stat. Ann. (2d Ed.) §§ 2869, 2873. It could rarely occur normally that a rule would be suffered to prevail which would prior to the entering of the decree allow one rate of interest upon its component parts, such as liquidated damages and the like, and another rate upon the decree. For that would be to affirm that the same thing should bear one rate before and another after the entry of the decree; and we do not see how anything more than the deprivation of the use of money could be involved, no matter whether it be before or after the date of the decree. It follows that there is now more reason for applying the state rate to the present decree, than there was for adopting it with respect to the decree in the case of *The New York*; and certainly no decision has come to our notice that would justify both ignoring the present state rate (5 per cent.) as regards the decree, and sanctioning the higher rate (6 per cent.) allowed below as to the time previous to the decree. *Steamship Wellesley v. C. A. Hooper & Co.*, 185 Fed. 733, 740, 108 C. C. A. 71 (C. C. A. 9th Cir.); *The Newaygo*, supra.

What we have said respecting a uniform rate of interest, both before and upon any given decree, is not affected by counsel's suggestion that it is contrary to the view expressed in *Hemmenway v. Fisher*, supra, 20 How. at page 259, 15 L. Ed. 799, to the effect that there is no reason for giving different rates of interest according to those fixed in the states where the cases of collision or salvage might in the first instance be tried. The view so expressed had reference to interest upon a decree, and is opposed to the principle adopted in the case of *The New York*, supra, 175 U. S. at page 210, 20 Sup. Ct. 67, 44 L. Ed. 126. Further, that view is not in accord with the spirit and apparent purpose of Rule 23 of the Supreme Court, which in substance provides that, unless otherwise ordered, a decree for the payment of money in a case in chancery (a kindred although not identical subject) shall bear interest at the same rate that similar decrees bear in the courts of the state where such decree is rendered. We may observe, too, that our own Rule 26 (202 Fed. xvii, 118 C. C. A. xix) is like this except that our rule expressly includes decrees in admiralty.

We have thus far considered only the rates of interest that have been and should be applied to ascertained damages resulting from torts which are sought to be redressed in suits in admiralty, and to decrees entered upon the amounts so found; but in principle our conclusion finds still further support, we think, in the rule that claims upon contracts entered into and to be performed in a given state with respect to a vessel or anything connected with it, shall bear interest at the rate prescribed by statute in such state. *The Mary N. Bourke*, 145 Fed. 909, 911, 76 C. C. A. 441 (C. C. A. 2d Cir.). We may add that the rate of interest that should be allowed on the damages as ultimately fixed in favor of *Jerrainy McIntyre*, administratrix, is ruled by the decision of this court in *Thompson Towing & Wrecking Ass'n v. McGregor*, supra, 207 Fed. at pages 219, 220, 124 C. C. A. 479; and so must for this additional reason be limited to 5 per cent. per annum.

It results that the rate of interest allowed by the final decree must be so modified as not in respect of any time prior to the date of the decree, or upon the decree itself, exceed the rate of 5 per cent. per annum. Subject to this modification, the decree is affirmed. In view of the large amount of interest involved, the costs of this court will be divided; and the cause is remanded with direction to enter a decree accordingly.

THE R. P. FITZGERALD.

(Circuit Court of Appeals, Sixth Circuit. January 16, 1914.)

No. 2390.

1. SHIPPING (§ 136*)—LIABILITY FOR INJURY TO CARGO—HARTER ACT.

Before a vessel owner can avail himself of the provision of section 3 of Harter Act of February 13, 1893, c. 105, § 3, 27 Stat. 445 (U. S. Comp. St. 1901, p. 2946), exempting him from liability for loss or damage to cargo from faults or errors in navigation or in the management of the vessel, he must show that the vessel was seaworthy at the commencement

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the voyage, or that he exercised due diligence to make her so, which is made a condition precedent to such exemption.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. § 136.*]

2. SHIPPING (§ 136*)—LIABILITY FOR INJURY TO CARGO—HARTER ACT—DILIGENCE TO MAKE VESSEL SEAWORTHY.

In exercising the degree of care and diligence imposed on an owner to make his vessel seaworthy by Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 (U. S. Comp. St. 1901, p. 2946), he will be required to take such precautions as are reasonably adequate for the protection of the cargo against known perils, or which reasonable foresight may have anticipated.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. § 136.*]

Statutory exemptions of shipowners from liability, see notes to *Nord-Deutscher Lloyd v. Insurance Co. of North America*, 49 C. C. A. 11; *Ralli v. New York & T. S. S. Co.*, 83 C. C. A. 294.]

3. SHIPPING (§ 138*)—LIABILITY FOR INJURY TO CARGO—HARTER ACT—SEAWORTHINESS.

A steamer carrying a cargo of wheat in bulk on the Great Lakes had a lamp room situated directly over the cargo, in which was a 60-gallon tank of kerosene in daily use. The room was lined with zinc, and the sheets on the floor and for a distance up the sides were soldered together so as to be liquid tight. The floor sloped down toward one corner where the opening through which an exhaust pipe came up was also made tight, but a live steam pipe for use for fire protection, put in later, was left with an open space around it unprotected. A seaman in cleaning the oil tank apparently loosened a seam in the bottom causing it to leak, and the oil ran through the space around the steam pipe causing damage to a part of the cargo. *Held*, that the danger of injury to grain from the leaving of such opening in the floor was so obvious, as evidenced in part by the care originally taken to make the floor tight, that the owner could not be said to have exercised due diligence to make the vessel seaworthy for such a cargo, even though other vessels of her class were similarly constructed, and she had been passed by inspectors and surveyors and given a good rating, and that, conceding that the negligence of the seaman was the proximate cause of the damage and was a fault or error in the management of the vessel, the owner was not exempted from liability by Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 (U. S. Comp. St. 1901, p. 2946).

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. § 138.*]

Appeal from the District Court of the United States for the Eastern District of Michigan; Alexis C. Angel, Judge.

Suit by the Cleveland Grain Company against the steamer R. P. Fitzgerald, George B. Taylor, claimant. Decree for respondent, and libellant appeals. Reversed.

Warren, Cady & Ladd and S. A. Hill, all of Detroit, Mich. (Lewis, Adler & Laws, of Philadelphia, Pa., of counsel), for appellant.

Holding, Masten, Duncan & Leckie, of Cleveland, Ohio, for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and HOLLISTER, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HOLLISTER, District Judge. The Cleveland Grain Company filed a libel against the steamer R. P. Fitzgerald and George B. Taylor, claimant and owner of the vessel, seeking to recover for an injury to a cargo of wheat shipped from Duluth to Cleveland on a voyage ending October 31, 1909. The wheat (84,500 bushels) was in good order and condition when shipped, and the bill of lading provided that it was to be delivered at Cleveland in like good order and condition to the libellant, the consignee of the shipper.

Early in the morning of November 1, 1909, the process of unloading at an elevator in Cleveland began, and early in the afternoon it was discovered that a portion of the cargo was injured by coal oil. Upon examination it appeared that coal oil was leaking from a hole in the floor of the steamer's lamp room, situated on deck about amidships and immediately over the cargo. The room was 10 feet by 5 feet, sheathed on the inside with zinc. The metal sheets on the wooden floor were soldered at the seams and up the sides for a distance of six or eight inches, making the floor, were it not for the hole hereinafter referred to, liquid tight.

In one corner of the room, projecting three or four inches above the floor, was a rack upon which rested a 60-gallon tin oil can. At the far corner, on the same side and coming through the floor, was an exhaust pipe for the steam heater which had a nipple and washers above and below the deck, thus making the hole through which the pipe came liquid tight.

Within three inches of it was another pipe put in for the purpose of introducing live steam in case of fire. For the introduction of this pipe a hole had been cut through the floor, and there was an unguarded aperture of from three-eighths to one-half an inch between the pipe and the circumference of the hole. This pipe had been introduced many years before as a protection against fire, to comply with a law of the United States in that behalf. The floor sloped slightly in all directions toward this corner, so that all liquid on the floor would naturally flow toward the hole and drop upon the cargo. The vessel was about 25 years old.

In the morning of November 1st, while the unloading was going on, a seaman was instructed to clean the oil tank. It contained about five gallons of oil, which he withdrew from the tank, and, after the cleaning, poured back into the tank. Upon investigation it appeared that the soldering of the seam between two tin plates at the bottom of the tank was no longer effective for its purpose for a distance of about four inches or less. The tank in other respects was apparently in good condition. Several gallons had leaked out of the tank and had run across the floor to the hole in the corner and down upon, and into, the wheat, damaging 8,904 bushels, to the agreed amount of \$4,218.57. There was some other loss caused by water, which, with expenses connected therewith, was paid by respondent. This and the matters involved in respondent's cross-libel are not now in controversy.

The libellant claims the ship was unseaworthy when it left Duluth, in that the oil tank was worn out through years of service and its material had broken down at its final cleaning which was done in the

usual manner; and in that the lamp room was unseaworthy because of the hole in the floor which permitted the damage to be done.

There was some evidence tending to show that the seam at the bottom of the tank had been injured by some iron implement, the claim being made by the claimant that the seaman who did the cleaning used an iron scraper which in its action disturbed the seam and the solder which made the seam oil tight.

As to the second claim of unseaworthiness, it was the claimant's contention that its construction was in common practice in wooden vessels upon the lakes and had been for many years; that inspectors and surveyors, government and insurance, had for many years inspected and passed this vessel; and that, although by reason of this occurrence wooden vessels were thereafter required to have pipes of that kind in such a location protected in such a way that water would not escape through the orifice in the floor made by the pipe, yet this was not evidence of any want of seaworthiness or of care, but merely an advance in the art of ship construction as experience from time to time suggested.

The District Court held that the injury to the tank was caused by the carelessness or excess of zeal of the seaman in scraping its bottom, and hence the carrier was not responsible for the damage which resulted from "faults or errors * * * in the management" of the vessel, under the provisions of the third section of the Harter Act (Act of February 13, 1893, c. 105, 27 Stat. 445, U. S. Comp. St. 1901, p. 2946);¹ and that the hole in the floor was not a condition of unseaworthiness existing at the time the vessel left Duluth, because the leaking of oil at such a place from such a can and with such consequences was not a result ordinarily to be anticipated; and that, since such construction was, and had been for many years, common practice in wooden vessels engaged in transporting grain on the Great Lakes, the question of unseaworthiness was to be determined with reference to the customs, practices, and usages of the ports from and to which the vessel had sailed.

Whether or not we would have found the condition of the oil can due to carelessness in cleaning it (if that is the true explanation of the leak) is not material now. Assuming the carelessness of the seaman

¹ "Be it enacted, etc., That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

"Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the

as established, and that it was a fault or error in management of the vessel of such kind as to exempt the shipowner from responsibility for its condition, as counsel on both sides of the case agree it was, yet the question remains whether or not, under the facts in this case and the law applicable thereto, the shipowner is relieved under section 3 of the act from responsibility from the damage to this cargo.

[1] The contention of the claimant that carelessness in cleaning the can was the proximate cause of the damage, and that, being excused by the third section of the act from its results as a fault or error in management, the libelant cannot recover, has no sanction in the law. This is clearly shown by Judge Addison Brown, in *The Manitoba* (D. C.) 104 Fed. 145, 155, 156. It will be seen that the question is not one of relative operating causes, proximate or remote. It has to do with the circumstances under which the owner of a vessel is relieved by the operation of the act from consequences for which he would have been responsible prior to its enactment, and involves his responsibility for the condition of his vessel at the inception of the voyage to carry the cargo which he has contracted to transport.

Having in mind the terms of the bill of lading (which make the contract, Justice Gray, in *The Caledonia* [C. C.] 43 Fed. 681, 685) that the wheat was to be delivered in the same good order and condition as shipped, no pertinent exception or exemption from liability appearing, little doubt can be entertained that under the law as it existed prior to the act there would be a warranty of seaworthiness. *The Edwin I. Morrison*, 153 U. S. 199, 210, 14 Sup. Ct. 823, 38 L. Ed. 688; *The Caledonia*, 157 U. S. 124, 130, 15 Sup. Ct. 537, 39 L. Ed. 644; *The Irrawaddy*, 171 U. S. 187, 190, 18 Sup. Ct. 831, 43 L. Ed. 130; *The Southwark*, 191 U. S. 1, 6, 24 Sup. Ct. 1, 48 L. Ed. 65; 3 Kent's Com. (13th Ed.) 205.

But the Supreme Court in recent cases in which the shipowner sought to escape liability for the condition of his vessel at the beginning of the voyage, by claiming exemption for faults or errors in the management of the vessel under section 3 of the act, have in positive terms established the rule that the exemptions under this section cannot be availed of by the owner unless he shows his vessel to have been

master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

"Sec. 3. That if the owner of any vessel transporting merchandise of property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

seaworthy at the inception of the voyage or that he had used due diligence to make her so.

In *Int. Nav. Co. v. Farr, etc., Co.*, 181 U. S. 218, at page 225, 21 Sup. Ct. 591, at page 593 (45 L. Ed. 830), Chief Justice Fuller reaffirmed what he stated to be the general rule that:

"Seaworthiness at the commencement of the voyage is a condition precedent, and that fault in management is no defense when there is lack of due diligence before the vessel breaks ground."

And says (181 U. S. 226, 21 Sup. Ct. 594, 45 L. Ed. 830):

"We repeat that, even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions."

Justice Day takes up the question in *The Southwark*, 191 U. S. 1, at pages 7, 8, 24 Sup. Ct. 1, 2, 3 (48 L. Ed. 65), and, after referring to the absolute quality of the shipowner's warranty prior to the passage of the act, says:

"Section 3 must be read with section 2 to effectuate the purpose of the act, and shows an intention upon the part of Congress to relax in certain respects the harshness of the previous rules of obligation upon shipowners, provided the owner shall exercise due diligence to make the vessel seaworthy in all respects, in which event neither the vessel nor the owner shall be liable, among other things, for faults of management or for loss from inherent defect, quality or vice of the thing carried. * * * Since the passage of the act, as to cases coming within its terms, before the owner can have the benefit of the relief provided by section 3 he must have exercised due diligence to provide a seaworthy vessel capable of performing her intended voyage."

The same learned justice, speaking for the court in *The Wildcroft*, 201 U. S. 378, at page 388, 26 Sup. Ct. 467, at page 468 (50 L. Ed. 794), says, with reference to the facts in that case:

"* * * There could be no question as to the liability of the vessel owner from the established facts of the case, but for the immunity afforded by that act. To permit a cargo of sugar to be injured by the introduction of fresh water in the manner shown, but for the provisions of this act, would have made a case of clear liability against the owner, and where the statute has given immunity against such loss by reason of error in navigation or management, it does so upon the distinct condition that the owner shall show that the vessel was in all respects seaworthy and properly manned, equipped, and supplied for the voyage; or, if this cannot be established, that he has used due diligence to obtain this end. This discharge of this duty is not left to any presumption in the absence of proof. It is the condition precedent, compliance with which is required of the vessel owner in order to give him the benefit of the immunity afforded by the act."

[2] The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport. So Justice Gray says in *The Silvia*, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241, and it is said to be the commonly accepted test. Justice Day in *The Southwark*, 191 U. S. 1, 9, 24 Sup. Ct. 1, 48 L. Ed. 65.

Whether or not the vessel is reasonably fit to carry her cargo must be determined upon all the circumstances and evidence in the case. *Int. Nav. Co. v. Farr, etc., Co.*, 181 U. S. 218, 224, 21 Sup. Ct. 591, 45 L. Ed. 830.

In exercising the degree of care imposed upon the owner by the law (*The Irrawaddy*, 171 U. S. 187, 192, 18 Sup. Ct. 831, 43 L. Ed. 130; *The Tenedos* [D. C.] 137 Fed. 443, 445), he will be required to take such precautions as are reasonably adequate for the protection of the cargo against known perils, or which reasonable foresight may have anticipated (*The Jean Bart* [D. C.] 197 Fed. 1002, 1003, 1004).

[3] Having in mind the lamp room and its location, the wheat in bulk below, the fact that the floor was originally made liquid tight, its slope toward the hole in the corner, the location and capacity of the oil tank, its frequent daily use, the possibility of its leaking and of negligence or accident in handling it for frequent use, the character of the cargo and its susceptibility to injury by a small amount of oil, or even the odor of oil, did the owner provide a seaworthy vessel or use due diligence in endeavoring to do so?

The respondent claims that he did. He has the burden of showing it. To the cases already cited dealing with that subject may be added *The Folmina*, 212 U. S. 354, 29 Sup. Ct. 363, 53 L. Ed. 546, 15 Ann. Cas. 748; *The Rappahannock*, 184 Fed. 291, 107 C. C. A. 74 (C. C. A. 2d Cir.); and there are many others. To carry this burden, he shows that the method of carrying pipes of this kind through the floor after the law required their installation was common for many years in wooden vessels on the Great Lakes; that the primary purpose of surrounding the live steam pipe with a nipple and packing, making liquid tight the aperture through which it came, was to prevent the charring or deterioration of the surrounding wood caused by the at times superheated pipe (though another purpose was to prevent the flow into the hold below of any liquids that might be spilled); that this boat, and others with similar construction, had been inspected and passed by various inspectors and surveyors representing associations of vessel and of cargo insurance underwriters, and classified with a high rating (though not the highest) with respect to adequacy for insurance purposes, and by United States local inspectors of steam vessels and by inspectors under a Minnesota statute requiring vessels, into which grain is about to be loaded, to be made clean and in proper condition to receive the same, with particular attention to vessels that have been used for transportation of coal, oil, lime, stock, etc., and on no account suffering grain to be loaded into a vessel if there is danger of its becoming damaged by reason of the character of previous cargoes.

He cites *The Blue Jacket*, 10 Ben. 248, Fed. Cas. No. 1,569, and *The Amelie*, 6 Wall. 18, 27 (18 L. Ed. 806) that:

"The advice of a fair, competent and disinterested survey is always considered to be strong evidence in justification of a course adopted by the master of a ship in a port of distress."

And he argues that the requirement, following this occurrence, that all such orifices be made liquid tight, does not reflect adversely upon the contrary practice theretofore prevailing, but is merely the result of experience teaching a better way, since progress is always making through the teachings of that hard taskmaster. And he cites *The Nevada*, 106 U. S. 154, 157, 1 Sup. Ct. 234, 27 L. Ed. 149, to the point

that "the event is always a great teacher," and that possibilities are not the criteria when the question of reasonable prudence is at issue.

Giving due weight to these facts and arguments, we are nevertheless not persuaded by them.

Counsel admit that negligence in handling an oil tank from which oil might escape to the damage of a cargo would be "an error or fault in management," and upon this counsel for the respondent base the exemption of liability of the owner in this case, and acknowledge the same measure of obligation as to internal dangers, such as the admitted fault or error in management, as is borne by shipowners with respect to ordinary perils of the sea, the one being internal and the other external, but to be dealt with under the same rules.

No doubt if the deck of a vessel were improperly calked and water from cleaning the deck, or from careless handling, or from the ordinary perils of the sea, had leaked through to the damage of a load of wheat immediately below, there would be a condition of unseaworthiness. *The Ninfa* (D. C.) 156 Fed. 512. Kelley, the master of the ship, and Nacey, the respondent's surveyor, agree that openings in the deck must be made absolutely tight to the sea. Why should not failure to properly make the floor of the lamp room oil tight, a cargo of wheat immediately below it, be declared to be a condition of unseaworthiness? Why was it that the metal covering of the floor was soldered and the sheathing on the walls not soldered? Why was the soldering carried up a number of inches from the level of the floor? While it might be admitted that sheathing the room generally with zinc (it being an oil room) was primarily a protection against fire, yet that protection did not need the soldering of the joints of the metal on the floor, or the extension of the metal so soldered any distance up the sides of the room.

This consideration is proof enough of the anticipation that oil might leak upon the floor, and, if it did, that it would otherwise trickle down through the wooden joints of the flooring into the cargo.

This vessel's business was largely in carrying grain, an article peculiarly susceptible to the destructive contact of oil—and, indeed, to the odor of oil. The mere odor of petroleum is a fact to be borne in mind by the owner of a vessel when the cargo is susceptible to injury from contact with it (*The Lizzie W. Virden* [C. C.] 8 Fed. 624); so, also, the effect upon a cargo of the fumes of creosote (*Church Cooperage Co. v. Pinkney*, 170 Fed. 266, 95 C. C. A. 462).

Not only was this room in daily frequent use in taking oil out of the large tank, but there is abundant evidence, from respondent's witnesses, as well as others, that the leaking of oil cans is by no means an uncommon occurrence on shipboard. One cannot but wonder why it is that when such care was exercised for several inches up the sides, so as to prevent the escape of oil from the floor to the hold, so little care was exercised, after the hole was punched through the floor for the purpose of introducing the fire extinguisher pipe, in leaving an aperture of quite an appreciable size in the floor through which the oil would run, thus bringing to naught the laudable purpose of the original construction. This thought is emphasized by the fact that the other

pipe, three inches away, was so protected that it not only served its primary purpose, but also prevented the flow of liquid through the hole into the hold from which it came.

The third section of the Harter Act is an act of grace, giving the owner exemption from acts of carelessness in management, such as improper cleaning of the oil can, if only he shows his vessel to have been seaworthy at the inception of the voyage, and excuses him from liability to which he otherwise would be subjected for such negligence, if, in spite of the negligence and notwithstanding the injury resulting therefrom, his vessel is seaworthy as against such acts, or he has used reasonable diligence to make it so.

The owner is not responsible for internal dangers such as the negligent handling of the oil can, but he is responsible for not providing, at the beginning of the voyage, a ship adequate to meet them. The rule is not, as claimed by counsel for respondent, that the owner is not bound to anticipate that his servants in handling oil will be careless, or that the oil may leak from a defective can; but his foresight must be so comprehensive as to provide at the beginning of the voyage a ship seaworthy as against the consequences of negligence, accident, or leakage, or other errors or faults in management reasonably to be anticipated. He ought to foresee that oil, escaping, whether through negligence or accident or leakage, will flow like water, and is even more searching in its permeations, as the evidence shows, than water; and that, if it did escape, the result must be damage to the cargo, if there is a hole in the floor to let the oil through upon it. That in fact he did foresee this is shown by the construction of the floor expressly made otherwise liquid tight.

Since the leaking oil would, in the natural course of events, flow through the hole in the floor and fall directly upon the wheat, it can be said with considerable certainty that the vessel was not in a reasonably fit condition to safely transport its cargo. A vessel, says Judge Addison Brown, in *The British King* (D. C.) 89 Fed. 872, 874—

"though seaworthy as respects navigation, may be unseaworthy as respects cargo; since the direct natural consequence of the leak in that case is to damage the cargo, and the ship, therefore, is not in a reasonably fit condition for its transportation."

It will not do to say that the required measure of anticipation of future occurrences is met because inspectors have found no fault with the construction. Indeed, the supervising master of the respondent's line of steamers stated emphatically that, even when a classification had been given a vessel, there was still a responsibility upon the owner for adequately fitting out the vessel, and that the classification would not relieve the owner from such responsibility. The fact of the vessel's having obtained a surveyor's certificate was not regarded as of great importance. *The Abbazia* (D. C.) 127 Fed. 495, 496, in which Judge Adams says:

"The diligence required * * * is diligence with respect to the vessel, not in obtaining certificates."

And so in a number of cases it appears that vessels which surveyors had passed, or which had received a high rating, were nevertheless found unseaworthy. *The Folmina*, 212 U. S. 354, 360, 29 Sup. Ct. 363, 53 L. Ed. 546, 15 Ann. Cas. 748; *The Rappahannock*, 184 Fed. 291, 292, 107 C. C. A. 74; *The Ninfa* (D. C.) 156 Fed. 512, 525; *The Presque Isle* (D. C.) 140 Fed. 202; *The Brilliant* (D. C.) 138 Fed. 743, 749, affirmed 159 Fed. 1022, 86 C. C. A. 671.

While, no doubt, if the owner had taken advice of competent, disinterested persons and had acted accordingly, that might be strong evidence in justification of his course; yet in this case the approval of the surveyors and inspectors was only of a negative character. They might, or might not, have examined the oil room, and, if they did, being human, they are by no means exempt from the common human frailty of negligence.

"It is quite true," says Justice Holmes, in *The Germanic*, 196 U. S. 589, 595, 596, 25 Sup. Ct. 317, 318 (49 L. Ed. 610), "that negligence must be determined upon the facts as they appeared at the time and not by a judgment from actual consequences which then were not to be apprehended by a prudent and competent man. * * * But it is a mistake to say, as the petitioner does, that if the man on the spot, even an expert, does what his judgment approves, he cannot be found negligent. The standard of conduct * * * is an external standard, and takes no account of the personal equation of the man concerned."

And surely it can be no defense, if true in fact, that other owners of wooden vessels were also wanting in properly protecting similar holes in the floors of their lamp rooms. It is said in *The Tenedos* (D. C.) 137 Fed. 443, 446, 447, affirmed 151 Fed. 1022, 82 C. C. A. 671:

"But the fact that shipowners are not in the habit of using precautions which would demonstrate unseaworthiness is immaterial. They are bound to use them"—citing *The Edwin I. Morrison*, 153 U. S. 199, 215, 14 Sup. Ct. 823, 38 L. Ed. 688.

The conclusion cannot be escaped that the respondent neither provided a seaworthy vessel nor used due diligence to make her so.

Even if there were doubt about it, the owner could not escape liability; for, as said by Justice Day in *The Wildcroft*, 201 U. S. 378, 389, 26 Sup. Ct. 467, 469 (50 L. Ed. 794), if "the question of the ship's seaworthiness was left in doubt, that doubt must be resolved in favor of the shipper, because the vessel owner had not sustained the burden cast upon him by the law to establish that he had used due diligence to furnish a seaworthy vessel."

See, also, *The Edwin I. Morrison*, 153 U. S. 199, 212, 14 Sup. Ct. 823, 38 L. Ed. 688.

We are of opinion that the respondent is liable for the injury to the libellant's wheat, and libellant is entitled to a decree for \$4,218.57 (the amount of damage not being disputed), interest and costs here and in the court below.

Since the rate of interest in Ohio in cases in which interest may be recovered is 6 per cent. (General Code of Ohio, § 8305), interest from November 1, 1909, the date of loss, will be computed at that rate in accordance with the decision of this court handed down January 6,

1914, in the case of *Cambria Steamship Co. v. Pittsburgh Steamship Co.* (No. 2386) 212 Fed. 674, 129 C. C. A. 210, for the reasons there given by Judge Warrington, fixing the interest in that case at 5 per cent., the statutory rate in Michigan.

The judgment below is reversed, and the case is remanded to the District Court for further proceedings in accordance with this opinion.

In re FEDERAL CONTRACTING CO.

FAIRBANKS STEAM SHOVEL CO. v. WILLS.

(Circuit Court of Appeals, Seventh Circuit. January 14, 1914.)

No. 2047.

1. COURTS (§ 24*)—JURISDICTION—SUBMISSION TO JURISDICTION.

Where a bankrupt, after petition filed but before adjudication, brought suit against a mortgagee of the bankrupt in a district court having no jurisdiction over the subject-matter, the mortgagee, answering to and contesting the merits, thereby consented to jurisdiction.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 76-78; Dec. Dig. § 24.*]

Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

2. BANKRUPTCY (§ 279*)—ACTIONS BY TRUSTEES—RIGHT TO SUE—ADMISSIONS.

A suit by a trustee in bankruptcy against a mortgagee of the bankrupt, to recover possession of property taken by the mortgagee under an alleged invalid mortgage, is an independent and plenary suit by the trustee as representative of the bankrupt and the general creditors, and the mortgagee, answering to the merits, thereby admits that the trustee has capacity to sue, and the mortgagee, if desiring to question capacity, should file a plea raising the issue.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 419-424; Dec. Dig. § 279.*]

3. BANKRUPTCY (§ 152*)—RIGHTS OF TRUSTEE—MORTGAGEES OF THE BANKRUPT.

Under Bankr. Act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) § 70, as amended by Act Feb. 5, 1903, c. 487, § 16, 32 Stat. 800 (U. S. Comp. St. Supp. 1911, p. 1511), defining title to property of the trustee of a bankrupt, the right of a trustee in bankruptcy intervenes as of the date of the filing of the petition in bankruptcy, unaffected by any subsequent act of a mortgagee of the bankrupt in taking possession, unless the mortgage, valid if duly executed and recorded, was acknowledged and recorded according to the statutes of the state of the residence of the bankrupt.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 194; Dec. Dig. § 152.*]

4. CORPORATIONS (§ 52*)—DOMICILE—PRINCIPAL OFFICE—PLACE OF BUSINESS.

Where a corporation organized under Rev. St. Ill. 1913, c. 32, § 1 et seq., stated in its articles of incorporation that its principal office was in Chicago, and thereby complied with section 2, and no attempt was made to comply with section 50 et seq., authorizing a change of place of business, the corporation's residence was at Chicago.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 140-150; Dec. Dig. § 52.*]

5. ACKNOWLEDGMENT (§ 19*)—AUTHORITY TO TAKE—TERRITORY OF OFFICER.

Under Rev. St. Ill. 1913, c. 95, § 2, providing that chattel mortgages in counties having over 200,000 must be acknowledged before enumerated of-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ficers of the district wherein the mortgagor resides, an acknowledgment, executed by a corporation residing in Chicago, before an officer residing elsewhere, is insufficient, and the mortgage is invalid as against the corporation's trustee in bankruptcy.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 112-121; Dec. Dig. § 19.*]

Appeal from the District Court of the United States for the Southern Division of the Southern District of Illinois; J. Otis Humphrey, Judge.

In the matter of bankruptcy proceedings of the Federal Contracting Company, bankrupt. From an order adjudging that a chattel mortgage, executed by the bankrupt to the Fairbanks Steam Shovel Company, was invalid as against William V. Wills, trustee in bankruptcy, the Fairbanks Steam Shovel Company appeals. Affirmed.

From the agreed statement of facts it appears that on March 25, 1913, Federal Contracting Company hereinafter termed the bankrupt, was adjudicated a bankrupt in the District Court of the United States for the Southern District of Illinois, Southern Division, upon petition filed December 30, 1912. Prior to such adjudication, and on September 6, 1907, the bankrupt gave a written order to appellant for one two-yard dredge complete, describing the machinery in detail, to be delivered at Beardstown, Ill., price \$10,500, for which sum the bankrupt agreed to give its notes, and, at the time and place of delivery, "to give in security of said notes a first mortgage on the above-named machinery," and further agreed in writing that "the title to the goods above ordered shall not pass until paid for in cash or until notes given for the same are fully paid and discharged, but shall rest only in you and the property shall be yours until that time." The order was accepted, the dredge delivered, and the notes and a chattel mortgage securing the same given to appellant as agreed. The mortgage was acknowledged and recorded in Cass county, Ill. The notes not having been paid at maturity, new notes aggregating \$12,215.30 were, on June 8, 1912, executed and delivered to appellant by the bankrupt for the balance due, and some additional indebtedness for repairs furnished, and a new chattel mortgage was also executed and delivered upon the dredge by the bankrupt to secure the new notes, which mortgage was acknowledged and recorded in Cass county aforesaid. On March 6, 1913, the bankrupt having defaulted in the payment of said notes, the appellant took possession of the said dredge, and advertised it for sale pursuant to the terms of the chattel mortgage and the statutes of Illinois; appellant not being at that time advised of the bankruptcy proceedings. The amount then due upon said notes was the sum of \$11,215.30 and accrued interest.

On March 28, 1913, the bankrupt filed its petition in said District Court, setting up that appellant had taken possession of said dredge under and by virtue of said chattel mortgage, and had advertised the same for sale as in said chattel mortgage provided, and alleging, further, that said chattel mortgage was invalid as against the rights of the trustee to be thereafter appointed, that unless such sale were restrained, the dredge would be sold at a sacrifice, and that the said sale should be enjoined. Thereupon the court entered a temporary restraining order. Appellant, without questioning the jurisdiction of the court, appeared, and in its answer alleged that the chattel mortgage was valid, and admitted that it had taken and still had possession of the dredge under the chattel mortgage provisions. It further answered that it had thereby perfected its title thereto prior to the adjudication in bankruptcy, and asked that the injunction be dissolved. On April 18, 1913, no trustee having yet been appointed, it was ordered by the court, on the stipulation of the parties, that the sale might proceed, and that if appellant bought in the dredge, it should hold it subject to the right of the trustee to take possession thereof, should the cause be decided adversely to appellant. The trustee was appointed on April 22, 1913, and substituted for said bankrupt in said cause. Appellant

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 212 F.—44

purchased the dredge at the sale. Thereupon the cause was referred to the referee in bankruptcy as a special master to take proofs and report the same and his conclusions as to the law to the court. He thereafter made report, finding that the chattel mortgage was void as to the trustee for the reason that it was not acknowledged and recorded in Cook county, Ill., the residence of the bankrupt, that the title of the trustee attached to the dredge as of the date of filing the petition in bankruptcy, and was not affected by appellant's taking possession after that date. The special master thereupon recommended that the motion to dissolve the injunction be denied, and that an order be entered directing the appellant to surrender the dredge to the trustee. Appellant thereupon filed its exceptions to the report, and prayed for a review and revision by the District Court. That court overruled the exceptions and approved the special master's report, from which order this appeal was taken.

The errors assigned are, (1) that the court found that the residence of the bankrupt was in Cook county, Ill.; (2) that the court found that the title of the trustee attached as of the date of filing the petition in bankruptcy, and was prior to that of appellant; (3) that the court refused to dissolve the injunction and made the same perpetual. Other facts appear in the opinion.

John A. Bellatti and Walter Bellatti, both of Jacksonville, Ill., for appellant.

Elbert C. Ferguson, of Chicago, Ill., William Mumford, of Pittsfield, Ill., and John C. Burchard, of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). On the hearing of the appeal herein, appellant orally urged upon the court the question of the right of the trustee to bring and maintain this cause in the District Court, for the reasons:

[1] First. That the District Court had no jurisdiction over the subject-matter of this suit under the decision of the Supreme Court in *Harris v. First National Bank*, 216 U. S. 382, 30 Sup. Ct. 296, 54 L. Ed. 528. With regard to this objection, it suffices to say that appellant's answer to the merits, and its acts in contesting the merits during the pendency of the suit, amount, beyond question, to a consent to such jurisdiction. Whether under clauses 23a and 23b, construed together with clause 70e as amended in 1903, consent to jurisdiction of the District Court is required need not therefore be considered.

[2] Second. That the District Court, by its finding in the present suit that the bankrupt's principal office and principal place of business under the Illinois corporation and recording statutes was in the Northern District of Illinois, in legal effect found that the District Court of the Southern District of Illinois, sitting in bankruptcy, had no jurisdiction under the national bankruptcy statute to make the adjudication and appoint the trustee. This present cause is an independent and plenary suit by the trustee (who adopted the bill of complaint filed by the bankrupt in anticipation of the appointment of the trustee), professing to act in the right of the bankrupt mortgagor and its general creditors against appellant as mortgagee to recover possession of property taken by appellant under an alleged invalid mortgage. This suit might therefore have been brought as well in a state court. But wherever brought, if appellant desired to challenge the right of the trustee to sue as representative of the bankrupt and its

general creditors, appellant should have raised the issue in this suit by a proper plea. Appellant's answer to the merits of the question of title and right of possession of the property was an admission of the trustee's capacity to sue. 31 Cyc. 171, 172. If appellant had filed such a plea, it would then, and only then, have become necessary to consider (with the bankruptcy record introduced into this cause as evidence, and if the bankruptcy record showed the question in a way to be determined collaterally) whether principal office and principal place of business inevitably have identical meanings under the Illinois corporation and recording statutes, and under the National Bankruptcy Act. As the record stands, appellant will not be heard to question the right of the trustee to maintain the present suit.

[3] While, upon the merits, other points were made by the trustee, the special master properly held that the only one necessary to be considered was whether the chattel mortgage was acknowledged and recorded according to the statutes of Illinois. Unless it was, the rights of the trustee would intervene as of the date of filing of the petition in bankruptcy, and would not be affected by the subsequent act of the mortgagee in taking possession. *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; *In re Rodgers*, 125 Fed. 169, 60 C. C. A. 567, decided by this court; section 70 of Bankruptcy Act as amended Feb. 5, 1903, Supp. of 1911, U. S. Comp. Stat. of 1901, p. 1511; *Everett v. Judson*, 30 Am. Bankr. Rep. p. 1, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927, 46 L. R. A. (N. S.) 154, decided by United States Supreme Court April, 1913; *Toof v. City Nat'l Bank*, 30 Am. Bankr. Rep. 79, 206 Fed. 250, 124 C. C. A. 118, decided by United States Circuit Court of Appeals June, 1913; *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208.

[4] Section 2 of chapter 95 of mortgages of the statutes of Illinois provides that chattel mortgages in counties having over 200,000 population, if the mortgagee is a resident of the state at the time, must be acknowledged before officers therein enumerated, in the town, precinct, district, or county wherein the mortgagor resides. The articles of incorporation of the bankrupt stated that the location of bankrupt's principal office was "in the city of Chicago, in the county of Cook and state of Illinois," and the commissioners in their report to the Secretary of State set out—

"that the post office address of the business office of said company is at number ——— Park Hotel * * * in the city of Beardstown in the county of Cass and state of Illinois."

The special master found that the charter was filed for record and recorded in Cass county, Ill.; that all but two of the stockholders' and directors' meetings were held at Beardstown, and that after a short time no office was maintained in Chicago, but that the bankrupt did maintain an office at Beardstown, where it kept its records, books, etc.; that its stationery carried the address of Beardstown, and that address was given in its reports to the Secretary of State and collector of internal revenue as the location of its principal office, and that for all practical purposes the principal office was at Beardstown when

the mortgage was given in June, 1912. Upon this state of facts the special master found, as above stated, that the bankrupt's residence was at Chicago, Ill.

This finding of the special master is in accord with the weight of authority. By section 50 of the Illinois Corporation Act, it is provided:

"That whenever the board of directors, managers or trustees of any corporation * * * hereafter organized by virtue of any law of this state, may desire to change * * * the place of business * * * they may call a special meeting of the stockholders of such corporation * * * for the purpose of submitting to a vote of such stockholders * * * the question of such change of place of business."

Section 51 prescribes the notice—not less than 30 days, and the manner in which it shall be given, while section 52 provides that such change must be effected by a two-thirds vote of all the stock of the corporation. Section 53 provides that when such change is voted, a certificate thereof, verified by the affidavit of the president and under seal of said corporation, shall be filed in the office of the Secretary of State and recorded in the county where the principal business of such corporation is located, whereupon the change as to the place of business, etc., shall become effective. Section 54 requires publication of such change to be made in a newspaper published in or nearest the county in which the principal office is located.

Here no attempt was made to comply with the statute in the above respect.

While section 2 of the corporation act uses the language, "the location of the principal office," and the language of section 50 of said act is to change the "place of business," we are of the opinion that the two are synonymous as used in the statute.

It has been held that the domicil of a corporation is that place where its principal office is located. Every corporation has a residence within the meaning of the word as used in the Practice Act, where its principal office or place of business is established. *Jenkins v. California Stage Co.*, 22 Cal. 537.

In *Connecticut, etc., R. R. Co. v. Cooper*, 30 Vt. 476, 73 Am. Dec. 319, it is said that, where a corporation is not located by the terms of its charter, its residence and location are regarded as being in the place where it keeps its principal office and does its corporate business.

It was held in *Western Transportation Co. v. Scheu*, 19 N. Y. 408, that a corporation had its domicil for the purpose of taxation in the city or town in which the principal office for managing the affairs of the company was located, as evidenced by its charter.

The Supreme Court of the United States said, in *Galveston, etc., Ry. Co. v. Gonzales*, 151 U. S. 504, 14 Sup. Ct. 401, 38 L. Ed. 248, that the question of inhabitancy of a corporation must be determined, not by the residence of any particular officer, but by the location of the principal offices—where its books are kept and its corporate business is transacted, even though it may transact its most important business elsewhere, citing *Conn., etc., R. R. Co. v. Cooper*, supra.

In *Ex parte Schollenberger*, 96 U. S. 377, 24 L. Ed. 853, the court

decided that a corporation can have its legal home only at the place where it is located by or under the authority of its charter.

It was early decided in Illinois that:

"The residence of a corporation, if it can be said to have a residence, is necessarily where it exercises corporate functions. It dwells in the place where its business is done. It is located where its franchises are exercised. * * * It has voluntarily established its residence in Cook county. It has there located its chief business office." *Bristol v. C. & A. R. R. Co.*, 15 Ill. 436.

A chattel mortgage covering property in Chenoa, Ill., was held to have been properly acknowledged in St. Louis, Mo., that being the home office of the company. *Hewitt v. General Electric Co.*, 164 Ill. 420, 45 N. E. 725.

A statement in a certificate of incorporation as to the location of the corporation's principal place of business is conclusive on the corporation. *People v. Barker*, 5 App. Div. 227, 39 N. Y. Supp. 88.

The general act under which a corporation was organized granted the power to "change the location of its principal office." Held, that the term "principal office" was intended to include "principal place of business," and such a change of the place of business to another city in the state was authorized. *Bernstein v. Kaplan*, 150 Ala. 222, 43 South. 581; *C., D. & V. R. R. Co. v. Bank of North America*, 82 Ill. 493-496, citing *Bristol v. Chicago & Aurora R. R. Co.*, 15 Ill. 436. See, also, *First National Bank v. Wilcox*, 72 Wash. 473, 130 Pac. 756, 131 Pac. 203; *Clark & Marshall's Private Corporations*, p. 363; sections 464 and 496, *Thompson on Corporations* (2d Ed.).

In *Crofut v. Brooklyn Ferry Co.*, 36 Barb. (N. Y.) 201, it is said that the certificate of incorporation of a company, together with its acts in the exercise of its franchise, show where it is established. The place where its books are kept, where the office of its attorney is, where its directors meet, or where it is assessed for personal property, are not proof conclusive of the locus of its establishment.

[5] The court was right in approving the report of the special master and holding that the residence of the bankrupt was at Chicago, that therefore the chattel mortgage in suit, having never been properly acknowledged, was invalid as against the trustee of the bankrupt, and in refusing to dismiss the temporary injunction and ordering the dredge to be turned over to the trustee.

The decree of the District Court is, therefore, affirmed.

IN RE FEDERAL CONTRACTING CO.

WILLS v. FIRST NAT. BANK OF BEARDSTOWN.

(Circuit Court of Appeals, Seventh Circuit. January 14, 1914.)

No. 2049.

1. ACKNOWLEDGMENT (§ 61*)—CERTIFICATE—DEFECTS—EVIDENCE.

Where chattel mortgages, given by a corporation having its principal office and residence in the First district of the municipal court of Cook county, were acknowledged before a clerk "of the municipal court in the ——— district, in the county of Cook," or before "clerk of the municipal

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

court of the First district in the county of Cook," the irregularities in the acknowledgments, tested by the requirements in Illinois Mortgage Act (Hurd's Rev. St. 1913, c. 95), § 2, providing that in counties having a population of more than 200,000, chattel mortgages shall be acknowledged before a clerk of the municipal court in the district in which the mortgagor resides, could be remedied by evidence, and, when so remedied, the acknowledgments were in accordance with the statute.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 336-344; Dec. Dig. § 61.*]

2. CORPORATIONS (§ 440*)—POWERS—RIGHT TO BORROW MONEY.

A corporation, organized for pecuniary profit under Hurd's Rev. St. Ill. 1913, c. 32, § 1 et seq., has power to borrow money and execute a mortgage to secure the same.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1775-1777; Dec. Dig. § 440.*]

3. BANKRUPTCY (§ 464*)—APPEAL—QUESTIONS REVIEWABLE.

Where no error was assigned to the action of the district court in bankruptcy on a petition in intervention, the action was not before the Circuit Court of Appeals on appeal.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 464.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

Appeal from the District Court of the United States for the Southern Division of the Southern District of Illinois; J. Otis Humphrey, Judge.

In the matter of bankruptcy proceedings of the Federal Contracting Company, bankrupt. From an order of the District Court directing a sale of property mortgaged to the First National Bank of Beardstown, and applying the proceeds to satisfy the mortgage, and holding the balance for the further order of the court, William V. Wills, trustee in bankruptcy, appeals. Affirmed.

From the agreed statement of facts, it appears that the Federal Contracting Company, being indebted to the First National Bank of Beardstown, Cass county, Ill., in the sum of \$20,000, according to the terms of its five promissory notes, did on November 9, 1911, make, execute, and deliver to said bank its two certain chattel mortgages, covering personal property in said county of Cass, for the purpose of securing said notes. One of said mortgages was acknowledged twice—once before Homer K. Galpin, "a clerk of the municipal court in the ——— district, in the county of Cook and state of Illinois," and once before a justice of the peace "of the city of Beardstown in the county of Cass and state of Illinois." The other was acknowledged once before "Homer K. Galpin, clerk of the municipal court of the First District in the county of Cook," etc., and again before "a justice of the peace of the city of Beardstown in the county of Cass and state of Illinois." Each of said mortgages was twice recorded—once in the recorder's office for Cook county, Ill., on May 16, 1912, and once in the recorder's office for said Cass county, Ill., on May 20, 1912.

From the statement of facts it further appears that on December 30, 1912, creditors filed their petition asking to have said Federal Contracting Company declared a bankrupt. Afterwards such proceedings were had that said Federal Contracting Company, hereafter herein termed the bankrupt, was adjudicated a bankrupt on March 25, 1913.

On December 30, 1912, one of the creditors of the bankrupt filed its petition for, and the District Court granted, an order restraining said mortgagee, the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

First National Bank of Beardstown, from attempting to foreclose its said mortgages or take possession of the mortgaged property, alleging that the chattel mortgages were invalid.

After the appointment of a trustee in bankruptcy, said bank filed its petition praying for a sale of the property covered by the mortgages, which was contested by the trustee upon the ground that the mortgages were improperly acknowledged, and for other reasons. The referee found in favor of the mortgagee, and ordered that the mortgaged property be sold and the proceeds applied on the several mortgage indebtedness. The trustee presented a petition for review by the District Court, which court approved and confirmed the referee's report.

For further facts see opinion filed in case No. 2047 in the same bankrupt's estate, entitled the Fairbanks Steam Shovel Company v. William V. Wills, trustee, etc., 212 Fed. 688, 128 C. C. A. —, decided at the present session of this court.

The errors assigned are, in substance, that the court held the mortgages to be valid and ordered the mortgaged goods to be sold and the proceeds turned over to appellee.

Elbert C. Ferguson, of Chicago, Ill., William Mumford, of Pittsfield, Ill., and John C. Burchard, of Chicago, Ill., for appellant.

John A. Barber and Clayton J. Barber, both of Springfield, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). In cause No. 2047, 212 Fed. 688, 129 C. C. A. 224, decided at this term of the court, we held that the bankrupt's principal office and residence was at Chicago, Cook county, Illinois. That being so, the only matters now presented to the court for disposition, are whether the several acknowledgments of the chattel mortgages respectively comply with the requirements of the statute.

[1] By section 2 of the Illinois mortgage act as amended in 1905 (Hurd's Rev. St. 1913, c. 95), it is, among other things, provided that in counties having a population of more than 200,000, chattel mortgages shall, in the absence of a justice of the peace, etc., be acknowledged before a clerk or any deputy clerk of the municipal court in the district in which the mortgagor resides.

As will be seen from the statement of facts and the finding of the referee, both mortgages were actually acknowledged before the clerk of the municipal court of Chicago in the First district of said court, in which district the bankrupt had its principal office and residence. The irregularities in the acknowledgments, if they amount to such, might be and were remedied by the evidence before the referee. *Harvey v. Dunn*, 89 Ill. 585; *Gilbert v. Sprague*, 196 Ill. 444, 63 N. E. 993. We deem the mortgages acknowledged in accordance with the statute.

[2] The contention that the bankrupt was not empowered to borrow money is without merit. By the act in question the step taken was authorized and lawfully exercised.

[3] As to the action of the District Court upon the intervening petition of the Partridge Levee and Drainage District, no error has been assigned, and the same is therefore not before us.

We think the referee and the District Court were right in ordering

the trustee to sell the mortgaged property and apply upon the balance due the bank so much of the proceeds thereof as may be necessary to satisfy the same, and, if enough for that purpose is realized on the sale after paying costs accrued to hold the balance, if any, to abide the further order of the court.

The order of the District Court is therefore affirmed.

In re FEDERAL CONTRACTING CO.

WILLS v. NEAT, CONDIT & GROUT.

(Circuit Court of Appeals, Seventh Circuit. January 14, 1914.)

No. 2048.

Appeal from the District Court of the United States for the Southern Division of the Southern District of Illinois; J. Otis Humphrey, Judge.

In the matter of bankruptcy proceedings of the Federal Contracting Company, bankrupt. From an order of the District Court in favor of Neat, Condit & Grout, William V. Wills, trustee in bankruptcy, appeals. Affirmed.

Elbert C. Ferguson, of Chicago, Ill., William Mumford, of Pittsfield, Ill., and John C. Burchard, of Chicago, Ill., for appellant.

J. M. Riggs, of Winchester, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

PER CURIAM. The facts in the present case are, for all practical purposes, identical with those of case No. 2049, decided at the January session of the court, 1914, entitled *In re Federal Contracting Company, Bankrupt, Wills, trustee, etc., v. First National Bank of Beardstown*, 212 Fed. 693, 129 C. C. A. 229.

The finding of the referee was, on review, approved by the District Court, and the cause is here on appeal from that order.

For reasons set out in said cause No. 2049 the order of the District Court is affirmed.

WESTERN TRANSIT CO. v. DAVIDSON S. S. CO.

(Circuit Court of Appeals, Sixth Circuit. March 13, 1914.)

No. 2416.

1. COLLISION (§ 95*)—STEAMER AND TOW MEETING IN NARROW CHANNEL—
DUTY OF FREE VESSEL.

When vessels are to meet in a narrow winding channel, and one of them, being free, can absolutely control her own motions, while the other, being with a tow carried on a towline, can neither stop nor back, and cannot move at all except as the safety of the tow is also considered, this fact alone is sufficient to put upon the free vessel a considerable burden of duty to so handle her own speed and position and to so select the exact place of meeting as to minimize whatever unavoidable danger there may be.

[Ed. Note.—For other cases, see *Collision*, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*

Collision with or between towing vessels and vessels in tow, see note to *The John Englis*, 100 C. C. A. 581.]

2. COLLISION (§ 95*)—STEAMER AND TOW MEETING IN NARROW CHANNEL—MUTUAL FAULTS.

A collision in Portage river, Mich., between the steamer Troy, passing up alone, and the barge Chieftain, coming down in tow on a 200-foot line, *held* due to the fault of both vessels; the Troy being primarily in fault for meeting the barge at a bend in the channel where, if the barge failed to make the turn properly, collision was inevitable, while by slowing or stopping a very short time the vessels would have met in a straight channel; and the Chieftain being in fault for not being more carefully navigated around the turn after passing signals had been exchanged.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*]

3. ADMIRALTY (§ 85*) — REFERENCE TO COMMISSIONER — CONCLUSIVENESS OF FINDING.

The rule, which governs in equity where a reference is made by consent of parties, that a finding of fact by the master is unassailable if there is any testimony consistent with it, is not so strict in case of an ordinary reference by a court of admiralty to a commissioner to take proof of damages and compute and report the same, and, while the commissioner's findings on conflicting evidence are presumptively right and should not be lightly disturbed, the court should not hesitate to exercise its own judgment and reach a contrary result when clearly convinced that the finding is wrong.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 619, 620; Dec. Dig. § 85.*]

4. COURTS (§ 371*)—SUIT FOR DAMAGES—INTEREST.

Damages awarded for a collision which occurred within the jurisdiction of a state should bear interest, both before and after decree, at the legal rate established by statute in the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 907, 972-976; Dec. Dig. § 371.*]

Appeal from the District Court of the United States for the Eastern District of Michigan; Henry H. Swan and Clarence W. Sessions, Judges.

Suit for collision by the Davidson Steamship Company, owner of the barge Chieftain, against the steamer Troy; the Western Transit Company, claimant. Decree for libellant, and claimant appeals. Reversed.

J. B. Richards and Harvey L. Brown, both of Buffalo, N. Y. (Brown, Ely & Richards, of Buffalo, N. Y., of counsel), for appellant.

H. D. Goulder and F. S. Masten, both of Cleveland, Ohio, for appellee.

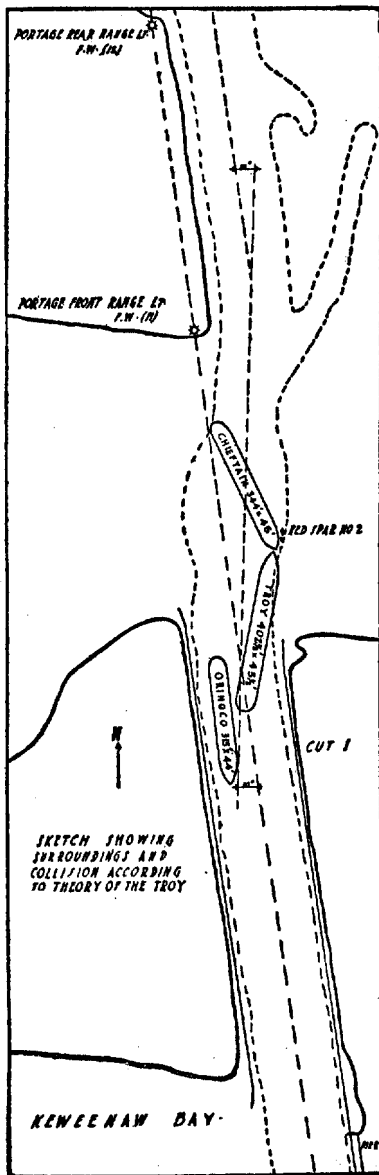
Before KNAPPEN and DENISON, Circuit Judges, and COCHRAN, District Judge.

DENISON, Circuit Judge. The steamer Troy, belonging to the Western Transit Company, was libeled by the Davidson Steamship Company on account of damages suffered by its barge Chieftain, while being towed by its steamer Orinoco. A collision occurred in the Portage river. The Troy was bound for Duluth, and shortly after entering from Lake Superior into the lower end of the river channel, and while below "cut No. 1," gave a port to port meeting signal, and the Orinoco, then coming down the river at a point about a half mile

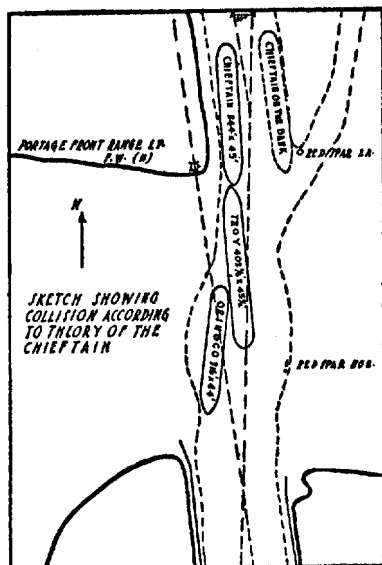
*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

above, agreed. The size of the boats, the particular surroundings of the place, and the position of the boats in collision, according to the theories of the respective parties, appear by the following plats, based upon the Lake Survey charts. The channel in cut No. 1 was about 200 feet wide, somewhat wider in the open water next above, and narrowed to 120 feet in the reach from which the Chieftain was emerging.

SKETCH No. 1.



SKETCH No. 2.



Irregular dotted lines show channel banks; straight dotted lines are range courses.

It is claimed by the Troy that she was kept headed to starboard as far as practicable, and that the Chieftain swung to port and came across the bows of the Troy, away over upon the Troy's side of the channel, and that the collision happened just as the Troy was swinging to starboard, while clearing cut No. 1. It is the Chieftain's claim that, upon a 200-foot towline, she was following the Orinoco and was keeping as close as possible to the bank (which here was a revetment) on her starboard; that passing the end of this revetment she began to make the turn to starboard, but that the Troy came over into the Chieftain's side of the channel across the Chieftain's course, and then struck the latter on her starboard bow, a few feet aft of the anchor hawse pipe.

At the outset, we think it necessary to determine the conflicting question of fact presented by these two theories. It would be useless to discuss all the evidence, but, upon the whole, we are clearly satisfied that the theory of the Troy is correct; and that the collision occurred substantially at the point and in the manner shown by sketch No. 1. If we examine the Chieftain's claim that she was at the point shown on sketch No. 2, and was successfully making her turn to the starboard, it is not impossible (as at first glance it appears to be) that the 400-foot Troy could have passed through the space between the Orinoco and the Chieftain, and swung around and struck the latter from the other side, inflicting the kind of a blow given and at the spot where received—but though not impossible, this is highly improbable. It is to be noted also that shortly before the collision the Chieftain's captain had dropped his starboard anchor, thus indicating that his vessel was swinging to port beyond the control of her rudder, or at least that the rudder was insufficient to turn the bow to starboard as desired; and by this fact the improbability of the Chieftain's claim is increased. Then we have the final, controlling circumstance, by testimony from the Chieftain's crew, that just before the boats came together they saw a red spar under their port bow. There seems no reason to doubt that this must have been "Red Spar No. 2," because "Red Spar No. 2A," though it was shown by the charts which were before the witnesses at the time they were testifying, was in fact not placed until the year after the collision. Any possibility of reconciling the Chieftain's testimony about the red spar with its present theory that the collision occurred at the point shown by its sketch depends upon a mere guess, supported by no testimony, that there may have been a red spar unknown to the records of the Lake Survey in the same place where No. 2A was afterwards set. Taking the testimony all together, we are clearly satisfied that the collision occurred as shown on sketch No. 1.

[1] The district judge found that the Troy was in fault in allowing the meeting to take place at this necessarily dangerous turn in a narrow channel. With this result we agree. We do not, however, base this conclusion on Rule 24 and the principles governing boats moving with or against current or tide. "Portage Entry and River" is a channel four or five miles long, connecting Lake Superior and Portage Lake. It runs through marshy ground. Normally there is a slight current from Portage Lake to Lake Superior. There is another

outlet to Lake Superior from the opposite side of Portage Lake, and under suitable wind conditions the current may be the other way. The evidence conflicts as to whether on the day in question there was any current; and rights should hardly be fixed with reference to a conventional current in a channel where the navigators may not be able to tell which way the actual current is running—at least, if resort may be had to any other applicable rule and clearer standard. In our judgment, the fault of the Troy sufficiently depends on the fact that she was alone, while the Orinoco was burdened with a tow. When vessels are to meet in a narrow, winding channel, and one of them, being free, can absolutely control her own motions, while the other, being with a tow carried on a towline can neither stop nor back and cannot move at all except as the safety of the tow is also considered this fact alone is sufficient to put upon the free vessel a considerable burden of duty so to handle her own speed and position, and so to select the exact place of meeting, as to minimize whatever unavoidable danger there may be. We do not find that this duty has been declared quite so explicitly as in the language just used, and in a case where neither current nor tide was important; but we think we fairly state the necessary result of applying the rule of ordinary care. See *The Syracuse*, 9 Wall. 672, 675, 19 L. Ed. 783; *The Saratoga* (D. C.) 1 Fed. 730, 732; *The Owego* (D. C.) 71 Fed. 537.

[2] In the instant case the Troy unnecessarily proceeded to a point where, if for any reason the Chieftain kept on past the proper turning point for only her own length without making the turn properly and successfully, a collision must happen; while by slowing a little more, or by stopping for two minutes down in the straight channel of cut No. 1, there would have been ample opportunity either for the Chieftain to straighten up and recover her rightful position, or, if she did not do so, for the Troy to have remained in a place of safety. The Troy must be condemned.

Our finding as to the manner and place of collision leads inevitably to the conclusion that the Chieftain was also in fault. Possibly some unexplained bottom or bank conditions caused her to sheer to port, or, what is practically the same thing, to refuse to mind her helm and come to starboard; perhaps more probably, her steersman, through inattention or misjudgment, did not port until too late. The Chieftain had only to fail to make the turn at exactly the right point, and to continue on her former course for 300 feet after she should have turned, to get her nearly into the position where we have found she was. Upon either supposition, she does not escape a contributory liability; her fault is clear enough to satisfy the requirement that, when the primary liability is placed elsewhere, the contributing fault must be very clear. *Upton v. Whitaker* (C. C. A. 6) 196 Fed. 651, 654, 116 C. C. A. 343. It necessarily follows that the damages must be divided, and the Chieftain must carry one-half of her loss. See *The George Presley* (C. C. A. 6) 111 Fed. 555, 49 C. C. A. 438.

[3] After the collision the Chieftain was taken to Bay City and put into dry dock. This dry dock belonged to the same James Davidson who, with his family, held all the stock of the corporation which own-

ed the Chieftain. The boat remained in dry dock for 30 days, during which time the dock was not occupied by any other vessel, and the Chieftain was extensively repaired in respects having nothing to do with the collision. A considerable part of those repairs which did not follow from the collision could as well have been made outside of the dry dock. Of the other repairs some, like caulking the entire bottom, required its use, and others, like painting the decks, could have been done outside. For its use the owner of the dry dock charged the owner of the boat \$162.24 for each one of these 30 "lay days." We are quite satisfied that, for the reasons suggested in the facts we have just recited, at least one-half of this time was unnecessary for the repair of the damage caused by the collision; and that the allowance for "lay days" should be reduced from \$4,867.20 to one-half that sum.

The district judge seems to have based his allowance of the full sum not so much upon his own consideration of the proofs as upon the fact that there was conflicting evidence, and upon the assumed rule that, if there is evidence amply supporting a commissioner's finding, that finding should not be disturbed. The rule has sometimes been stated as broadly as this; indeed, in *Davis v. Schwartz*, 155 U. S. 631, at page 636, 15 Sup. Ct. 237, at page 239 (39 L. Ed. 289), Mr. Justice Brown said: "So far as there is any testimony consistent with the finding, it must be treated as unassailable." He was speaking in a case involving a master's report in equity; but the practice of giving effect to a commissioner's finding in admiralty is based on its analogy to the usual master's finding (*The Cayuga* [C. C. A. 6] 59 Fed. 483, 488, 8 C. C. A. 188; *The La Bourgogne* [C. C. A. 2] 144 Fed. 781, 783, 75 C. C. A. 647); hence the effect should be the same. The conclusion in *Davis v. Schwartz*, that the finding was "unassailable," if that conclusion is to be treated as a thing decided, may well depend on the circumstance that the reference to state facts was by consent of parties, thus creating practically an arbitration, like a trial before a United States District judge under R. S. 649. See our discussion of *Davis v. Schwartz* in *Haines v. Bank*, 203 Fed. 225, 228, 121 C. C. A. 431. We think in the ordinary case of a reference by the equity court to its master "to take proofs and report his findings of fact and law," or by the admiralty court to its commissioner (as here) "to take testimony of such damages and to compute and report same," it has never been intended to hold that the finding or report should have any greater force than is implied by the criterion, "clearly against the weight of the evidence" (*The La Bourgogne*, supra, 144 Fed. at page 783, 75 C. C. A. 647; *The Elton* [C. C. A. 4] 83 Fed. 519, 520, 31 C. C. A. 496), or, "unless error clearly appears" (*Tilghman v. Proctor*, 125 U. S. 136, 150, 8 Sup. Ct. 894, 31 L. Ed. 664), or our own formula, "a decided preponderance against the judgment" (*In re Snodgrass*, 209 Fed. 325, 326, 126 C. C. A. 251; *Carey v. Donohue*, 209 Fed. 328, 333, 126 C. C. A. 254). We think that to carry the authority of the finding beyond these standards would be in effect to deprive the parties of the right to a hearing *de novo* on appeal; and that, while the master's or commissioner's findings on conflicting evidence are presumptively right and should not be lightly disturbed, yet the District Court

should not hesitate to exercise its own judgment, and reach a contrary result, when clearly convinced that the finding is wrong.

Judged in this way, the allowance for more than half of the 30 lay days cannot stand. It is undisputed that the boat was getting the benefit of a general caulking, which would otherwise have required docking the next season, and that the entire job was done in a deliberate fashion, with a small force. The very persuasive proof that half the work could have been done after floating the vessel outside of the dock has nothing definite to dispute it, except Mr. Davidson's final claim that the stem was out of line and had to be held rigidly braced from the sides of the dock until the work was finished. Not only was the twisting of the stem not discovered in the original survey in which this witness participated, but the boat was in fact floated in the dock on one occasion during these lay days. The situation is very similar to that arising in the Second circuit regarding lay days in this very dock. *The Bourke* (D. C.) 135 Fed. 895; s. c. (C. C. A. 2) 145 Fed. 909, 76 C. C. A. 441.

The finding of damages, as modified and affirmed by the district judge, forms the subject of further complaint in several particulars. We think it unnecessary to recount these in detail. In each of these particulars, under the rule which we have stated as to the force of the master's findings and under the analogous rule as to the force to be given by us to the double findings now existing, they should be affirmed. *Constam v. Haley* (C. C. A. 6) 206 Fed. 260, 124 C. C. A. 128.

[4] The decree gives interest at 6 per cent. Since this case was heard below, we have decided, in *Cambria S. S. Co. v. Pittsburgh S. S. Co.*, 212 Fed. 674, 128 C. C. A. —, decided January 6, 1914, that where the collision occurred and suit is brought in Michigan, the proper rate of interest is 5 per cent., the legal rate in that state; and only 5 per cent. can be allowed here.

The decree below is reversed, and the case remanded, with instructions to enter a decree in accordance with this opinion. The appellant will recover the costs of this court.

McKINNON v. WESTERN DEVELOPMENT CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

No. 169.

BANKS AND BANKING (§ 112*)—REPRESENTATION BY OFFICER—LIABILITY FOR CONVERSION.

Where a bank agreed to make a loan against certain collateral, and received the borrower's note and collateral, it was entitled to turn over the note and collateral to an officer of the bank, who made the loan personally, and, having done so, was not responsible for such officer's subsequent conversion of the collateral.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 271, 272; Dec. Dig. § 112.*]

In Error to the District Court of the United States for the Southern District of New York.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by the Western Development Company against John W. McKinnon, as stockholders' agent, etc., of the Bank of North America. Judgment for plaintiff, and defendant brings error. Reversed.

Underwood, Van Vorst & Hoyt, of New York City (John G. Milburn, J. Markham Marshall, and Alexander B. Siegel, all of New York City, of counsel), for plaintiff in error.

Ferdinand E. M. Bullowa, of New York City (Frank H. Platt, of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. At a former trial of this case the court directed a verdict in favor of the plaintiff, assignee of Otto Heinze & Co., on the ground that the Bank of North America, for whose stockholders the defendant was agent, having agreed to loan that firm \$126,000 against certain collateral, neither made the loan nor on demand returned the collateral. We reversed the judgment because the court had not permitted the defendant to show, if it could, that the bank did not agree to make the loan and had delivered the collateral to C. W. Morse, who did make it.

At the new trial it appeared that on October 14th, in the hard times of 1907, the firm of Otto Heinze & Co. were in urgent need of from \$450,000 to \$500,000 to take up outstanding loans and release valuable collaterals, among which was a loan from J. S. Bache & Co. for \$126,000. Otto Heinze applied to his brother F. A. Heinze, who was president of the Mercantile National Bank, for the loan. F. A. Heinze said that the bank would not make it unless it was participated in by some other financial interest. The brothers then went to the Bank of North America to see C. W. Morse, who was chairman of the executive committee of the Mercantile National Bank and vice president of the Bank of North America. F. A. Heinze had a private interview with Morse, Otto Heinze remaining outside the room. At this interview Morse gave his check to the order of F. A. Heinze individually for \$126,000, and then told Otto Heinze that his firm would get the loan at the Mercantile National Bank the next day, and that he should send the collateral for the Bache loan to the Bank of North America. October 15th Otto Heinze made a collateral note payable on demand to the Bank of North America and sent it with the collateral to the bank. When the package was handed to the president of the bank he said the bank had never agreed to make the loan, and never would make it, and he handed the package to F. A. Heinze, then present, who immediately took it into Morse's office and delivered it to him.

The testimony left it in doubt whether Morse individually or the bank agreed to make the loan, but there is no doubt that Otto Heinze & Co. intended the collateral to secure the repayment of the loan, that Morse individually made it, and that Otto Heinze & Co. received it. Although Otto Heinze & Co. drew a check for \$126,000 on the Bank of North America they never deposited it or presented it for payment. The Bank of North America did not indorse Otto Heinze & Co.'s collateral note, which went with the collateral into the hands of Morse.

The court charged the jury:

"What I can and must tell you is this: What you should do according to the different possibilities of your findings. Let us suppose that in the first place, you believe that in the interview in which Otto and Augustus and Morse were there, after lunch, it was understood that Morse individually should take the loan, and it should not be the Bank of North America. If that be so, then you will have to give a verdict for the defendant, because then the bank did not have anything to do with it. Otto understood he was liable to Morse. Let us suppose as a second possibility that it was left vague at that time; the transaction was undetermined from whom Otto was going to get the money; then you might determine that when he went to Augustus and let Augustus go into the room with Morse, he meant to agree to the arrangement as Augustus should make it with Morse. That is to say, you may treat the transaction as substantially a consent by Otto to let Augustus make the deal for him. In that case, if you believe the deal went through as Augustus said it went through, and it was to be personal, then Otto would be bound, and you must render a verdict for the defendant.

"There is a third possibility to the case. You may conclude that it is quite clear from the fact that Morse afterwards kept the note, when it came on the 15th, and from the other testimony, that the original agreement contemplated a loan by the bank, as far as Otto knew, and that Otto never gave any authority to Augustus to deal for him, but that the interview was a matter between Augustus and Morse individually. And yet you may conclude that Augustus is telling the truth, when he said that he and Morse arranged that Morse should take it over, and that when Morse paid him money in the form of the check, in performance of the loan, he meant it as a payment to the Mercantile Bank, and that the agreement was that the money should be paid to the Mercantile Bank.

"Now, if you should determine that, what would be the rights of the parties? Well, this is an assignable contract. If Otto made a contract for a loan from the bank—and, as I told you, it seems to me he did—and the bank the next day, before the loan had been made, or the same day, at once before any advance had been made, had assigned it to Morse in a formal way, Otto could not have objected to it. And if he had meant that the only person to whom he would intrust his security was the National Bank of North America, he was bound to indicate that at the time he made the contract, because unless there was some such indication, the contract would be assignable.

"So, you see, it did not take Otto's co-operation in that case to effect the assignment of the contract. It would have been a valid assignment if he had not known anything about it.

"You may conclude that Morse indicated his assent, in this conversation between himself and Augustus, that he should take it over personally, regardless of how the contract read, so far as Otto was concerned. And you may conclude that on the next morning the transactions between Curtis and Morse indicated that Curtis, the president of the bank, was quite willing that Morse should take it over; that, when he sent the securities in to Morse saying, 'We won't have anything to do with it,' in view of the fact that Morse had already advanced the money they both agreed, both Curtis for the bank and Morse for himself, that he should take over the transaction. Now, if that was the understanding between Curtis and Morse, then the only question in the case is whether, when Morse gave the check to Augustus, he was paying the money as Otto intended the money should be paid. Because if the contract is as Otto says it was, that the money should be paid directly to him, not deposited in the Mercantile Bank, a delivery of a check by Morse to Augustus would not be good. It would not be the delivery that Otto had stipulated he should get. But, if in the agreement between Otto and the bank, Otto expected that the money should be deposited or delivered to the Mercantile Bank for him, then I charge you that any delivery by Morse to Augustus was a good performance under that contract, unless you suppose that when he delivered that he said something to Augustus, or it was understood between them, that that check was not for that purpose at all, as the plaintiff suggests you might believe.

"That question is a very crucial fact in the case, and I am going to leave that to you. I am going to leave it to you and not express any opinion about that. The only testimony in the case is that that was the intention, and you have got to decide that.

"If you determine that that is what was done, then the plaintiff cannot recover. But, if you determine either that Otto expected to get the money some other way, or that Morse, when he gave him the money, had no intention to pay it to the bank or to Augustus as an officer of the bank, then, you will have to find a verdict for the plaintiff."

In accordance with the last paragraph of the foregoing, the jury found a verdict in favor of the plaintiff for the value of the collateral as of October 22, 1910, the date of demand and refusal, \$160,903 with interest at 6 per cent. to the date of the verdict, November 21, 1912, \$20,112.50, aggregating \$181,012.50. But we discover no testimony whatever that Morse paid the \$126,000 to F. A. Heinze for any other purpose than to enable Otto Heinze to get accommodation for the amount at the Mercantile National Bank. Any conclusion to the contrary was founded on pure conjecture. The result is extraordinary, because it takes no account whatever of the loan received by the plaintiff from Morse October 14, 1907, of \$126,000, with interest at 6 per cent. from date to November 21, 1912, which would aggregate the sum of \$165,000.

If the bank were to pay the judgment and Morse collected his loan out of the collateral in his hands, the plaintiff would receive the full value of its collateral from the bank and a loan of \$126,000, fully paid out of its collateral in Morse's hands, with a possible claim against him for a surplus. On the other hand, if Morse were to sue on the collateral note, the plaintiff would, on payment of it, get back the original collateral and at the same time have its full value from the bank.

Assuming that the bank did agree to make the loan against the collateral as the plaintiff contends, it had the right as pledgee to turn over Otto Heinze & Co.'s note with the collateral to Morse, who did make the loan personally. The bank would not be responsible for any conversion by him of the collateral. *Goss v. Emerson*, 23 N. H. 38; *Bank v. Davis*, 113 Ga. 341, 38 S. E. 836, 84 Am. St. Rep. 248. The fact that it did not indorse the note makes no difference in this case. Morse had the equitable title to it and the absence of indorsement only left him subject to any equities which the plaintiff might have had against the Bank of North America, and none are suggested. *Freund v. Bank*, 76 N. Y. 352. The court erred in not directing a verdict in favor of the defendant.

Judgment reversed.

THE BANGOR.

THE ZOUAVE.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 108.

1. COLLISION (§ 98*)—RULES FOR PREVENTING—SLIP WHISTLE.

Inland Navigation Rules, art. 18, rule 5 (Act June 7, 1897, c. 4, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2882]), which provides that, when steam vessels are moved from their docks or berths and other boats are liable to pass from any direction toward them, they shall give the same signal as in case of vessels meeting at a bend (one long blast) does not fix any precise time at which the signal shall be given, and whether or not it should be given when the vessel starts to move apparently depends on circumstances, as the depth of the slip or the presence of other obstructing vessels.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 208-210; Dec. Dig. § 98.*]

2. COLLISION (§ 96*)—LEAVING AND ENTERING SLIP.

A decree affirmed which, on testimony given in open court, found a steam lighter solely in fault for a collision with another lighter in tow alongside a tug, near the entrance to a slip from which she was backing.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 203-205; Dec. Dig. § 96.*]

3. EVIDENCE (§ 601*)—COURSE OF TIDE.

That the current of a tidal river is flowing downstream is not conclusive that there is at the time an ebb tide, since the tide will be flooding at the bottom of the river for some time while the current is still running down on the surface.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2425-2429; Dec. Dig. § 601.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty for collision by Owen J. McWilliams and others, owners of the lighter Moonlight, against the steam lighter Bangor, of which the Delaware, Lackawanna & Western Railroad Company was claimant, and cross-libel against the steam tug Zouave. Decree against the Bangor, and her claimant appeals. Affirmed.

J. L. Seager, of New York City (A. J. McMahon, of New York City, of counsel), for appellant.

Herbert Green, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. June 3, 1912, at about 6:40 p. m., the lighter Moonlight on the port side of the tug Zouave, while entering the slip between covered piers 4 and 5 of the Delaware, Lackawanna & Western Railroad Company on the North river, came into collision with the steam lighter Bangor, which was backing out. The Bangor started from the grain dock, a pier about 260 feet inside of the mouth of the slip between piers 4 and 5. The entrance is nearly 300 feet wide, but was reduced to about 200 feet, because of car floats lying at the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

river end of pier 4 on the north side and projecting into it some 90 feet.

The libel states that when the Zouave and her tow were 400 feet off the mouth of the slip, the tug's engines were slowed, and when 200 feet off stopped and the tow drifted about 50 feet into the slip when the Bangor blew the slip whistle and began to back out to port. The Zouave blew an alarm and began to go astern, but the Bangor did not start her engines ahead until she was within 10 feet of the bow of the lighter, when it was too late to avoid collision. The answer says that the Bangor blew the slip whistle, backed out straight, and when near the end of pier 5 the Zouave and her tow suddenly came around the end of the pier, from the south. The Bangor stopped and went ahead, but the Zouave kept on until the bow of the Moonlight struck the stern of the Bangor.

The captain of the Zouave testified that he rounded to and slowed down off the mouth of the slip, when from 400 to 500 feet away. After going half that distance he stopped, intending to drift in. He saw the Bangor when he first rounded to, lying at the grain dock, and when 200 feet off saw that she began to back out. Although he went astern at once, he got 50 feet inside of the end of pier 5, and the collision took place about 50 feet outside of that pier.

Moran, the mate of the Zouave, says that the tow was 50 feet inside the slip when the Bangor blew and began to back, and that the collision took place about 30 feet off the end of pier 5.

The master of the Bangor says he had backed 150 feet when he saw the tow coming around the end of pier 5 into the slip, and then he went ahead looked up, and the collision took place at the mouth of the slip.

[1] The story of the Zouave requires a finding of gross negligence on the part of the Bangor, whereas the story of the Bangor discloses a sudden emergency when a collision might readily occur, though both vessels at the moment of discovering each other navigated with prudence. The District Judge was induced to the conclusion that the Bangor was solely at fault by two considerations. One was that the slip whistle ought to have been blown before the Bangor started to back out, whereas her master admitted that he had proceeded some 50 feet before he blew, although the pleadings of both parties allege that he blew, as he began to move out. This signal is regulated by article 18, Rule 5 of the Inland Regulations which reads:

" * * * When steam vessels are moved from their docks or berths and other boats are liable to pass from any direction toward them, they shall give the same signal as in the case of vessels meeting at a bend * * *" (One long blast.)

The act does not fix any precise time at which this signal is to be blown. The time would apparently depend upon the circumstances of the case, e. g., if the vessel were lying high up in a deep dock or if her exit were obstructed by other vessels, notice might be more effective if given after than before she began to move. At all events, the signal was of no importance in this case because the witnesses on the Zouave testified that they saw the Bangor before she started out, and therefore they did not need to be apprised by a whistle at all

[2, 3] The other consideration was that on an ebb tide it was more likely that the Zouave would enter from a point opposite the slip than that she should come in around the corner of pier 5. The pleadings of both parties stated and the only testimony on the subject was to the effect that the tide was ebb. At the argument the claimant's counsel contended that the Official Tide Tables show that at 6:40 p. m. of this date it had been running flood for about two hours. He has since submitted the tide tables for 1912, contending that we may take judicial notice of the fact, even if it is contrary to what was alleged at the trial. It is to be remembered, however, that the currents of rivers do not synchronize with the tides. The tide tables do show that it was low water in the North river, where the Delaware, Lackawanna & Western Railroad Company's piers are, at 4:30 p. m. on June 3, 1912. They also show that the current continues to run down the river some $2\frac{1}{2}$ to 3 hours after low water, so that at the time of the collision, although the tide would be flooding at the bottom of the river, the current on top would be still running down. See the subject treated in his usual admirable manner by the late Judge Addison Brown in the *Ludvig Holberg* (D. C.) 36 Fed. 914; also *The Bremen* (D. C.) 111 Fed. 228, 232; *The Ciudad de Reus*, 185 Fed. 392, 107 C. C. A. 447. Under these circumstances we do not feel at liberty to differ with the conclusion of the District Judge who heard and saw the witnesses.

Decree affirmed, with interest and costs.

LEHIGH VALLEY TRANSP. CO. v. KNICKERBOCKER STEAM TOWAGE CO.

(Circuit Court of Appeals, Second Circuit. February 10, 1914.)

No. 146.

1. TOWAGE (§ 12*)—GROUNDING OF TOW—LIABILITY.

That a barge being towed on a hawser 40 to 60 fathoms in length gradually sheered 35 feet from the course of the tug was not so unusual, where the master was unacquainted with the stream as to charge her with fault for grounding.

[Ed. Note.—For other cases, see *Towage*, Cent. Dig. §§ 24-26, 29; Dec. Dig. § 12.*]

2. TOWAGE (§ 11*)—GROUNDING OF TOW—LIABILITY OF TUG.

A towing tug is bound to know, not only what appears upon government charts as to obstructions, but whatever is known to persons in the habit of navigating the waters in question; but for striking a rock uncharted and unknown to local navigators she is not responsible.

[Ed. Note.—For other cases, see *Towage*, Cent. Dig. §§ 11-23; Dec. Dig. § 11.*]

3. EVIDENCE (§ 601*)—TIDAL RIVERS—COURSE OF TIDE.

That the current of a tidal river is flowing downstream is not conclusive that there is at the time an ebb tide, since the tide will be flooding at the bottom of the river for some time while the current is still running down on the surface.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2425, 2456-2459; Dec. Dig. § 601.*]

4. TOWAGE (§ 11*)—GROUNDING OF TOW—LIABILITY OF TUG.

A tug *held* not liable for the stranding of her tow in the Kennebec river on a submerged rock which was uncharted and apparently unknown to local navigators, and where also the position of a buoy as shown on the government chart had been changed so that the channel at the place of stranding was not as it appeared on the chart.

[Ed. Note.—For other cases, see *Towage*, Cent. Dig. §§ 11-23; Dec. Dig. § 11.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the Lehigh Valley Transportation Company, owner of the steel barge *Buffalo*, against the Knickerbocker Steam Towage Company. Decree for libellant, and respondent appeals. Reversed.

Hyland & Zabriskie, of New York City (Nelson Zabriskie, of New York City, of counsel), for appellant.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and Robinson Leech, both of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This libel is filed to recover for damages sustained by the steel barge *Buffalo* as the result of running on a rock while in tow of the tug *Seguin*, belonging to the respondent. The District Judge directed a decree for the libellant.

July 9, 1911, the tug *Seguin* at Bath, Me., took in tow the steel barge *Buffalo* on a hawser 45 to 60 fathoms in length and behind her the light schooner *Mary Weaver* on a shorter hawser. The destination of the tow was to points higher up the Kennebec river. The tug drew 11½ feet, the barge 14 feet 1 forward and 14 feet 3 aft, and the schooner 7½ feet. As the tow approached Abadagassett Point, some six miles above Bath, she proceeded on the government ranges and while passing a black buoy close aboard on the port side the *Buffalo*, which was sheering some 35 feet to the starboard of the tug, fetched up at a point opposite, and estimated to be from 90 to 100 feet east by north of the black buoy. The schooner, continuing on her course, ran into the port quarter of the barge, and was carried by the tide alongside and turned bow downstream. In about half an hour, as the tide rose, the tug pulled the barge off and proceeded.

[1] The respondent's first contention is that if the barge had followed in the wake of the tug, the accident would not have happened, and that therefore her own negligence was the proximate cause of it. We, however, think such gradual sheering by a barge towed on a hawser is not unusual, and that the master of the barge, being unacquainted with the stream, could not be charged with the grounding as a fairly to be expected consequence of the sheer, even if it were the result of his inattention.

[2] The rock was not indicated on the chart, and the case turns upon the question whether it was known to persons navigating the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Kennebec river. The law is extremely simple. The barge having been injured while in tow on a well-known and safe route, the burden of explanation is on the tug. She is bound to know, not only what appears upon government charts, but whatever is known to persons in the habit of navigating the waters in question. But for striking a rock uncharted and unknown to local navigators, the tug is not responsible. *The Nathan Hale*, 99 Fed. 460, 39 C. C. A. 604.

[3] When it comes to the question of fact, we are as well able to decide it as was the District Judge, because all the important testimony was taken by deposition. The master of the barge testified that the tow left Bath at about 6:30 a. m., whereas the master of the tug put the start an hour later. We adopt the account given by the master of the barge because he entered the times of the various occurrences in his log, and because the time he gives for starting makes the water lower when the barge struck and so accounts better for the accident. The master of the barge thought the tide must have been ebb at the time the tow started because the barge was lying at anchor head upstream. This is not a conclusive reason. In rivers the current continues to run down on top long after the tide has begun to rise at the bottom. See our opinion in *McWilliams v. The Bangor*, 212 Fed. 706, 128 C. C. A. —. All parties agree upon the material fact that the tide was rising flood at the time of the accident.

[4] There was no indication of any obstruction on the government chart which showed water not less than 18 feet at mean low water all around where the barge struck. Another error in the chart was that it showed the black buoy at a point south and more than 200 feet to the westward of where it actually was. The proof is that it was moved some time early in 1910. The result was that the apparent channel was greatly reduced, and that the government ranges ran very close to the buoy. It appears, however, that navigators of the river rely upon the ranges and buoys without much use of the government chart.

We think it is quite obvious that if the obstruction had been known to navigators no search would have been made for it after the accident, nor any difficulty encountered in finding it. In the summer or early fall of 1911, the government sent an engineer to locate it, who was unable to do so by sounding because he found nothing under 18 feet of water between half ebb and half flood. In August of 1912 he was sent again, and by sweeping the vicinity by ranges laid out from the shore he located, opposite and east of the buoy, a projecting ledge rectangular in shape 50 by 60 feet in a general northeast and southwest direction, having on the west edge a narrow strip with only 13 feet 5 inches of water at mean low water for a distance of 10 feet, running in a direction up and down the channel. This is the rock upon which all parties agree that the barge fetched up, and it was subsequently blown up by the government.

The respondent called a number of local navigators engaged in towing on the river who said they did not know of this obstruction. If it had been generally known, their testimony must have been deliberately false. On the other hand, the libellant called four or five wit-

nesses who testified to the location of rocks with reference to the black buoy as originally placed, none of which could have been the rock in question. One witness, Dingley, who testified November 12, 1912, in the same manner, did also say that he knew of this particular ledge. As this was after the accident, the government survey and the general talk on the subject among the rivermen, we are satisfied that he derived whatever information he had subsequent to the accident. The testimony convinces us that the barge struck on an uncharted and unknown obstruction, and that the tug is without fault.

The decree is reversed, with costs.

UNITED STATES v. ATLANTIC FRUIT CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

No. 210.

1. ALIENS (§ 57*)—"ALIEN IMMIGRANT."

Alien immigrants within Act March 3, 1893, c. 206, § 8, 27 Stat. 570 (U. S. Comp. St. 1901, p. 1303), providing that all steamship transportation companies regularly engaged in transporting alien immigrants to the United States shall file certificates of the posting of the Immigration Law, etc., are those who come to the United States to remain.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 114; Dec. Dig. § 57.*]

For other definitions, see Words and Phrases, vol. 1, p. 302; vol. 8, p. 7571.]

2. ALIENS (§ 58*)—IMPORTATION—TRANSPORTING ALIEN IMMIGRANTS—"REGULARLY ENGAGED"—QUESTION FOR JURY.

Defendant operated chartered vessels between Jamaica and New York for the importation of fruit. It never solicited passengers, but carried from one to five alien passengers on every steamer, generally gratuitously, they being its own employes or planters with whom it had dealings, who in some cases paid passage money. They were entered on the manifest, and the head tax was paid as required by the Immigration Law. *Held*, that whether defendant was "regularly engaged" in transporting alien immigrants within Act Cong. March 3, 1893, c. 206, § 8, 27 Stat. 570 (U. S. Comp. St. 1901, p. 1303), requiring all transportation companies regularly engaged in transporting alien immigrants to the United States to file certificates of the posting in their foreign ticket offices of the United States Immigration Law, etc., was for the jury, the term "regularly" being regarded not as meaning "in accordance with law," but rather continuous employment.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 113, 114; Dec. Dig. § 58.*]

3. ALIENS (§ 57*)—IMMIGRATION LAW—POSTING—STEAMSHIP COMPANIES—CERTIFICATES—"IMMIGRANT."

Act Cong. March 3, 1893, c. 206, § 8, 27 Stat. 570 (U. S. Comp. St. 1901, p. 1303), provides that transportation companies regularly engaged in transporting alien immigrants to the United States shall certify to the Secretary of the Treasury that they have furnished and kept conspicuously posted in each of their foreign ticket offices a copy of the Immigration Law. *Held*, that where defendant was engaged in importing fruit from Jamaica, and never solicited passengers, proof that it carried from one to five alien passengers on every steamer, generally gratuitously, they

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

being its own employes or planters with whom it had dealings, some of whom paid passage money, and all of whom were entered on the ship's manifest, and for whom head tax was paid as required by the Immigration Law, such persons were not immigrants within the law.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 114; Dec. Dig. § 57.*

For other definitions, see Words and Phrases, vol. 4, p. 3410.]

In Error to the District Court of the United States for the Southern District of New York.

Action at law by the United States against the Atlantic Fruit Company. Judgment for defendant, and the United States brings error. Affirmed.

See, also, 206 Fed. 440, 124 C. C. A. 322.

H. Snowden Marshall, U. S. Atty., and Addison S. Pratt, Asst. U. S. Atty., both of New York City.

Ralph James M. Bullowa, of New York City, for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. The United States brought this action against the Atlantic Fruit Company to recover fines aggregating \$2,500 for its failure to file every six months, beginning January 1, 1910, the certificate required by section 8 of the act of March 3, 1893, 27 Stat. 570, which reads:

"Sec. 8. That all steamship or transportation companies, and other owners of vessels, regularly engaged in transporting alien immigrants to the United States, shall twice a year file a certificate with the Secretary of the Treasury that they have furnished to be kept conspicuously exposed to view in the office of each of their agents in foreign countries authorized to sell emigrant tickets, a copy of the law of March third, eighteen hundred and ninety-one, and of all subsequent laws of this country relative to immigration, printed in large letters, in the language of the country where the copy of the law is to be exposed to view, and that they have instructed their agents to call the attention thereto of persons contemplating emigration before selling tickets to them; and in case of the failure for sixty days of any such company or any such owners to file such a certificate, or in case they file a false certificate, they shall pay a fine of not exceeding five hundred dollars, to be recovered in the proper United States court, and said fine shall also be a lien upon any vessel of said company or owners found within the United States."

It appeared at the trial that the defendant was a steam transportation company running a line of chartered vessels with more or less regularity between the Island of Jamaica and the port of New York. Its business was the importation of fruit. It never solicited passengers by advertisement or otherwise, but did carry from one to five alien passengers on every steamer, generally gratuitously, they being its own employes or planters with whom it had dealings. In some instances passage money was paid, and manifests of all the aliens carried were furnished, and the head tax paid, as required by the Immigration Law.

[1, 2] An alien immigrant is one who comes to this country to stay, and the government offered no proof that the aliens in question were such immigrants. The inferences were all to the contrary, that they came on pleasure or business and returned to Jamaica. Judge Hough

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

submitted to the jury the question whether the defendant was "regularly engaged in transporting alien immigrants." The jury found a verdict for the defendant, and the United States takes this writ of error to the judgment entered thereon.

We think the court was right upon the first question, and that is enough to dispose of the case. The word "regularly" in the act cannot be construed as meaning transportation of aliens "in accordance with law," as was held in *Wilson v. Gray*, 127 Mass. 98, in the case of the refusal of a registered vessel engaged in a single coasting voyage to employ a pilot. This was justified, because the vessel, though registered, was at the time making a coasting voyage "regularly," that is, in accordance with law. Congress evidently intended by "regularly" in the act under consideration a continuous employment. The section speaks of offices for the sale of tickets, and requires the certificate to be filed twice a year, provisions which would not be applicable to a steamer making one or two voyages or only making occasional voyages. Although this line was running steamers regularly, the question was whether the court could say, as a matter of law, that it was regularly engaged in "transporting alien immigrants," that being an unimportant incident of its actual business and not solicited nor generally paid for. The regular business of the company was the importation of fruit. As different minds might draw different inferences from the undisputed facts, the court properly submitted the question to the jury.

[3] Indeed, we think the court might have gone farther and directed a verdict in favor of the defendant on the ground that the United States offered no proof that the aliens carried were immigrants. Section 8 of the act of 1893 can be read consistently with Act of March 3, 1903, c. 1012, 32 Stat. 1213, and Act Feb. 20, 1907, c. 1134, 34 Stat. 499 (U. S. Comp. St. Supp. 1911, p. 499), by supposing that Congress intended the notice in question to be given and certificate to be filed only by persons regularly engaged in bringing alien immigrants to this country. In these latter acts Congress undertook to bring together scattered legislation, and to amend such portions as it found inadequate. Every section of the act of 1893 was included with modifications except section 8. It was not expressly modified nor repealed nor re-enacted. There is nothing unreasonable in assuming that Congress intended that the section should remain on the statute book unchanged. The judgment is affirmed.

CONNECTICUT VALLEY LUMBER CO. v. STONE.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

No. 215.

1. LOGS AND LOGGING (§ 10*)—"SCALER."

The term "scaler," as used in the contract for certain logging operations, means an expert employed to determine the number of board feet and the percentage of unsound timber in logs.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 19-28; Dec. Dig. § 10.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. LOGS AND LOGGING (§ 10*)—CONTRACT—DECISION OF SCALER.

Where a log scaler is agreed on by the parties to a logging contract, his report is binding on both, though there is no stipulation to that effect in the contract, unless it is set aside for fraud or obvious mathematical errors.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 19-28; Dec. Dig. § 10.*]

3. LOGS AND LOGGING (§ 10*)—CONTRACT—MEASUREMENT OF LOGS—REPORT OF SCALER.

Where a logging contract provided that the timber was to be scaled sound by a specified rule, the scaler furnished and paid by defendant and boarded by plaintiff, it would be construed to mean that any scaler furnished and paid by defendant and boarded by plaintiff was a scaler mutually agreed on, whose reports would be conclusive against both parties, unless shown to be fraudulent or to contain obvious mathematical errors.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 19-28; Dec. Dig. § 10.*]

In Error to the District Court of the United States for the District of Vermont.

Action by Eugene Stone against the Connecticut Valley Lumber Company. Judgment for plaintiff, and defendant brings error. Reversed.

Drew, Shurteff, Morris & Oakes, of Lancaster, N. H., and Dunnett & Leslie, of St. Johnsbury, Vt., for plaintiff in error.

Elisha May and Harland B. Howe, both of St. Johnsbury, Vt., for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. Stone, the plaintiff below, entered into a contract to cut, haul and deliver on the bank of the Connecticut river at the rate of 2,000,000 board feet per year all the soft wood in a specified territory estimated to contain from 6,000,000 to 8,000,000 feet. The material provisions of the contract are:

"The timber is to be delivered at the rate of 2 million board feet per year and to continue at this rate until the land is all cut over.

"Scale.—The timber is to be scaled sound by the Maine or Holland rule, the scaler furnished and paid by the company and boarded by Stone. And Stone agrees to board such agents for the company as it is necessary to send over the works to attend to its proper cutting.

"The Connecticut Valley Lumber Company agrees to pay Eugene Stone six dollars and fifty cents (\$6.50) for each and every thousand feet of logs properly cut, hauled, landed and scaled under the terms of this contract in payments as follows:

\$3.00 per M on logs yarded
2.00 " " when landed
1.00 " " on May 1st
.50 when the job is completed.

"Fifty cents per thousand is to be reserved until \$2,000 is withheld, and this account is to be held by the company until the job is completed and the territory cleaned according to the provisions of this contract.

"Payments to be by check or draft monthly. Stone to be paid on or before the 15th of every month for work done the previous month with reservations stated above. Interest to be charged Stone at 6 per cent., on drafts maturing before May 1st, and interest to be credited to him on drafts maturing later

than May 1st, from May 1st to date of maturity. Final settlement to be made May 1st, at end of each logging season.

"Stone agrees to mark and stamp the logs with the company's regular mark and to land them in such manner that they may be properly scaled."

The timber as it was cut was yarded; that is, stored in places in the woods. The defendant sent a scaler there, who remained until November 10th. After that there was no scaling as called for by the contract, the plaintiff being paid monthly by the defendant for logs yarded apparently on estimates. He did employ a scaler himself, who never reported to the defendant. As he took no exception to the amounts paid on the logs yarded, it is to be presumed that both parties agreed to a modification of the contract as to the scaling in the woods, making conclusive the scaling at the river bank.

At the end of the season, and after he had been paid in accordance with the scaler's weekly reports made to him and to the defendant, the plaintiff claimed that he had cut, hauled and delivered about 350,000 more feet than the scaler reported. Payment of this alleged shortage being refused, he declined to go on with the contract, and brought this suit to recover \$6.50 per thousand for the alleged shortage; so much of the expense as he incurred in building roads in the territory to be cut as is properly apportionable to the uncompleted term of the contract and the 50 cents per thousand feet which the company retained on the amount it admitted he had delivered. No claim of bad faith was made against the company defendant, but only against the scaler at the river bank.

[1, 2] A scaler is an expert person employed to determine the number of board feet and the percentage of unsound timber in logs. Scaling is essential to fix the rights of the parties in a contract like this and it is a continuous operation. The situation is not like those building contracts which provide that the owner's engineer or architect shall decide any disputes which may arise and shall determine when the work is completed. When the scaler is agreed upon by the parties, his report is binding upon both although there is no stipulation to that effect in the contract and it can be set aside only for fraud or obvious mathematical errors. *Robinson v. Fiske*, 25 Me. 401; *Bailey v. Blanchard*, 62 Me. 168; *M. D. & I. Co. v. Allen Co.*, 102 Me. 257, 66 Atl. 537; *Manufacturers' Bank v. Hollingsworth*, 106 Me. 326, 76 Atl. 880.

[3] Although the scaler was not named in this contract, we think that under its provisions any scaler furnished and paid by the defendant and boarded by the plaintiff is to be regarded as a scaler mutually agreed upon. In accordance with this view the trial judge charged the jury that the scaler was the agent of both parties and his reports binding on the plaintiff, unless shown to have been dishonest. The only evidence to impeach the reports was that of the scaler employed by the plaintiff, who measured the logs in the woods and made 1,823 pieces and 373,310 board feet more than the scaler appointed under the contract made of the logs delivered at the river bank; the plaintiff's testimony that in one week he counted 72 logs more than the scaler allowed; finally, the testimony of several of the teamsters that logs discharged at the river bank sometimes rolled over. This discrepancy in fig-

ures is no evidence of dishonesty, and if logs rolled over at the river bank it would be the plaintiff's fault because he undertook to "land them in such manner that they may be properly scaled." However, there was no evidence to show how many rolled over, or that they were not scaled. We think the court erred in not directing a verdict for the defendant as requested.

Judgment reversed.

H. S. KERBAUGH, Inc., v. GRAY.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

No. 80.

1. MASTER AND SERVANT (§ 72*)—CONTRACT OF EMPLOYMENT—PROMISE OF BONUS—CONSIDERATION.

Where plaintiff was not legally bound to continue in defendant's employ to the end of the season, defendant's promise, alleged to have been made in May, 1910, that he would give him a bonus equal to his salary, to begin January 1, and end December 31, 1910, was not nudum pactum.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 87, 88; Dec. Dig. § 72.*]

2. EVIDENCE (§ 130*)—RELEVANCY—RES INTER ALIOS ACTA.

Where, in an action by defendant's general superintendent to recover an alleged bonus, defendant denied ever having contracted to pay plaintiff a bonus, but admitted promising to raise the wages of the foremen on the work and pay them a bonus, evidence of plaintiff's conversations with the foremen when he told them their wages would be raised and a bonus paid, and testimony of one of the foremen of his conversations with plaintiff on the subject, was res inter alios acta, and inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 403; Dec. Dig. § 130.*]

In Error to the District Court of the United States for the Southern District of New York.

Action by William B. Gray against H. S. Kerbaugh, Incorporated. Judgment for plaintiff, and defendant brings error. Reversed.

William Travers Jerome, of New York City (Harland B. Tibbetts, of New York City, of counsel), for plaintiff in error.

A. H. & A. D. Van Buren, of Kingston, New York (Jerome H. Buck, of New York City, of counsel), for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. H. S. Kerbaugh, Incorporated, the defendant below, had a contract with the state of New York for the construction of a section of the Catskill Aqueduct. Gray, the plaintiff below, was its general superintendent at a salary of \$350 a month. In May, 1910, the work was dragging, and the foremen were dissatisfied with their pay. The plaintiff reported this to Kerbaugh, the president of the defendant, who authorized him to raise the pay of three foremen and to promise them in addition a bonus equal to their monthly pay from May 1st to the end of the concrete season. Whether this bonus was to be in consideration of their doing a fixed amount of concrete work, as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Gray testified, or of doing it economically, as Kerbaugh said, is in dispute, but the making of the contracts and the raising of the wages and the payment of the bonuses are all admitted by the defendant.

The plaintiff produced a salary list, Plaintiff's Exhibit 1, in which his name does not appear, which Kerbaugh at the time of the above-mentioned conversation initialed, marking in pencil the increase in wages from May 1, 1910. The plaintiff testified that at the same time Kerbaugh promised him a bonus equal to his salary of \$350 a month, to begin January 1, and end December 31, 1910, provided 15,000 feet of concrete was completed during the season. Kerbaugh denied making any contract whatever, and this was the issue that went to the jury.

[1] The objection mainly relied upon at the trial and here was that this promise of a bonus, if made, was nudum pactum because the plaintiff, being bound to do his best for his salary, gave nothing in the way of consideration to support the promise of a bonus. This would be true if the plaintiff were legally bound to continue in the employment of the defendant to the end of the season. But he was not and could have quit work at any time. *Martin v. New York Life Ins. Co.*, 148 N. Y. 117, 42 N. E. 416. Therefore the jury had a right to find that he continued in the employment after this promise of a bonus, relying upon it.

[2] Another exception is that the court erred in admitting the paper marked Plaintiff's Exhibit 1 and the testimony of the plaintiff as to his conversations with the foremen when he told them their wages would be raised and a bonus paid, as well as the testimony of one of the foremen as to his conversation with the plaintiff on the same subject. The promise to raise the wages of the foreman and to pay them a bonus, which was admitted by the defendant, in no way tended to prove that Kerbaugh, in face of his flat denial, had made any contract with the plaintiff on the subject. It was all *res inter alios acta* and highly prejudicial to the defendant. So far as it came out as a part of the conversation in which the plaintiff testified Kerbaugh made the contract with him, it was properly in the case. But it should have been followed up no farther. The testimony of the foreman had the effect of confirming the plaintiff's testimony as to the ground upon which the bonus was to be paid, viz., that it was for a certain amount of concrete work, as he testified, and not for doing the work economically as Kerbaugh testified. This was perfectly immaterial upon the question whether Kerbaugh made any contract at all with the plaintiff. The court himself was misled by these transactions because, although the plaintiff, who was the only witness to sustain the contract he claimed was made, testified that his bonus was to be from January 1 to December 31, 1910, yet the court charged the jury:

"The plaintiff claims in this action \$3,850—that is, a bonus of \$350 a month from the 1st of January to the end of November of the year 1910. Now, that is 11 months. As I recall the evidence in the case of the other men, the bonus ran from the 1st of May, but if you conclude the plaintiff is entitled to a bonus, it is for you to say when that should be computed from. At all events, if you find for the plaintiff, I do not understand that there is any controversy but that if there was an agreement for a bonus it was for \$350 a month, the same as the plaintiff's salary. If you find a bonus, you will give him a

recovery for a sum computed for so many months as in your opinion under the agreement this bonus was to be earned."

In accordance with this charge, the jury found a verdict for a bonus beginning May 1, 1910, which there is not a word of testimony to support. The judgment is reversed.

THE ROBERT ROBINSON.

(Circuit Court of Appeals, Second Circuit. February 10, 1914.)

No. 144.

TOWAGE (§ 11*)—SWAMPING OF TOW—LIABILITY OF TUG.

A tug, proceeding with a tow of 6 boats in three tiers from New York to New Haven, when off Stratford Point, owing to increasing seas, turned and sought harbor in Bridgeport. After turning, the open barge *Derby*, loaded with coal, shipped water through her open hatchways and sank. *Held*, on the evidence that the tug was not in fault; the tow being properly made up, the construction of the barge one not unusual, and there being no weather conditions previously which apparently rendered it necessary to seek shelter.

[Ed. Note.—For other cases, see *Towage*, Cent. Dig. §§ 11-23; Dec. Dig. § 11.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by Michael J. Derby, owner of the open boat *Hugh J. Derby*, against the steam tug *Robert Robinson*. Decree for claimant, and libellant affirmed.

On appeal from a decree of the District Court for the Southern District of New York dismissing the libel which was filed by Michael J. Derby, the owner of the open boat *Hugh J. Derby*, against the steam tug *Robert Robinson* for the alleged negligence of the tug in towing the *Derby* with a cargo of coal from Newtown Creek to New Haven, Conn., on the 26th of February, 1910.

The libellant contends that the tug was not sufficiently powerful to handle her tow, which consisted of six boats in all, under the weather conditions which prevailed in Long Island Sound on the morning of the 27th and that she should have at once put in to Bridgeport. Instead of doing so she proceeded on until she found that she was unable to round Stratford Point when she attempted to make Bridgeport Harbor. In executing this maneuver she placed the *Derby* broadside to the sea which broke over her and filled her with water. She sank at 11:30 o'clock on the morning of the 27th.

Ward D. Williams and Horace L. Cheyney, both of New York City, for appellant.

Carpenter & Park, of New York City (Samuel Park, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). On February 26, 1910, the tug *Robert Robinson* made up a tow at Whitestone in three tiers of two boats each, destined for New Haven. The *Derby* was on the port side in the last tier. She was properly manned and loaded with coal. She was 90 feet long, 26 feet beam, had a freeboard of about 14 inches and hatch coamings of 30 inches, making the top

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the coaming about 3 feet 8 inches above the water. She had no covers over her hatches. She was what is called an "open boat" with about 17 feet between the coamings. Early the next morning when off Penfield Light the weather was good and though there was a dead roll on the sea, there was no indication of a serious storm. When off Stratford Point the master of the tug thought it prudent to seek shelter at Bridgeport. The wind was blowing fresh from the southwest. After turning around the Derby was the weather boat. When a little over a mile from Bridgeport Harbor she sank. Negligence is charged against the Robinson in not proceeding directly from Penfield Light to Bridgeport, but we think the District Judge was correct in holding that there was no reason to apprehend danger when they passed Penfield Light. There was no dangerous sea at that time and no necessity for going into Bridgeport. It was three or four hours after passing Penfield before they encountered seas 5 or 6 feet high. Burke, the master of the Derby, says that prior to the turn to enter Bridgeport Harbor, "no sea came on the deck, not a bit of water." We cannot find from the testimony that it was a fault for the tug to proceed on her voyage after passing Penfield Light. We think that when, three or four hours later, the weather became so threatening that it was doubtful if the flotilla could weather Stratford Point, the Robinson cannot be criticised for seeking shelter in Bridgeport Harbor.

The Robinson was powerful enough to handle such a tow, the testimony being that her usual tow is from 8 to 12 boats; in the present case she had but six.

We do not think the tug can be held liable for half the damages because the Derby was unseaworthy. There was nothing about her construction, her loading or starting with covers off which was unusual or negligent. When the tow was made up no unusual condition of the elements was to be apprehended and there was no negligence apparent in the make-up of the tow. Nothing need be added to the opinion of the District Judge on this branch of the case.

The decree is affirmed with costs.

CINCINNATI TRACTION CO. v. POPE.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1914.)

No. 2306.

PATENTS (§ 324*)—SUIT FOR INFRINGEMENT—REOPENING OF CASE.

After the affirmance of a decree finding validity and infringement by the appellate court, such court may on motion remand the record to permit the defendant to petition for a reopening of the case and leave to introduce new evidence of prior devices, on affidavits indicating that such testimony is material and may be important on the question of invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 600-606; Dec. Dig. § 324.*]

On petition to rehear and remand for further testimony. Granted. See 210 Fed. 443, 127 C. C. A. 175.

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PER CURIAM. The decree of the District Court found the Pope patent, No. 805,133, for transfer ticket, valid and infringed. That decree was affirmed by this court. 210 Fed. 443, 127 C. C. A. 175.

We are asked to reopen the case and remand for further testimony relative to the manufacture and use of a large number of ticket structures, claimed either to anticipate the Pope patent or to show lack of invention therein. Unless with two exceptions, the new references are merely cumulative, and are no stronger than those presented on the original hearing, and justify neither remand nor rehearing.

The exceptions referred to are the Chicago, Burlington & Quincy Railway ticket, form 200, and the Chicago & Eastern Illinois Railroad ticket, form 1, the use of which tickets as indicated by ex parte affidavits, antedates the Pope device. The Chicago, Burlington & Quincy ticket is so constructed as that when used with the triangular coupon attached it is a full fare ticket; when used without the coupon, it is half fare; the coupon contains a legend to this general effect, and the body bears the character "1/2." It has also a conventional time-table. The Chicago & Eastern Illinois Railroad ticket is in prominent respects structurally similar to, although not identical with, the Chicago, Burlington & Quincy Railway ticket. It has, however, no time-table, and the legend relating to use is on the stub only.

The real question presented is, we think, whether there was invention in the Pope device notwithstanding the devices referred to, or, whether the Pope device was a mere double use of the device found in the Chicago, Burlington & Quincy structure.

Without attempting to determine at this time the question stated, or the effect of these references, we think them important enough to justify a remand of the record to the District Court with leave to petition that court for a rehearing and for permission to introduce the Chicago, Burlington & Quincy and the Chicago & Eastern Illinois Railroad devices, together with such testimony as either party may desire to put in on the subject of actual prior use of those tickets, as well as such testimony as either party may deem necessary to an understanding of the construction, force, and effect of those references as affecting the validity of the Pope patent.

Such order will accordingly be made.

AMERICAN ROLL GOLD LEAF CO. et al. v. W. H. COE MFG. CO. et al.†
(Circuit Court of Appeals, First Circuit. February 10, 1914.)

No. 1002.

1. PATENTS (§ 165*) — CONSTRUCTION — INTERPRETATION OF LANGUAGE OF CLAIMS.

The protection afforded by a patent is specified in the claims, and the public have a right to rely upon the language of the claims in determining how far the patentee's rights go. A patent, like any other grant, is a two-sided instrument, and the intent of the grantor (the public) as to what was covered is as important as that of the grantee.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
†Rehearing denied June 22, 1914.

2. PATENTS (§ 176*)—CONSTRUCTION — DEFINITION OF TERMS — “AUTOMATICALLY.”

The word “automatically,” as applied to mechanism in a claim of a patent, means self-acting, and implies a certain cycle of movements which the machine itself makes without outside control.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 250 $\frac{2}{3}$ –252; Dec. Dig. § 176.*]

For other definitions, see Words and Phrases, vol. 1, pp. 649, 650.]

3. PATENTS (§ 328*)—INFRINGEMENT—MACHINE FOR PACKAGING GOLD LEAF.

The Coe patent, No. 580,817, for a machine for packaging decorative films, claims 1 and 4, which respectively include as elements “means for automatically causing the lapping contact” of the films and “means for automatically lapping the films,” *held* not infringed by a machine in which the movement by which the lapping is effected is performed by hand. Claims 2 and 3, also, *held* not infringed.

4. PATENTS (§ 22*)—INFRINGEMENT—EQUIVALENT ELEMENTS.

That elements of different machines accomplish the same result is not sufficient to constitute them equivalents, but the means of accomplishment must be themselves substantially the same.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 24; Dec. Dig. § 22.*]

5. PATENTS (§ 328*)—INFRINGEMENT—PACKAGE ROLL OF GOLD LEAF.

The Coe patent, No. 848,883, for a package roll of metallic leaf having its supporting strip provided with a smooth surface at one side and a comparatively rough surface at the other, the purpose being to give the paper strip a surface on one side to which the gold leaf will adhere and on the other side a surface to which it will not adhere, *held* not infringed by a package roll in which the strip is roughened on one side but is made nonadhesive on the other by the application of a powder.

Appeal from the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Suit in equity by the W. H. Coe Manufacturing Company and others against the American Roll Gold Leaf Company and others. Decree for complainants, and defendants appeal. Reversed.

For opinion below, see 199 Fed. 435.

Frederick P. Fish, of Boston, Mass. (J. Lewis Stackpole, of Boston, Mass., and Horatio E. Bellows, of Providence, R. I., on the brief), for appellants.

William R. Tillinghast, of Providence, R. I. (Herbert A. Rice and Tillinghast & Collins, of Providence, R. I., on the brief), for appellees.

Before DODGE, Circuit Judge, and ALDRICH and MORTON, District Judges.

MORTON, District Judge. This is a suit for infringement of letters patent No. 580,817, to W. H. Coe, dated April 13, 1897, for a “machine for packaging decorative film,” and letters patent No. 848,883, to W. H. Coe, dated April 2, 1907, for a “package roll of metallic leaf.” As to each patent, the principal defense is noninfringement. The decree below held that the appellants infringed both patents.

The machine shown in the first of these patents was invented by Coe for making, from sheets of gold leaf contained in a book, a con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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tinuous film supported upon a paper strip, or backing. It is said for the complainants that the patent was a pioneer patent. This is true to the extent that Coe's machine was the first which formed sheets of gold leaf into a continuous film without their being handled by workmen.

The Coe machine is clearly described in the opinion of the learned District Judge. It consists essentially of roller mechanism, which moves forward a paper strip, adhesive on one side and nonadhesive on the other, and table mechanism, which presses a sheet of gold leaf in a book against the under (or adhesive) side of the paper strip, and moves the sheet forward with the strip as the roll turns; the result being that the gold leaf is rolled off the book onto the under side of the paper. After each piece of gold leaf has been thus rolled off, the roll stops, leaving the end of the film in such a position thereon that, when the next sheet of gold is pressed up against the roll and strip, the front end of it will overlap and unite with the end of the previously formed film. It is a property of gold leaf that sheets of it unite readily when pressed together. Joining pieces of gold leaf in this way is called "lapping" them.

The appellants' machine and the Coe machine are substantially equivalent as far as the roller mechanism is concerned; that part of them need not at present be further described. The alleged differences are found in the table mechanism, i. e., the part of the machines upon which the book of gold leaf rests, and by which it is moved.

In the Coe machine, the table moves forward horizontally with the exposed piece of gold leaf until the end thereof is under the end of the film, and then rises vertically, bringing the piece and the film into contact, thereby "lapping" them. At this point, the roll starts to revolve, and the table follows the paper on the roll, continuing pressure against it, until the piece of gold has been rolled off the book. The table then drops vertically a distance sufficient to clear the book from the roll, and returns horizontally to its first position. The whole action of the machine, from the time the table starts until it returns, having completed the operation, is entirely automatic. This automatic operation of the Coe machine is specifically mentioned in two of the claims in suit, which are as follows:

"1. In a machine for winding decorative films into a package roll, the combination with means for drawing the strip forward, of the pressing roller, the table for holding the book of decorative films, and means for automatically causing the lapping contact of the decorative films upon the strip, substantially as described."

"4. In a machine for winding decorative films into a package roll, the combination with the pressing roller, the table for supporting the book of films, and means for automatically lapping the films upon the strip, of the stationary roller, and the movable roller, adapted to hold the winding package in contact with the pressing roller and the stationary roller, substantially as described."

In the appellants' machine, the table, instead of having a solid top, as in Coe's machine, has a longitudinal slide therein which is operated entirely by hand. The operative draws out this slide, places thereon the book of gold leaf having an exposed sheet, and then pushes the

slide forward. This brings the piece of gold leaf in the book under the end of the film on the roll. The appellants' table is pivoted near its center, so that its ends tilt up and down. The front end is tilted down at the time when the slide is pushed forward. The operative now tilts up the front end of the table by hand, thereby bringing the sheet of gold leaf in the book into contact with the film on the roll and lapping the two together. Still holding the front end of the table up against the roll, the operative starts the machine; the roll revolves, carrying forward the table with it, and rolling off the piece of gold from the book. The entire table then drops vertically, and returns horizontally to its first position. The operative pulls back by hand the slide on which the book of gold leaf rests, and uncovers a fresh piece of gold leaf. The cycle above described is then repeated. It will be noticed that the forward movement of the slide which brings the book of gold leaf under the end of the film, and the upward movement of the front end of the table by which the lapping is caused, are both performed by hand, as is the withdrawal of the slide after the automatic cycle has been completed; whereas, in the patentee's machine the entire cycle is performed by the machine itself, without assistance or interference from the operative.

Does this machine of the appellants have "means for automatically causing the lapping contact of the decorative films upon the strip," or "means for automatically lapping the films upon the strip"? The contention of the appellees is that "automatically," in the claims referred to, means that the machine, not the operative, really does the work; that it is not material whether the actuating power is furnished by the operative, or from some other source; that a skillful mechanic could readily organize the appellants' machine to perform a complete cycle of movements under power, without assistance from the operative; that "automatically lapping" means lapping without any handling of the gold by the operative, and refers to the entire operation of positioning the end of the film on the roll, joining the new sheet thereto, and rolling the sheet off the book; that a machine which does this acts "automatically" within the meaning of the claims of the patent, whether its various movements are produced and controlled by the operative or not.

That there is a difficulty in so construing the word "automatically" is apparent. At the argument, counsel for the appellees contended that "automatically" was to be given the meaning of "mechanically," and in their brief it is said:

"It is therefore not so much a question of what 'automatically' means as how much and what mechanism is intended to be covered by the last element of these claims." Page 27. "And there is every reason also for giving the word 'automatically' a colloquial meaning, equivalent, if necessary, to 'mechanical,' and not confine it to its strict derivation." Page 32.

[1] Coe's invention was a meritorious one; and his representatives are entitled to a liberal construction of the patent in their favor. At the same time the protection afforded by the patent is specified in the claims. The public have a right to rely upon the language of the claims in determining how far the patentee's rights go. A patent, like

any other grant, is a two-sided instrument, and the intent of the grantor (the public) as to what was covered is as important as that of the grantee.

"The object of the patent law in requiring the patentee to 'particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery' is not only to secure to him all to which he is entitled, but to apprise the public of what is still open to them. The claim is the measure of his right to relief." *McClain v. Ortmyer*, 141 U. S. 419, 424, 12 Sup. Ct. 76, 77 (35 L. Ed. 800).

[2, 3] The word "automatically," as applied to mechanism, is in common use and is unambiguous. It means "self-acting," and it implies a certain cycle of movements which the machine itself makes without outside control. This cycle may be simple or complex. In the development of many machines there can be traced a constantly increasing extent of automatism; by which is meant that many steps or processes, which formerly had to be started, stopped, or controlled by the operative, are now started, stopped, or controlled by the machine itself. When the valves of the steam engine, which were at first operated by hand, were connected to and operated by the engine itself, the valves became automatic. We think that the words "means for automatically causing the lapping contact," and "means for automatically lapping the films," imply a cycle of movements made by the machine without outside interference, which cause the lapping contact, or which do the lapping. *Gould Coupler Co. v. Trojan Car Coupler Co.*, 74 Fed. 794, 21 C. C. A. 97; *King Philip's Mills v. Kip-Armstrong Co.*, 132 Fed. 975, 66 C. C. A. 45.

This view is strongly supported by the proceedings in the Patent Office. The seventh claim there presented by the applicant was for substantially the same combination as is covered by the first claim of the patent, except that "the movable bed for carrying the table" was inserted as an additional element, and, instead of "means for automatically causing the lapping contact," etc. (claim 1), the seventh claim had "means for causing the timely elevation of the table to lap the films upon the strip, etc." We think this seventh claim as applied to Coe's machine was intended to cover, and did cover, substantially the same combination as the first claim without the element of automatism, i. e., that it covered "mechanical" lapping by roller and table mechanism, as distinguished from "automatic" lapping. On objection by the Patent Office, it was canceled by the applicant. We do not think that Claim 1 ought now to be so construed, at great violence to its language, as to cover what was included in the abandoned claim. A suit for infringement is not a reissue proceeding. Moreover, if claim 1 were so broadened as to include as its last element all mechanical means for completing the operation of the machine, it would, we think, be essentially functional rather than descriptive.

"To say that the patentee of a pioneer invention for a new mechanism is entitled to every mechanical device which produces the same result is to hold, in other language, that he is entitled to patent his function. Mere variations of form may be disregarded, but the substance of the invention must be there." *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136.

The fourth claim is said by the complainants to be "very similar" to the first, and to "cover the same mechanism," though certain of its elements are differently described. These statements are clearly correct, and render separate discussion of the fourth claim unnecessary.

As to claims 2 and 3 of the first patent, which are as follows:

"2. In a machine for winding decorative films into a package roll, the combination with means for winding up the strip and film in a package roll, of a bar of wax or other suitable material, in contact with which the strip is drawn, to receive a coating adapted to secure the proper adhesion of the film to the strip, and means for applying the film to the strip, substantially as described.

"3. In a machine for winding decorative films into a package roll, the combination with means for drawing the strip forward, of a pad for spreading the powder upon one side of the strip, and a bar of wax or other suitable material, in contact with which the strip is drawn to receive a coating upon the opposite side of the strip, which is adapted to secure the proper adhesion of the decorative film thereto, substantially as described."

These claims are not limited to machines for forming metallic films into strips, which was Coe's important invention. They relate to "machines for winding decorative films into a package roll." The prior art shows several machines which come close to the combinations specified in these claims. Each of the claims includes as one element "a bar of wax or other suitable material in contact with which the strip is drawn to receive a coating" adapted to secure the proper adhesion of the film to the strip.

The appellants contend: (1) That they do not infringe these claims; and (2) that said claims are void for lack of novelty.

As to 1, the appellants' machine does not contain any "bar of wax," or any other arrangement for "coating" the strip of paper for the purpose of making it adhesive. It does have, in substantially the same place as the wax roll, a revolving round brush of wire which brushes against the surface of the strip to which the gold is to be attached. The function of the brush was not satisfactorily explained by the appellant. Presumably it serves some purpose; it probably roughens that side of the paper, and perhaps also removes accidental dust or powder.

[4] It was necessary that one side of the strip should be more adhesive to the gold than the other side, in order that the film might unroll without tearing. Coe secured this result by applying an adhesive coating on one side, and powder (which is a nonadhesive) on the other side. Gold leaf adheres better to a rough surface than to a smooth one. Roughening the surface of the paper by the brush in the appellants' machine serves the same purpose as coating it with wax in the complainant's, i. e., makes it more adhesive to the gold leaf. The wax cylinder and the wire brush, therefore, accomplish the same result, but in essentially different ways. The appellees contend that this identity of result is sufficient to constitute the wire brush an equivalent of the bar of wax and adhesive coating of the claims under discussion. But we think mere identity of result is not sufficient. There must be the employment of "substantially the same means to accomplish the same result." *Machine Co. v. Lancaster*, 129 U. S. 263, 290, 9 Sup. Ct. 299, 32 L. Ed. 715. This is especially

true where, as here, of several methods by which the result may be secured, the claim specifically describes one. As Judge Colt said in the Edison Light Case:

"If the claim had been limited to conductors of platinum wire, as the filament is limited to carbon, the case might be different." *Edison Electric Light Co. v. Boston Incandescent Lamp Co.* (C. C.) 62 Fed. 398.

"On the other hand, it is true that words and phrases which might have been omitted on the presumption that they relate to nonessentials may be introduced in such direct and positive manner as to leave the courts no option except to regard them as affecting the objects and limitations of the instrument in question." *Putnam, J., Reece Button-Hole Machine Co. v. Globe Button-Hole Machine Co.*, 61 Fed. 958, 961, 10 C. C. A. 194.

Granting that the patentee is entitled to a liberal interpretation of the rule as to equivalents, we do not think that the wire brush of the appellants is the equivalent of the "bar of wax" and the "coating" specified in these claims. We therefore, without deciding the question as to validity, hold them not infringed. *Westinghouse v. Boyden Co.*, ubi supra; *American Crayon Co. v. Sexton*, 139 Fed. 564, 71 C. C. A. 548.

[5] As to the second patent, No. 848,883: This patent is for a package roll of metallic leaf. The contention of the complainants is that the roll of paper and film produced by the appellants' machine is covered by the single claim of this patent, which is as follows:

"A package roll of metallic leaf having its supporting strip provided with a smooth surface at one side, and a comparatively rough surface at the other, whereby the metallic leaf may be suitably held for delivery upon unwinding the roll."

The prior art shows many different patents for rolled and flat packages of paper and gold leaf. The problem was to give one side of the paper a surface to which the gold would adhere, and the other side a surface to which the gold would not adhere; it was also necessary that the adhesive side should not cling to the gold so strongly as to prevent it from being readily removed therefrom. The purpose of the patent is, as therein stated, "to dispense with the use of both adhesive and non-adhesive materials in connection with the supporting strip of a package roll," and to avoid "the troublesome employment of wax or powder." This is accomplished by making one surface of the paper rough and the other surface smooth, and taking advantage of the "natural tendency of metallic leaf to cling to the rough side and leave the smooth side" of the paper strip. Considering the claim of the patent in the light of the specifications and of the prior art, it is clear that it was intended to cover a package roll in which the surfaces of the paper are such that neither an adhesive substance nor powder is necessary. The appellants unquestionably make use of a rough surface on the paper to cause the gold to adhere thereto; there is no evidence that they use the smooth surface to make the paper nonadherent. It is undisputed that the appellants use powder to secure nonadhesion, and it does not appear that the use of such powder is unnecessary. Assuming that the patent is valid, it is not entitled to a construction which shall include the appellants' roll, but is

limited to rolls in which neither adhesive nor powder is necessary, and is not infringed by the appellants' roll.

The decree of the District Court is reversed, and the case is remanded to that court, with directions to enter a decree dismissing the bill, with costs; and the appellants recover costs of appeal.

MOLINE PLOW CO. v. ROCK ISLAND PLOW CO.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1914.)

No. 1987.

1. PATENTS (§ 328*)—VALIDITY—DISK HARROWS—ANTICIPATION.

The Lindgren patent No. 799,012, for an improvement in disk harrows, claims 3, 4, 5, 7, and 9, providing a rectangular frame and saddle-plate between the front and rear bars of the frame and a mounting of the operative parts thereon, with compensating mechanism for avoiding torsional strain on the draw rod, *held* valid, not anticipated and infringed.

2. PATENTS (§ 73*)—INVENTION—DATE—ANTICIPATING PATENT.

One who seeks to carry the date of invention back of the date of an anticipating patent assumes the burden of proof and must establish an earlier date by evidence so cogent as to leave no reasonable doubt in the mind of the court that the transaction occurred substantially as stated.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 64; Dec. Dig. § 73.*]

3. PATENTS (§ 73*)—INVENTION—DATE—PROOF.

Where an invention is claimed to antedate an anticipating patent and is exhibited in a drawing or model, the date of the invention may be regarded as the date of the completion of a model or drawing sufficiently plain to enable those skilled in the art to understand the invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 64; Dec. Dig. § 73.*]

4. PATENTS (§ 29*)—"INVENTION."

To constitute an invention in the sense in which the word is employed in the patent act, the party alleged to have produced it must have proceeded so far as to have reduced his idea to practice and have embodied it in some distinct form.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 29.*]

5. PATENTS (§ 73*)—INVENTION—DATE—EVIDENCE.

While parol evidence of priority of invention under an anticipating patent is insufficient alone, yet parol evidence in addition to documentary evidence, consisting of entries in business records and books of complainant, showing the existence of complainant's invention and reduction of complainant's device to practice prior to the date of the anticipating patent, was sufficient.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 64; Dec. Dig. § 73.*]

Appeal from the District Court of the United States for the Northern Division of the Southern District of Illinois; J. Otis Humphrey, Judge.

Bill in equity by the Moline Plow Company against the Rock Island Plow Company, for infringement of the Lindgren disk harrow patent, No. 799,012. From a decree dismissing the bill, complainant appeals. Reversed with directions.

Samuel W. Banning, of Chicago, Ill. (Thomas A. Banning, of Chicago, Ill., of counsel), for appellant.

Charles C. Bulkley and Harold A. Swenarton, both of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLAAT, Circuit Judge. Appellant filed its bill in the District Court to restrain infringement of claims 3, 4, 5, 7, and 9 of patent No. 799,012 issued to appellant on September 5, 1905, as assignee of Alexis C. Lindgren, for an improvement in disk harrows. On final hearing the District Court found against appellant on the question of infringement and dismissed the bill for want of equity, which finding and decree is assigned for error.

The claims sued on read as follows:

"3. In a disk harrow, the combination with the frame, of a disk gang adjustable with relation to the frame transversely of the line of draft, and movable around a vertical axis, a hand-lever mounted on the frame in advance of the disk gang, and rearwardly-extending connections between the hand-lever and disk gang for turning the latter on its vertical axis, said connections being adjustable at the rear and relatively to the disk gang in the direction of the transverse adjustment of the gang.

"4. In a disk harrow the combination with the frame, of a disk gang adjustable therein transversely of the line of travel, and movable around a vertical axis, a hand-lever movable longitudinally, a connecting-rod extending longitudinally rearwardly therefrom, and adjustable connections between the rod and disk gang.

"5. In a disk harrow the combination with a frame, of a disk gang adjustable therein transversely of the line of travel and mounted to turn on a vertical axis, a hand-lever for controlling said axial movement, a rod extending rearwardly from the hand-lever, and a link having its inner end jointed to said rod and its outer end connected adjustably with the disk gang.

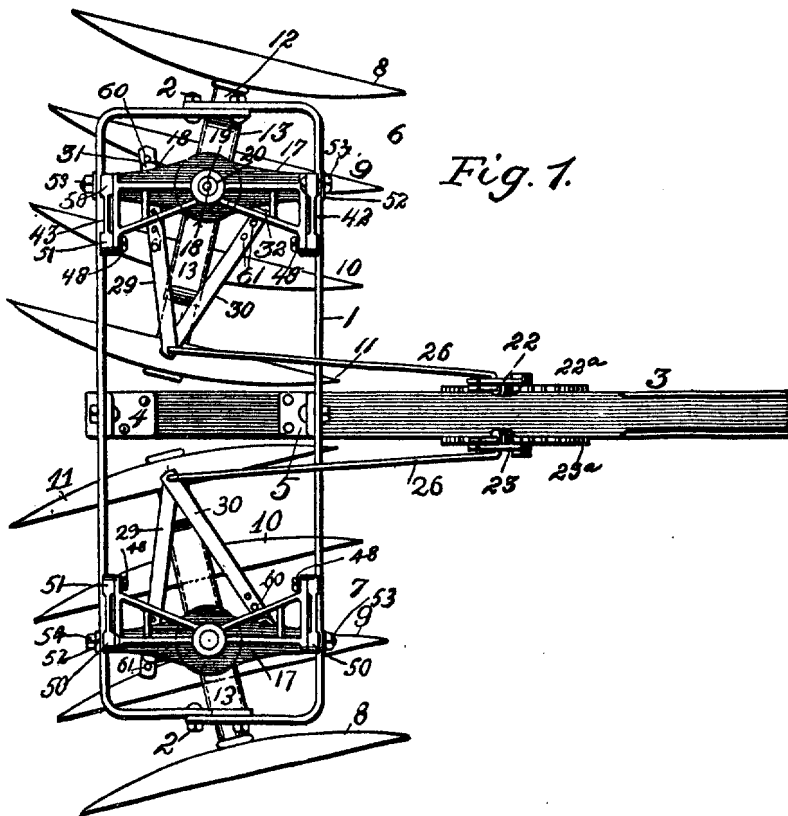
"7. In a disk harrow the combination with the frame member having front and rear frame-bars, of a saddle-plate extending longitudinally of the machine between said bars and adjustable vertically around a fore-and-aft axis extending longitudinally of said plate, and provided with a vertical bearing-socket, a disk-yoke formed with a vertical trunnion seated in the socket, means for connecting said parts together, and disks carried by the yoke.

"9. In a disk harrow the combination with the front and rear frame-bars, of a horizontally-arranged saddle-plate sustained by said bars and rotatably adjustable at its outer end around a fore-and-aft axis extending longitudinally of the machine, a clamping device at the opposite end of the plate for holding it in its different adjusted positions, and a disk gang carried by the saddle-plate."

The device of the patent relates to a reversible disk harrow, largely used in cultivating the soil in orchards and other lands where the space between the rows is narrow and where different adjustments are required. It consists of a rectangular or transversely-elongated frame, to the widely spaced front and rear bars of which a tongue is rigidly attached—saddle-plates on either side of the tongue, which are respectively mounted pivotally, and consequently tiltingly, on and within the front and rear bars, and which carry means for horizontally swinging the disk carriers, levers, and other devices for positioning the disk carriers and disks, and an operator's seat. It is appellant's contention that claims 7 and 9 cover the frame, while claims 3, 4, and 5 have ref-

erence to the other elements of the patent. The defenses set up are lack of patentable novelty in view of the prior art, and noninfringement.

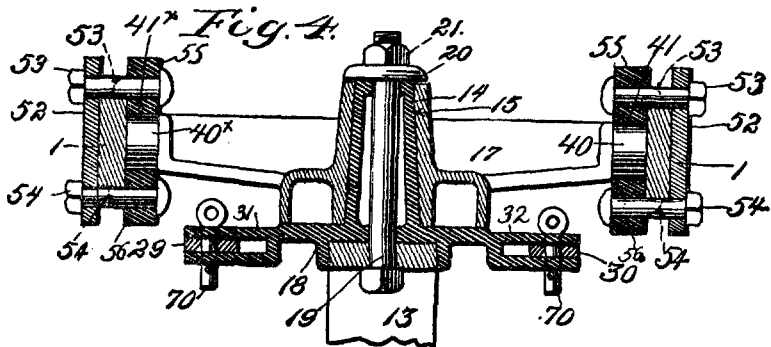
The harrow consists of two distinct parts, one on either side of the tongue. These and the operation of them are exactly alike, and it will be necessary to treat with only one of them. In order to simplify the description of the device, figure 1 of the patent in suit is here reproduced:



It was not new with Lindgren to provide a disk harrow producing substantially the results attained by the device of the claims in suit, so that the invention must be sought in the means employed by him.

Appellant's harrow has, generally speaking, the following features in common with the prior art: (1) Its disk gangs are so arranged as to be capable of being adjusted in different angling positions with reference to the forward line of travel of the harrow; (2) the gangs may be tilted toward or away from the center of the harrow; (3) the gangs may be bodily advanced along the front and rear bars toward or away from the tongue or center of the harrow. In the means provided for the accomplishment of these three results, the patentee claims he has

achieved invention. In the first place, he contends that the transversely-elongated frame 1, above shown, with its widely spaced front and rear bars, within which the disk gang and the operating means are mounted, and its capacity for enduring the strain without reinforcing rods was new. He also claims as new and incident to the use of the frame the saddle-plate 17, bridging the space between the front and rear frame-bars with means for laterally adjusting the same upon the frame-bars as tracks, and having horizontally pivoted bearings or axes on and wholly within the bars. He also claims as new the arranging of the vertical pivot upon the horizontally pivoted member in such a way that its axis intersects that of the horizontal pivot within the plane of the frame, and the special form of adjusting mechanism for manipulating the gang on its vertical pivot which compensates for lateral adjustment of the gang and maintains the draw-rod in its correct line of movement. Among the other advantages claimed for the rectangular frame are that its two wide apart frame-bars, front and rear, afford adequate and rigid anchorage for the tongue without the use of brace-rods, and that it furnishes the mountings for a saddle-plate in the plane between the front and rear bars, which carries the vertically pivoted trunnion, number 14 in figure 4, which in turn carries the yoke and disk gang, and that it serves as a support for all the other operating parts. In order to prevent unnecessary torsional strain upon the draw-rod when the disk gang has been positioned at an angle transverse to or different from the line of travel of the plow, and especially when the saddle has been laterally removed to its outermost position, the patentee has provided links 29 and 30, with which the draw-rod 26 is connected by a hook formed at its rear end, which passes through the overlapped converging ends of said links at a point in the line of draw of said rod. These links extend divergently to detachable union with the pins 70 at the end of the two arms 31 and 32 of the vertical trunnion 14 on the saddle plate, shown in drawing 4 of the patent here reproduced:



These links are made adjustable by forming therein a number of holes, 60, 61, etc., as shown in figure 4, by means whereof the length of the links may be adjusted to compensate for the lateral removal of the disk gang.

[1, 2] Assuming that the prior art discloses no rectangular frame, no saddle-plate between the front and rear bars of the frame, and no mounting of the operative parts thereon as shown in the claims in suit, and no compensating mechanism for avoiding tortional strain upon the draw-rod, the claims are deemed valid. The art is an old one, and hardly admits of radical improvement, while the wide range of uses for these plows makes welcome every inventive improvement, however simple.

Turning to the prior art, we find a number of patents deemed by appellee to be pertinent to the present issue. Of these we need only examine into the teachings of Corbin patent, No. 325,224, issued August 25, 1885, for a disk harrow, patent to Settle, No. 609,560, issued August 23, 1898, for a reversible disk harrow, patent No. 609,989 issued to Little August 30, 1896, for a reversible disk harrow, patent No. 670,070, issued to Willis and Porteous March 19, 1901, for a disk harrow, and patent No. 797,289, issued to Kennedy and Sharp August 15, 1905, for a disk harrow or cultivator. It will be noted that this last-named patent was issued 25 days prior to the issuance of the patent in suit, upon application filed March 21, 1904. The date of filing the application for the present patent was August 27, 1904. In this situation appellant undertook to establish Lindgren's date of invention as prior to that of Kennedy and Sharp. In that behalf appellant introduced evidence to establish the fact, and now claims that the record shows that the Lindgren invention was fully completed and embodied in an operative machine, like that of the patent, as early as January 1, 1903, that date being at least 14 months prior to the date of the application for the Kennedy and Sharp patent.

The patentee testified that he had first tried out his patent prior to January, 1903. He produced on the trial below the first shop order book of complainant, in which he pointed out six entries dated January 17, 1903, calling for the making of 100 Moline reversible harrows, identical with those of the claims in suit. The witness Johnson testified that he made those entries, and that they were made in the regular course of business, and on January 17, 1903. The witness Douglass identified the entries made on page 479 of a second order book, containing a list of all the parts entering into the construction of the harrows, as having been made by him, and stated that the book indicates that the entries were made in January, 1903. The witness Howlett, at that time head of the cost department of appellant's business, recognized book B in his handwriting, referring to the Lindgren device. He stated that it was the custom to number and catalogue the parts. This seems to show that the patentee was working on the experimental machine in 1902. Howlett also produced pencil specifications which, in his own handwriting, read, "To shop, 1-28-03 Howlett," and swore the entry was made at the time of its date. Howlett also identified "desk book 1" in his own handwriting, listing the cost of each of the parts—one entry being dated January 16, 1903—and stated that the entry denoted the date when the complete machine was first delivered to him. He testified that the parts so entered by him were identical with those shown on page 210 of appellant's 1904 cata-

logue, and that the machine so delivered to him was shown on page 64 of appellant's 1904 catalogue. There were placed in evidence by appellant the regularly kept books of appellant, designated as the first shop order book, the second shop order book, original catalogue number book B, desk book 1, and original pencil specifications. These books were fully identified. They make cross-references to one another. We are of the opinion that the identity of these early machines with that of the 1904 catalogue is established. Where one seeks to carry the date of invention back of the date of an anticipating patent, he assumes the burden of proof, and must establish an earlier date, "by evidence so cogent as to leave no reasonable doubt in the mind of the court, that the transaction occurred substantially as stated." *Deering v. Harvester Works*, 155 U. S. 286-301, 15 Sup. Ct. 118, 39 L. Ed. 153; *Columbus Chain Co. v. Standard Chain Co.*, 148 Fed. 622, 78 C. C. A. 394; *Barbed Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154; *Coffin v. Ogden*, 18 Wall. 120-124, 21 L. Ed. 821.

[3] In cases where the invention may be exhibited in a drawing or in a model, it will date from the completion of such a model or drawing as is sufficiently plain to enable those skilled in the art to understand the invention. *Walker on Patents*, § 7, citing *Loom Co. v. Higgins*, 105 U. S. 594, 26 L. Ed. 1177; *Deering v. Harvester Co.*, *supra*, and other cases.

[4] In order to constitute an "invention" in the sense in which that word is employed in the patent act, the party alleged to have produced it must have proceeded so far as to have reduced his idea to practice, and have embodied it in some distinct form. *Gayler v. Wilder*, 10 How. 498, 13 L. Ed. 504.

[5] Tested by the foregoing, was the proof, as to prior invention above referred to, sufficient to fix the date of Lindgren's invention as of or prior to January 1, 1903? Had appellant produced one of the disk harrows from the 100 said to have been ordered and manufactured prior to January 1, 1903, priority of invention would have been conclusively established. No such evidence has been produced nor has its absence been accounted for. In *Mueller v. Glauber*, 184 Fed. 609, 106 C. C. A. 613, we held that in attempting to show a prior use the defendant was required to produce the best evidence available or account for its absence. In that case, prior use was sought to be proven by oral evidence alone, which was not deemed sufficient. In the present case the appellant produced order books, stock books, original specifications, catalogue number book, and others, and also appellant's catalogue for the year 1904, together with oral evidence, all of which, taken together, can and do leave no doubt in our minds that the books and entries were made prior to January 1, 1903, and that Lindgren had invented and reduced to practice his harrow prior to that date. The evidence can be accounted for on no other theory. We therefore, hold that the Kennedy and Sharp patent, for the purposes of this suit, is not available as a part of the prior art.

The Corbin patent, relied on by appellee, lacks the rigid frame of Lindgren and, consequently, Lindgren's mounting of the operative

parts. It makes no provision for preventing the deflection laterally of the draw-rod when the disk gang is shifted with regard to the direction of travel or by lateral removal, and thus entails heavy strain in moving the gangs obliquely. It has means for lateral adjustment of the gangs radically different from Lindgren's. It has nothing equivalent to Lindgren's saddle-plate supported between the front and rear bars of the frame, nor any yoke supported from a saddle-plate. It lacks, and therefore does not anticipate, Lindgren's combination.

The Settle patent has but one frame-bar. This bar carries an angle plate which affords a socket for the vertical pivot extending upwardly from the gang yoke. It has no rigid frames supporting a saddle-plate mounted on horizontal axes journaled in the front and rear frame-bars. A limited vertical tip can be given the disk gang by manually adjusting certain screws. It has no saddle-plate at all, or anything like it; nor any horizontal axis for such a plate. It affords no compensating means for retaining the draw-rod in straight adjustment with its lever arm connection whenever the gangs are threatened with deflection by reason of the positioning of the disk gang at an angle transverse to the line of travel of the plow, or by lateral removal from its normal position with reference to the lever handle. Nor has it any means for adjusting the disk gang in respect to an independent connection between it and the rear end of the draw-rod. For these and other differences in combination it does not anticipate the claims in suit.

The Little patent shows a frame consisting of two bars set edge-wise and arched at the center, and has no end bars. It makes no provision for the protection of the draw-rods from frictional resistance in case of threatened deflection thereof. The connection between the two bars is made by means of a block which carries the vertical axis for the disk gang and is incapable of carrying the saddle-plates of Lindgren. No part of this patent could be adjusted to the Lindgren device. It is not available for purposes of anticipation.

In the Willis and Porteous patent the adjustment at the rear end of the draw-rod is entirely independent of the lateral adjustment for the gangs. In Lindgren, these two adjustments are mutually dependent upon each other. It ignores the necessity for lengthening or shortening of the members which afford transmission of movement from the rear end of the draw-rod to the gang mounting as shown in Lindgren.

Thus an examination of the above fairly representative patents of the prior art fails to disclose any disk harrow containing the elements combined in the harrow of the claims in suit. The claims must therefore be held valid. In view, however, of the condition of the art at the date of invention, they may not be held to be entitled to a broad construction.

Appellee's harrow has the rectangular frame and saddle-plate of Lindgren arranged as in the patent in suit. The saddle-plates are slidable along the front and rear frame-bars as in Lindgren, and adapted to be likewise clamped upon the bars in any desired position of lateral

adjustment. The saddle-plate is mounted to turn on a horizontal axis spanning and within the frame-bars. The tilting feature is present as in Lindgren. All the advantages of Lindgren's widely spaced bearing are obtained. The axis of the vertical pivot does not exactly intersect the axis of the horizontal pivot, but does so practically, thereby obtaining that advantage of the Lindgren construction. The rigid frame is used alone, for support of the parts as in Lindgren. Appellee also provides a device to prevent deflection of the draw-rod in case of lateral removal or transverse positioning of the gangs with reference to the forward travel of the harrow. The injection of the bell crank lever into this means of adjustment does not relieve appellee from liability as an infringer when using the adjustable link in connection with a bell crank, if the use of the links would otherwise constitute an infringement.

We are of the opinion that appellee's harrow embodies the substance of appellant's invention as set out in each of the claims sued on, and that such use should be restrained, and that it was error to dismiss the bill.

The decree of the District Court is therefore reversed, with directions to grant appellant the relief prayed for in the bill.

WITZEL et al. v. BERMAN.

(Circuit Court of Appeals, Second Circuit. February 10, 1914.)

No. 150.

1. PATENTS (§ 328*)—VALIDITY—BED SPRINGS—MATTRESS HOLDER.

Witzel patent, No. 921,494, reissued June 28, 1910, reissue patent, No. 13,125, claims 7, 10, 13, 14, 19, 20, 21, 22, 23, and 24, for a device to prevent the slipping of mattresses on wire bed springs, *held* to involve patentable invention and to be valid and infringed.

2. PATENTS (§ 138*)—REISSUE—RIGHT TO REISSUE.

Where no adverse rights have been acquired in the meantime, a patentee *held* entitled to a reissue on application made about a month after the grant of the original to correct inadequate claims which were filed through no fault of his.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 201-203; Dec. Dig. § 138.*]

3. PATENTS (§ 324*)—PATENT INFRINGEMENT—ANTICIPATION.

Alleged prior anticipating patents may not be introduced for the first time in the appellate court on appeal from a decree for infringement, with no explanation regarding them, except from counsel at the argument and in its brief.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 600-606; Dec. Dig. § 324.*]

Appeal from the District Court of the United States for the Southern District of New York.

The decree of the District Court of the United States (212 Fed. 447) for the Southern District of New York held valid and infringed claims 7, 10, 13, 14, 19, 20, 21, 22, 23, and 24 of reissued letters patent

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

No. 13,125 to Charles J. Witzel for improvements in wire mattresses. The original patent, No. 921,494, was dated May 11, 1909. The application for the reissue was filed June 12, 1909, and the patent was reissued June 28, 1910.

Samuel Brand and Edward S. Beach, both of New York City, for appellant.

C. A. Weed, of New York City, for appellees.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. [1] The object which Witzel sought to accomplish was a simple one, viz., to prevent the upper mattress filled with hair, or other similar material, from slipping on the wire mattress, so that it projects beyond the latter and presents a slovenly and unsightly appearance, besides losing its shape. To remedy these unquestioned defects Witzel provides longitudinal guards on both sides of the mattress which are bent up so as to hold the hair mattress in place. This is accomplished by providing metallic side guards extending on both sides along the longitudinal edges of the bottom and bent up so as to hold the hair mattress in position. This seems a simple problem to solve, but the exhibits and patents in evidence show several efforts to solve it and all of a crude, unsatisfactory form. These exhibits when aggregated may possibly show the separate elements of the Witzel claims, but nowhere in the prior art are these elements shown in combination. A mechanic with all this matter before him would probably make a mattress with sides so high that the occupant could not get out of it without assistance, or with side supports so insecurely fastened that the hair mattress would break them down or slide beneath them after a short period of use. We agree with Judge Mayer in thinking that there is nothing in the prior art as shown by the record before him which invalidates or materially limits the claims. We also think that infringement was clearly established. As the District Judge points out, the defendant has adopted the Witzel structure rather than that of his own patent which was granted eight months after the patent in suit. In fact, it is asserted, and not denied, that in the court below the defendant stated in his brief, "that the function and purpose of the defendant's side guard, we admit, is the same substantially as the complainant's."

It is also asserted that no attack was made in the court below upon the Witzel patent as a reissue.

[2] The description and drawings are the same in the original and reissue. The latter was applied for about a month after the grant of the original. No adverse rights were acquired by the public in the meantime and it seems to us that the action of the commissioner in granting a reissue with claims which cover only what Witzel invented is not open to criticism. It will be a disastrous blow to meritorious inventors if they cannot obtain the full fruits of their inventions because, through no fault of theirs, they fail to secure adequate claims, especially when they ask for the correction before the public has acquired any rights by reason of the mistake.

[3] Upon the question of invention we do not agree entirely with the optimistic view of the complainant that "it is the greatest invention in springs during the last 37 years." Nevertheless Witzel seems to be the first who held the hair mattress securely and firmly in place on the wire mattress and in view of the bungling and clumsy devices of the prior art, it cannot be denied that the patented structure required an exercise of the inventive faculties. The defendant now places his principal reliance upon eleven patents not cited in the answer or offered in evidence or referred to in the District Court. In support of this practice the doctrine of *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200, is invoked. We do not think that this case is an authority for the practice which is now under consideration. The Supreme Court held that it might properly take notice of a device—an ice cream freezer—which had long been known and used generally by the people throughout the country. We think, however, that no authority can be found for the introduction for the first time in an appellate court of eleven patents dealing with a complicated structure, with no word of explanation regarding them except from counsel at the argument and in the brief. The duty of an appellate court is to ascertain whether the court below has fallen into error and it would be manifestly unfair to the appellee and to the judge to reverse his decree upon documents which were not in evidence and which he never saw.

The decree is affirmed with costs.

WHITEHEAD & HOAG CO. v. KORTZ.

(Circuit Court of Appeals, Sixth Circuit. March 13, 1914.)

No. 2418.

PATENTS (§ 328*)—VALIDITY—LACK OF INVENTION.

The Hornich patent, No. 653,296, claim 1, for an advertising bill hook placard, held void for lack of patentable invention.

Appeal from the District Court of the United States for the Northern District of Ohio; William L. Day, Judge.

Bill in equity by the Whitehead & Hoag Company against Conrad J. Kortz. From a decree dismissing the bill, complainant appeals. Affirmed.

This was the usual infringement bill, based upon claim 1 of patent No. 653,296, issued July 10, 1900, to the Whitehead & Hoag Company, as assignee of William Hornich, Jr. It pertains to what is intended essentially as an advertising device. There is a flat card designed to hang upon the wall and carry a calendar or analogous article in connection with advertising matter. To make this of additional permanent value, it carries suspended therefrom a bill hook, intended to receive and hold papers that may be placed thereon. When in use this bill hook should project from the wall in a plane at right angles to the wall; but this position would make the article difficult to pack in quantities or send by mail in an envelope, and so for transportation the hook should be turned in a plane parallel with that of the advertising card, and should be raised so as not to project beyond the sides of the card. To accomplish this result the shaft of the hook is slidably and rotatably attached to the rear of the card. This is done by securing to the back of the card a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

metal plate, which plate is provided with a vertical channel or groove, struck up away from the card, and so shaped as to carry between the plate and the card the shaft of the hook and permit it to slide and rotate. The upper end of the shaft is turned over to form a small hook in a plane at right angles with the receiving hook at the lower end. The plate is provided with a socket alongside the main groove suitable to receive this upper hook. By these means it is possible that the hook may be shoved up, and laid flat against the back of the card, and within its borders, when the card is put in an envelope, and then, when the card is to be hung, the receiving hook is given a one-quarter turn to the front, the shaft is drawn down, and the hook on the upper end enters its socket, thus locking the shaft against rotation and insuring that the bill hook projects outwardly from the wall.

The only claim sued upon is the first, reading:

"1. As a new article of manufacture, a bill hook, comprising a card or placard, a plate secured thereto, said plate having a grooved or channeled portion, extending in a direction away from said card or placard, a wire body portion arranged in said grooved or channeled portion and movable vertically and rotatable between said card or placard and the inner part of said grooved or channeled portion, a receiving hook at the lower portion of said wire, adapted to be turned so as to lie flat in relation to said card or placard and the plate, and a holding means at the opposite end of said wire adapted to be forced in holding engagement with a part of the said plate when the receiving hook on said wire has been turned in a plane at right angles to the plane of the card or placard and that of the plate, substantially as and for the purposes set forth."

The District Court dismissed the bill, finding that there was no infringement, and complainant appealed.

E. A. Thompson and Howard P. Denison, both of Syracuse, N. Y. (W. A. Jones, of New York City, of counsel), for appellant.

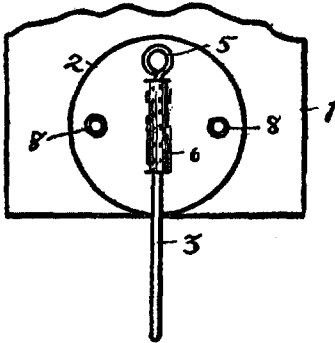
M. G. Norton, of Cleveland, Ohio, for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and COCHRAN, District Judge.

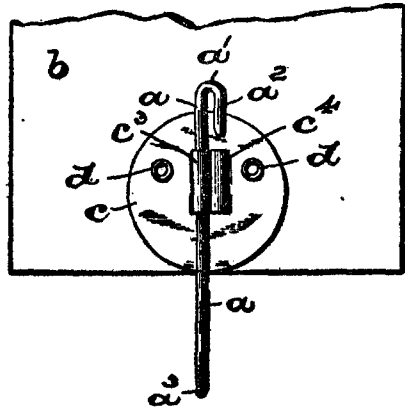
DENISON, Circuit Judge (after stating the facts as above). Without considering the question of infringement or the defense of aggregation, we are satisfied that the claim sued upon is invalid for lack of invention. The structure recited in the claim is merely the application to a holding card and bill hook of the common mechanical expedient by which a slidable and rotatable shaft may at one end of its sliding movement be locked in any desired position of rotation by engagement between a projection carried by the shaft and independently carried means for engaging the shaft projection. Whether we should take judicial notice that this mechanical idea is in common use, or whether there might be invention in first applying the idea to the card and bill hook combination; we need not consider, because the record shows earlier applications of the same idea to the same combination.

The patent to Studabaker, No. 615,921, of December 13, 1898, shows, except in the particulars to be stated, the same combination, to be used in the same way, to accomplish the same results. See discussion of the Studabaker patent, and of the prior art, by Judge Hazel in *Whitehead v. Bastian* (C. C.) 167 Fed. 565. Studabaker shows several forms; between one of them, his Figure 3, and Hornich, as illustrated by his Figure 5, the differences are two: The top of the shaft, instead of being bent to form a hook, is bent to form an eye; and in-

stead of the hook dropping into a socket in the plate, the eye is held by the plate itself against rotation. The differences are made clear by these drawings:



Studabaker's Fig. 3.



Hornich's Fig. 5.

This being the field into which Hornich came, we cannot think that it involved invention to change the Studabaker eye into a hook and to provide a receiving socket for the hook. The hook and the eye are alike mere offsets from the shaft; the contact between the eye and plate, and between hook and socket, alike form engaging means to resist rotation. Hornich's locking effect is very likely more perfect; but it is at best only a slight improvement, and by simple and obvious means. *Galvin v. Grand Rapids* (C. C. A. 6) 115 Fed. 511, 517, 53 C. C. A. 165; *American Carriage Co. v. Wyeth* (C. C. A. 6) 139 Fed. 389, 391, 71 C. C. A. 485; *Macomber*, § 654.

The decree of the District Court is affirmed, with costs.

WISCONSIN FURNITURE CO. v. BLUMBERG.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1914.)

No. 2032.

1. PATENTS (§ 316*)—CONSTRUCTION.

In an infringement suit, a claim of the patent, although not involved, may be examined, as affecting the construction of the claims which are in suit.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 562; Dec. Dig. § 316.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—EXTENSION TABLE.

The Klein patent, No. 602,509, for an extension table, construed, and held not infringed.

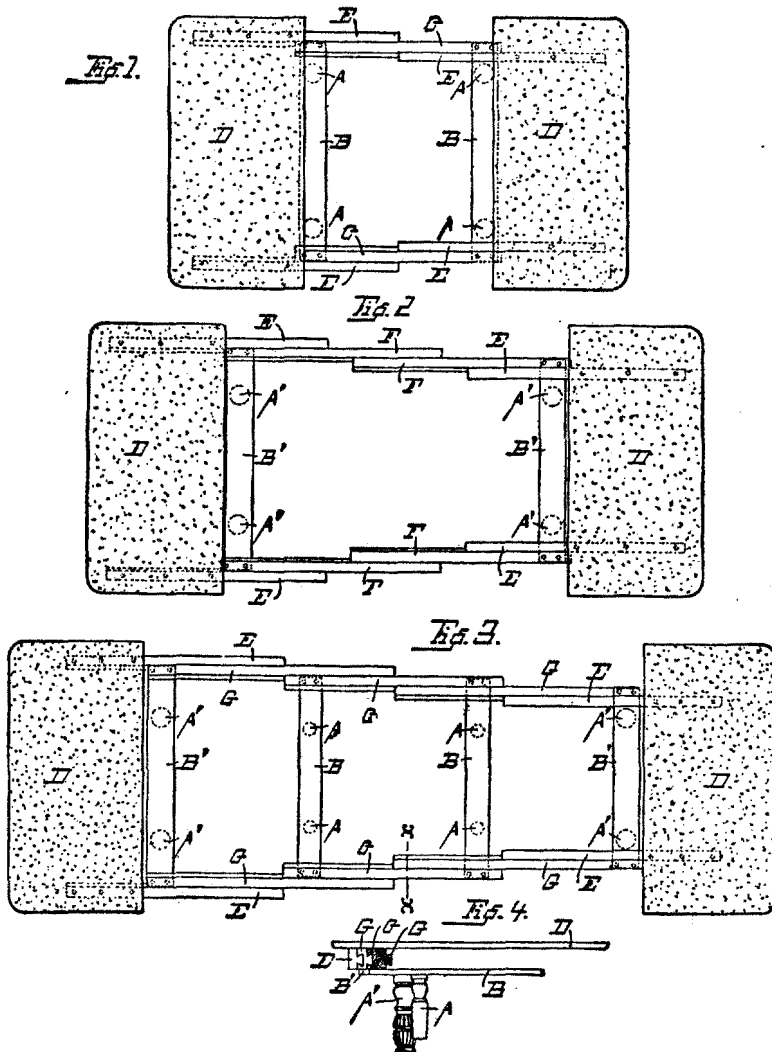
Appeal from the District Court of the United States, for the Eastern Division of the Northern District of Illinois; Arthur L. Sanborn, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit in equity by the Wisconsin Furniture Company against J. Blumberg. Decree for defendant, and complainant appeals. Affirmed.

Appellant, assignee of the Klein patent, No. 602,509, April 19, 1898, for an extension table, filed its bill to enjoin appellee from infringing the two claims of that patent.

The drawings are as follows:



In the specification applicant described his invention in these words:

"The objects of my invention are: First, to secure such a balance of the respective parts that the joints will not cramp or bind, and that the table may be easily extended or shortened by a single person; second, to cheapen the

construction by reducing the number and variety of parts used in the construction of the table.

"In the following description reference is had to the accompanying drawings, in which:

"Figure 1 is a top view, showing one of my tables in an extended position, the table shown being of small size. Fig. 2 is a similar view, showing my invention applied to a medium-sized table. Fig. 3 is a third top view, showing my invention applied to tables of large size. Fig. 4 is a cross-section drawn on line XX of Fig. 3.

"Like parts are identified by the same reference letters throughout the several views.

"Referring to Fig. 1, it will be observed that the legs *A* (shown in dotted lines) are secured directly to the respective cross-rails *B* and that the latter are connected by guide-bars *C*, which are rigidly attached at each end to the cross-rails. The permanent top boards *D* are secured to the slide-bars *E*, which are dovetailed to the bar *C*, those of the left-hand top board being arranged to slide upon the outer sides of the bars *C* and those of the right-hand top board being arranged on the inner side of the bars *C*. It will be observed that the slides have a bearing in the guide-bars equal to the width of the top board, and as the latter are extended independently of the legs there is no tendency to cramp or bind the slides.

"In Fig. 2 the construction is the same as that of Fig. 1 with the exception that I have substituted for the guide-bars *C* of Fig. 1 the double guide-bars *FF*, which are dovetailed together and arranged to slide upon each other, thus permitting the legs to be separated also. In this form the weight of the top boards extended beyond the legs counterbalances the weight of the center portion, as the slides *E* of the top boards extend inwardly upon the guide-bars *FF* to a considerable distance, and thus aid in supporting the latter.

"In Fig. 3 I show a further modification of my invention intended especially for tables of largest size. The four center legs *A* are connected by the cross-rails *B* and guide-bars *C* in the same manner as is shown in Fig. 1. Two additional pairs of legs *A'A'* are also provided, having cross-rails *B'*, to which are attached the slide-bars *GG*, running on the bars *C*, and which also serve as guide-bars for the slide-bars *E E* of the top boards. When this table is folded, the legs *A* and *A'* are brought together, as shown in Fig. 4."

The claims are as follows:

"1. In an extension-table, the combination with the table-legs connected in pairs by cross-rails, of the horizontal connecting guide-bars uniting the pairs of table-legs, and a pair of permanent top boards adapted to meet when the table is closed and provided with bars rigidly attached thereto and slidably engaging the connecting guide-bars between the cross-rails, whereby the top sections are permitted to move independently of the legs, substantially as described.

"2. In an extension-table, the combination of a central set of four legs rigidly united by connecting cross-rails and fixed horizontal guide-bars, movable legs connected in pairs by cross-rails and provided with sliding guide-bars engaged by the fixed guide-bars of the central legs, and a pair of permanent top boards adapted to meet when the table is closed, and having bars rigidly attached thereto and slidably engaging said sliding guide-bars, whereby the outer legs are permitted to move independently of the central legs, and the top boards independently of any of the legs, substantially as described."

After appellee had closed his proofs, appellant during its rebuttal withdrew claim 1 from the contest.

Appellee's alleged infringing table has for its center support, not the four center legs *A* of Figure 3, but a single leg fastened at the middle of a single piece of bridging at the middle point of the central pair of slide-bars.

On the hearing of the proofs the trial court held that appellee's table did not infringe claim 2 of the patent, and this appeal resulted.

Albert C. Bell, of Chicago, Ill., for appellant.

George T. May, Jr., of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). By looking at Figure 2 of the drawings it will be observed that the main supports, the four corner legs marked *A'*, are fastened not to the ultimate but to the penultimate pairs of guide-bars. By this construction the table is extensible not only by the spreading of the legs but also by the spreading of the permanent top boards independently of the legs. This last feature, namely, the extensibility of the top while the legs remain stationary, is exhibited in Figure 1. If in Figure 2 the four corner legs *A'* were bridged and fastened upon the outer pairs of guide-bars, the table would be extensible only as the legs were spread apart. That is the old style extension table.

From a reading of the specification we think it very clear that Klein believed that he was the inventor of the extension-top feature and that this was the important part of his application. This feature, in combination with the other parts necessary to its use, is expressed in claim 1, which covers the three forms of construction shown in the drawings. But Klein was mistaken in his belief. If the appellant's withdrawal of the claim in the face of appellee's proof may not be taken as an admission of the fact, the proof itself with respect to the prior use of a so-called Christiansen table and also the exhibition of the Pratt patent No. 5,905, November 7, 1848, indisputably establish that the extensibility of the top while the legs remain stationary was not the invention of Klein.

[1] Appellant contends that, inasmuch as claim 1 was withdrawn, that claim cannot now be considered as in the case for any purpose. But the claim itself and particularly that part of the applicant's description of his invention on which the claim is based are parts of the patent and may properly be examined for the purpose of determining exactly what the applicant had in mind in framing claim 2 and what invention, over and above the invention set out in claim 1, he was intending to cover by claim 2.

[2] Referring to the description of Figure 3, it will be noted that the applicant said that "the four center legs *A* are connected by cross-rails *B* and guide-bars *C* in the same manner as is shown in Figure 1." That is, the central portion of the table shown in Figure 3 is exactly the self-contained and self-supporting framework on which the sliding top boards are placed in Figure 1. But, since in Figure 3 the permanent top boards are to be spread very much farther apart, "two additional pairs of legs *A' A'* are also provided." Now, inasmuch as tables with extensible frames were old and tables with extensible tops had been made by Pratt and by Christiansen prior to Klein's time, there could be no invention in claim 2 over and above the invention set out in claim 1 except the union in one structure of the extension-frame table and the extension-top table with "a central set of four legs rigidly united by connecting cross-rails and fixed horizontal guide-bars."

Appellee's alleged infringing table does not have the self-contained

and self-supporting central structure of claim 2. But on behalf of appellant it is urged that, since by bringing the four legs *A* nearer and nearer together they could be made to merge into one central supporting leg, appellee by so doing has obtained the benefit of the invention covered by claim 2. An inventor is entitled of course, against infringers, to a range of equivalents that will give him protection fully as broad as the scope of his invention. And if in this case Klein were the originator of the idea and of the general means of providing a central support to guard against the sagging that is more or less inevitable in structures where the side members are not rigid, but only slidably connected, it might be easily possible to hold that the central support in appellee's table was the equivalent of the central support of the patented structure. But in extension tables of the old style it was a well known and common practice, long before Klein's time, to bridge the central pair of sliding guide-bars and to fasten a leg at the center point of such bridge. If claim 2 of the patent in suit were to be re-constructed so as to claim the central support of the ancient extension table, we could not uphold the claim, because in a table having both an extensible frame and an extensible top the purpose of supplying the single central supporting leg would be exactly the same as in old style tables having only the extensible frame. It is only by differentiating the old and commonly used central support of the old style extension tables from the central support exhibited in Figure 3 that claim 2 can be sustained. And under that construction of claim 2 it is impossible to hold that appellee has infringed by using upon an extension-top and extension-frame table the old and well known single central supporting leg.

The decree is affirmed.

SEEGER REFRIGERATOR CO. v. AMERICAN CAR & FOUNDRY CO.

(District Court, D. New Jersey. March 20, 1914.)

1. PATENTS (§ 318*)—INFRINGEMENT—DAMAGES—PROFITS RECOVERABLE.

Where a mechanism is supplied by a manufacturer under a contract and in conformity with specifications necessitating patent infringement, with respect to some feature or detail, without which requirement the particular contract would not have been made, the owner of the patent may not recover total profits made by the manufacturer from the contract; the profits recoverable being only those resulting from infringement of the patent monopoly, measured by the extent to which such infringement has been pecuniarily beneficial to the wrongdoer, to wit, those profits of which the infringer can be properly treated as a trustee *ex maleficio*.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

2. PATENTS (§ 318*)—INFRINGEMENT—PROFITS.

The fact that an infringing mechanism embodied in a refrigerator car body was a combination was not decisive of the question of divisibility or indivisibility of profits resulting to the infringer from the manufacture and sale of the cars.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. PATENTS (§ 243*)—INFRINGEMENT—COMBINATION.

Where a patented combination is an entire and indivisible entity, infringement occurs when the infringing mechanism contains all the elements of the combination as shown or their mechanical equivalents, co-operating or coacting in substantially the same manner, to produce a result of substantially the same nature; a use of any one or more, but not all of the elements, being insufficient.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 382-384; Dec. Dig. § 243.*]

4. PATENTS (§ 26*)—COMBINATION OF OLD ELEMENTS—INVENTION.

Where the elements of a combination and the combination itself are old and well known, patentability may be imparted to it by an invention, alteration, or improvement of one or more of the elements whereby the utility of the combination is increased; the invention being confined to the element or elements so altered, or improved.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.*]

5. PATENTS (§ 318*)—INFRINGEMENT—PROFITS.

Where a patented invention was confined to an alteration or improvement of one or more old elements increasing the utility of a combination, and a case against an infringer was not susceptible of an apportionment of profits, either from its nature or from a failure to keep proper accounts, or other cause making it impossible to establish the amount of profits on the combination attributable to the improvement or alteration, complainant may recover the entire profits.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

6. PATENTS (§ 318*)—DAMAGES—PROFITS RECOVERABLE.

To ascertain the measure of profits or damages recoverable for infringement of a patent, it is the court's duty to regard the real nature of the invention, whether constituting a mere improvement of an old device, or in a substantial sense a new and entire combination.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

7. PATENTS (§ 318*)—INFRINGEMENT—REFRIGERATOR CARS—PROFITS—APPORTIONMENT.

Where plans and specifications for certain refrigerator cars manufactured by defendant called for certain infringing refrigerator partitions, which afforded greater circulation of air in the car body, but the entire value of the car body was neither in law nor in fact attributable to the invention, and the difference in efficiency for refrigeration between infringing and noninfringing partitions was but slight, the case was one calling for an apportionment of profits if practicable.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

8. PATENTS (§ 318*)—COMBINATION—PROFITS.

Where a patented improvement combining old elements increases the efficiency or value of the mechanism, but does not change its function or affect the principle of its operation, the patentee in seeking to recover profits from an infringer is limited to the excess of profits realized by him from the use, manufacture, or sale of the mechanism as improved, over what he might or would have made from the manufacture, use, or sale of the old mechanical combination.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

9. PATENTS (§ 318*)—INFRINGEMENT—PROFITS—APPORTIONMENT.

Where, on an assessment of profits for patent infringement, the nature of the case does not per se exclude the possibility of just apportionment, and whatever difficulty exists grows out of special circumstances, complainant can recover the entire profits made by the infringer only after showing that he has realized profits and making every reasonable effort, unsuccessfully, to apportion the amount attributable to the patented invention; the burden of proof not being shifted from complainant to defendant until after complainant has proven the existence of profits attributable to the invention, and demonstrated that they are impossible of accurate or approximate apportionment.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

10. PATENTS (§ 319*)—PROFITS—APPORTIONMENT—NOMINAL DAMAGES.

Where, in a suit for patent infringement, the case was one calling for an apportionment of profits, but complainant made no effort to prove the amount of profits reasonably attributable to the infringement, relying on the position that it was entitled to recover the entire profits made by defendant from the sale of certain refrigerator cars containing the infringement, complainant could only recover nominal damages.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 577-586; Dec. Dig. § 319.*]

In Equity. Suit for patent infringement by the Seeger Refrigerator Company against the American Car & Foundry Company. A decree for complainant having been rendered, the case was referred to a master to state and report an account of profits. Exceptions to the master's report sustained.

See, also, 178 Fed. 278, 101 C. C. A. 542.

Wetmore & Jenner, of New York City, for complainant.

Fish, Richardson, Herrick & Neave, of Boston, Mass., for defendant.

BRADFORD, District Judge. This suit is before the court on exceptions to a master's report touching profits alleged to have been made by the American Car and Foundry Company, the defendant, through its infringement of the first, third and seventh claims of letters patent of the United States No. 539,009, dated May 7, 1895, granted to Gilbert F. Quinn, assignor to the G. F. Quinn Refrigerator Company, and by mesne assignment assigned and owned by the Seeger Refrigerator Company, the complainant. The circuit court for the district of New Jersey, in 1909, sustained the validity of the above mentioned claims and decreed that they had been infringed by the defendant. (C. C.) 171 Fed. 416. On appeal this decree was affirmed. 178 Fed. 278, 101 C. C. A. 542. It having been decreed that the complainant recover of the defendant profits and damages on account of the infringement, the case was referred to a master to state and report an account of such profits and ascertain and report such damages. The master has reported that the profits made by the defendant by reason of the infringement amount to \$662,923.20. He has not reported any damages, nor have any been claimed.

In the description of the patent in suit Quinn states:

"My invention relates to improvements in a combined refrigerator and freezer, and more particularly to certain principles of construction which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

tend to increase the refrigerating and freezing power and to regulate the degree of temperature."

The essential and distinguishing feature or element in the combination of the above-mentioned claims has been stated by both the circuit court and the circuit court of appeals.

The former court said:

"The important feature of the invention is found in the form of the partition in the refrigerator between the ice bunker and the food chamber, which, as set forth in the specifications and claims, contains a series of inverted V-shaped ports, by means of which a continuous circulation of air in the refrigerator is provided.

The circuit court of appeals said:

"Quinn was the first to put between the ice bunker and the refrigerating room of a refrigerator a partition composed of a series of inverted V-shaped sections so arranged that the open spaces, to use the language of the patent, 'form, as it were, air siphons leading from the refrigerating room into the ice bunker.' It is this series of open air spaces, somewhat resembling siphons, placed between the ice bunker and the refrigerating room, that distinguishes Quinn's patent from all the earlier patents. * * * What Quinn did was to introduce into refrigerators a new method of promoting the circulation of a confined body of air by the use of the open air spaces in his partition."

The accounting period extends from October 15, 1900, to June 28, 1909, and covers the manufacture and sale by the defendant of 16,032 freight refrigerator cars, embodying the combination of the patent in suit. The entire profits derived by the defendant from the manufacture and sale of those cars was \$2,753,335.68, representing an average profit of \$171.74 per car. All these cars were sold by the defendant to railroad companies under contracts specifying that they should be provided with a certain partition known as the Bohn partition, decided in this case to be the mechanical equivalent of the Quinn partition, and, with its associated elements, an infringement of the Quinn patent. Each car was sold as an entirety including not only the body of the car but its running-gear, without any apportionment of the contract price between the two. The master, I think, has attached to the fact that the contracts under which the freight refrigerator cars were manufactured and sold by the defendant to the railroad companies required in their specifications that they should contain the Bohn partition, an unwarranted degree of importance. His reasoning from that contractual requirement, if carried to a logical extreme, would show that the complainant is entitled to recover the entire profits realized by the defendant on the 16,032 freight refrigerator cars, amounting to \$2,753,335.68, and not merely the sum of \$662,923.20 allowed by the master as profits realized by the defendant on the bodies of those cars. For the contention of counsel for the complainant and the position of the master have been that the profits which the complainant seeks to recover in this suit were realized by the defendant solely under its contracts of sale with the railroad companies, in which the Bohn partition was specified and required; that had it not been for such stipulation for infringement the cars would not have been sold to the railroad companies who thus contracted for their purchase; and that the profits actually received

by the defendant from sales under such contracts having been rendered possible solely through infringement by the defendant are, therefore, recoverable by the complainant. The counsel for the complainant in their brief say:

"The master has found and the evidence is uncontradicted that, as shown elsewhere, the entire profit of the sale of the refrigerator cars was due to the presence of the Quinn invention, because it is established that the sale could not have been made without the presence of that invention. * * * Whether or not the invention is for a whole refrigerator or for a part of a refrigerator, is immaterial, because in either case it appears most conclusively that the entire salable value of the infringing refrigerators was due to the presence of the invention; that is to say, the infringing refrigerators were the only thing that could fulfill the orders therefor which the defendant accepted, and if it had not furnished those refrigerators it could not have filled the orders and would not have made the sales for which it has been held to account. * * * The invention of the patent in suit furnished the sole element of salability that enabled the infringing refrigerator cars to fulfill an indispensable requirement of each separate contract under which said cars in every instance were sold."

[1] The idea is thus advanced by both the master and the counsel for the complainant that, where mechanism is supplied by a manufacturer under a contract and in conformity with specifications necessitating patent infringement with respect to some feature or detail included in such mechanism, without which requirement that particular contract would not have been entered into between the contracting parties, the total profits, by virtue of these facts alone are recoverable by the owner of the patent, even with respect to those parts of the mechanism not covered by the patent monopoly. I am unable to accept this proposition as a sound exposition of the law. The profits recoverable are those directly resulting from the infringement of the patent monopoly measured by the extent to which such infringement is pecuniarily beneficial to the wrongdoer. They do not necessarily include all gains of the infringer which owing to stipulations or special circumstances could not have been realized without the infringement, but only those of which the infringer can be treated as a trustee *ex maleficio*. The court would not, I think, have authority under the patent laws to award profits beyond this limit. The counsel for the defendant with respect to the theory advanced by the master and the counsel for the complainant well say:

"The theory is unsound as well as novel. Each patent owner is entitled to the profits that the infringer has made from the use of *his invention*, and to nothing else. There might be a hundred features of the defendant's car which infringed a hundred patents. The insulation, the drains, the ventilators, the door locks, door packings, all in the car body, even the kind of paint used or the structure of the walls, roof or flooring, might each be an infringement of several patents. It is certainly not the law that solely because these devices are specified in the contracts under which the defendant built the cars, the defendant must pay to each one of the patentees the entire profit on the cars. * * * The complainant's theory adopted by the master would not, in the present case, stop short of awarding the entire profits on the entire car, running gear as well as body, because, on the same reasoning, the defendant could not have performed the contract, and therefore could have made no profits on the running gear, including air-brakes, draw-bars, axle-boxes, wheels, trucks, etc., of these cars if it had not equipped them with the Bohn siphon partitions. * * * It would compel the builder

of a \$10,000,000 ocean steamship to pay his entire profits to the owner of a patented steering mechanism if infringing steering mechanism is specified in the contract for the ship. It would compel him to pay it also to every other patentee whose patent is infringed by any device specified in the contract. The building contractor of a \$50,000,000 building would be obliged to pay his entire profits to the owner of a patent which is infringed by the kind of ventilating system which the contract specifies must be used. And not only must such a contractor pay his entire profits to this patentee, but to every other patentee whose patent has been infringed by any device specified in the contract. In each and every case the patentee could have said, with the complainant and the master in this case, to the contractor:—"You could not have performed your contract if you had not infringed, and hence, because if you had gone without the contract, you would not have made any profits, all the profits which you did make belong to me."

It is unnecessary further to discuss the point just considered. Indeed, the counsel for the complainant during the oral argument admitted, as the court understood, that the mere fact that the specifications of the contracts, by requiring the introduction of the Bohn partition into the cars in question, rendered its presence in them indispensable to their sale under the contracts under which they were in fact sold, did not and does not entitle the complainant to recover from the defendant the total profits on the cars. To hold otherwise would be virtually to affirm that wherever one sells a piece of mechanism which in any respect infringes a patent the vendor can be compelled to pay to the patent owner the total profits on the sale, regardless of the general salability of the mechanism without the patented feature or features or any confusion or commingling of profits;—a proposition utterly at variance with the authorities.

The principles determining the divisibility or indivisibility of profits as between patent owner and infringer, aside from their confusion or intermingling through an omission to keep proper accounts or otherwise, are intelligible and reasonable, although in particular cases much difficulty may arise in their practical application. The cases in which, in the absence of confusion or intermingling as above mentioned, infringers have been compelled to account for the total profits realized by them from the infringing process or mechanism, are clearly distinguishable from that now under consideration. In *Carborundum Co. v. Electric Smelting & Aluminum Co.*, 203 Fed. 976, 122 C. C. A. 276, the court of appeals for the third circuit held that:

"On an accounting for profits, and not for damages, in a case of infringement, where profits to the infringer are impossible save through his infringement, he must be treated as a trustee *ex maleficio* and can withhold none of his gains from the patentee."

But that court, while recognizing that in the case of mechanical inventions "where the entire commercial value of the mechanism arises from the patented improvement the owner of the patent will be entitled to recover from the infringer the total profits derived from the manufacture, use or sale of such mechanism," declared that "where the infringed patent covers a mere improvement upon mechanism before known and open to the defendant to use the complainant can recover only the excess of such profits as have been realized through the use of the improvement over what the defendant might have made by

the use of such mechanism without such improvement." In the carborundum case the patent in suit covered a new process for the production of an entirely new and useful chemical compound—carborundum—and every pound or ounce of that material manufactured by the infringer was wholly the result and embodiment of the infringement. *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000, bears a strong analogy to the carborundum case on the question of the right to recover total profits. There the court dealt with a patented combination product in its essential nature unitary and entire. Mr. Justice Bradley said:

"The Nicholson pavement was a complete thing, consisting of a certain combination of elements. The defendants used it as such,—the whole of it. * * * Nicholson's pavement, as before said, was a complete combination in itself, differing from every other pavement. The parts were so correlated to each other, from bottom to top, that it required them all, put together as he put them, to make the complete whole, and to produce the desired result. The foundation impervious to moisture, the blocks arranged in rows, the narrow strips between them for the purposes designated, the filling over those strips, cemented together, as shown by the patent,—all were required. Thus combined and arranged, they made a new thing, like a new chemical compound. It was this thing, and not another, that the people wanted and required. * * * It is not the case of a profit derived from the construction of an old pavement together with a superadded profit derived from adding thereto an improvement made by Nicholson, but of an entire profit derived from the construction of his pavement as an entirety."

So in *Hurlbut v. Schillinger*, 130 U. S. 456, 9 Sup. Ct. 584, 32 L. Ed. 1011, where the defendant had made gains from laying a pavement in violation of the plaintiff's patented invention, and it appeared that if the pavement had not been laid in that way it would not have been laid at all, it was held that the profit made was a single profit, derived from the construction of the pavement as an entirety, and consequently all of it was awarded to the plaintiff. Equally where the whole commercial or marketable value of infringing mechanism arises from a patented improvement, the owner of the patent is entitled to recover from the infringer the total profits made from the manufacture and sale of such mechanism. In *Crosby Valve Co. v. Safety Valve Co.*, 141 U. S. 441, 454, 12 Sup. Ct. 49, 53 (35 L. Ed. 809), the court said:

"It appearing that the defendant's valve derived its entire value from the use of the Richardson invention covered by the patent of 1866, and that the entire value of the defendant's valve, as a marketable article, was properly and legally attributable to that invention of Richardson, the plaintiff is entitled to recover the entire profit of the manufacture and sale of the valves."

Callaghan v. Myers, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547, though a copyright infringement case, is in principle in line with the foregoing authorities.

[2-6] The complainant contends that the claims in suit cover not only the Bohn partition but the entire car body as a combination. The mere fact that the mechanism embodied in the car body is a combination is not decisive on the point of the divisibility or indivisibility of profits resulting from its manufacture and sale by the defendant. There is no natural or logical connection between the entirety of a patented mechanical combination with respect to infringement, and

the divisibility or indivisibility of the profits realized through its infringement. The combination is an entire and indivisible entity, and in order that infringement may occur the infringing mechanism must contain all of the elements of the combination as shown or their mechanical equivalents, co-operating or co-acting in substantially the same manner, to produce a result of substantially the same nature. There can be no infringement by the use of any one or more, but not all, of the elements. In this sense the combination is unitary and entire. But the elements entering into such mechanical combination may all be new, or one or more of them old and the rest new, or all of them old. And where the elements of a combination are all old and well-known and the combination is also old and well-known, patentability may be imparted to it by an inventive alteration or improvement of one or more of the elements whereby the utility of the combination is increased. In such case the essence of the invention so far as the one making the improvement or alteration is concerned, and in its bearing upon the division of profits in case of infringement, inheres in and is confined to the element or elements as so altered or improved; although where the case from its nature is not susceptible of an apportionment of profits, or where from failure to keep proper accounts, or other cause, it becomes impossible to establish the amount of profits on the combination attributable to such improvement or alteration, the complainant may be decreed to recover the entire profits from the infringer. If the mere fact of an infringement of a patented combination entitles the patent owner to recover total profits from the infringer, upon the ground that any patented combination is an indivisible entity or entirety, it would afford a strong inducement to a grasping inventor of a small and insignificant improvement to include in his claims, not merely the thing invented by him, but a combination including among its elements that thing in conjunction with sundry old and well-known things, and to claim total profits upon the whole combination. For the purpose of ascertaining the measure of profits or damages recoverable in cases of infringement it is the duty of the court to regard the real nature of the invention of the patentee, as constituting a mere improvement in or addition to an old device, or, on the other hand, in a substantial sense a new and entire combination. Much of the argument on the part of the complainant has been based upon the proposition that the alteration or improvement introduced by Quinn changed the old combination and made the combination of the patent in suit a new and distinct entity. This in a sense is true, but only in the sense in which any improvement in an element of an old combination, which renders it patentable, necessarily converts it into a distinct entity. Referring to the placing in freight refrigerator cars of the Quinn partition with its V-shaped air ducts or passages—although decided in this case to have been meritorious—as the introduction of a “siphonic-system,” is calculated to mislead by creating an exaggerated notion of the scope of Quinn’s improvement. The construction of the partition of the patent in suit facilitated and promoted the circulation of air throughout the refrigerator with much greater efficiency than did the earlier partitions, and its utility and value as an advance in the art

have been authoritatively recognized and declared in this suit. But notwithstanding what has been said, the gist or essence of Quinn's invention lies in the construction or arrangement of the partition separating the ice bunker from the refrigerating room. There are several things about which on the evidence, there can be no serious question. The Quinn invention did not "inhere in" and include an entire refrigerator car body "as an entity," or convert the car body into an entire structure constituting a new article of manufacture, but was "only an improvement in a single element of an otherwise well-known device." Indeed, no mention of a car or car body is made in any part of his patent. The essence of his invention, as appears from the opinion of the circuit court of appeals and the lower court, was a new form of partition between the ice bunker and food chamber promotive of the circulation of air. Quinn states in his patent that by reason of his improvements—

"a continual circulation of air is obtained passing from the refrigerating room through the spaces in the partition into the bunker, and thence through the bottom of the bunker and back into the refrigerating room, cold and dry."

The underlying principle which imparts efficiency to the mechanism is the tendency of cold air to fall and warm air to rise owing to the difference in their specific gravity; the air chilled in the ice bunker descending and passing therefrom into the lower portion of the refrigerating room and thence circulating and rising with its increasing temperature until it enters the ice bunker through the air ducts in the partition and again descending under the influence of the lower temperature, thus maintaining a steady circulation of cold air in the refrigerating room. Precisely the same principle of specific gravity of the air as affected by varying temperature underlies the early forms of mechanism used for causing circulation of the air in refrigerator cars. The form and arrangement of the partition of the patent in suit are improvements on what had gone before and constitute a meritorious advance in the art, but, whether the heated air in going from the refrigerating room into the ice bunker, or the chilled air in going from the ice bunker to the refrigerating room, should pass through horizontal passages, or passages slanting only in one direction, or V-shaped passages, or siphon-shaped passages, or respectively over the top and under the bottom of the partition, involves merely a question of varying methods of varying efficiency and utility in promoting the desired circulation of air on the common underlying principle referred to. The choice of one of those methods rather than another, whether termed a siphonic system or not, could not convert the car body into "an entire structure constituting a new article of manufacture."

[7, 8] The entire value of the refrigerator car body as a salable and marketable article, in conjunction with the running gear, was not in law or in fact attributable to the invention of the patent in suit. It appears that during the accounting period the defendant, in addition to the infringing cars, made and sold many thousand freight refrigerator cars, equipped with plain non-infringing partitions between the ice bunker and food chamber, with an open space at the bottom to permit the cold air to pass from the ice bunker into the food chamber,

and an open space at the top to permit the comparatively warm air to pass from the food chamber into the ice bunker, thus maintaining the circulation of air in the car body, and that whatever difference in efficiency for refrigeration existed between the infringing and non-infringing cars was but slight. And there is evidence given by the assistant general manager of the defendant November 21, 1911, that the defendant was then engaged in filling an order for 2,500 freight refrigerator cars provided, not with the Bohn partition, but with a plain partition or bulkhead. Under these circumstances this case called for an apportionment if practicable of profits as between the complainant and defendant in accordance with the principles of law and equity applicable to the subject. Where mechanism, consisting of a mechanical combination, is old and open to be made, used and sold by the public, and one of its elements is so improved as to confer patentability upon the combination, as a whole, but such improvement, while increasing the efficiency or value of the mechanism over what was before known or used, does not change its function or affect the principle of its operation, the owner of the patent in seeking only to recover profits from an infringer of the combination is limited to the excess of profits realized by him from the manufacture, use or sale of the mechanism, as so improved, over what he might or would have made from the manufacture, use or sale of the old mechanical combination. *Garretson v. Clark*, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371; *Maier v. Brown* (C. C.) 17 Fed. 736; *Westinghouse v. New York Air Brake Co.*, 140 Fed. 545, 72 C. C. A. 61; *Westinghouse Co. v. Wagner Mfg. Co.*, 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653; *Brinton v. Paxton*, 134 Fed. 78, 67 C. C. A. 204; *Star Salt Caster Co. v. Crossman*, 4 Ban. & Ard. 566; *Baker v. Crane Co.*, 138 Fed. 60, 70 C. C. A. 486. In *Maier v. Brown*, supra, the invention found to have been infringed consisted in "covering the frame of the trunk with narrow strips of wood laid in close proximity to each other all around its top and sides." The master allowed the complainant the entire profits made by the defendant in the manufacture and sale of trunks covered by the patent. The court disapproved of the action of the master, saying, through Judge, afterwards Mr. Justice, Brown:

"There is no doubt whatever of the general proposition that the patentee of an improvement is limited in his recovery to such profits as may be properly apportioned to the use of his improvement. He can only recover profits upon the entire article when such article is wholly his own invention, or when its entire value is properly and legally attributable to the patentable feature. * * * The difficulty is in the application of this principle. Thus, if one discovers a new composition of matter, such as gun-cotton, nitro-glycerine, or vulcanized rubber, or invents some new machine, such as the telephone, or some new article of manufacture, such as barbed wire, or a new pavement, he would obviously be entitled to damages arising from the manufacture and sale of the entire article. Upon the other hand, if his invention were limited to some particular part of a large machine, such as the cut-off of an engine, the axle of a wagon, or the seat upon a mowing-machine, it is equally clear that his recovery must be limited to such profits as arise from the manufacture and sale of the patented feature. His damages, too, must be proved, and not left to conjecture; and the fact that it is impossible to separate the profits arising from the improvement from those incident to the manufacture of the whole machine, is an insufficient reason for awarding the plaintiff more than he is entitled to receive. * * * In case he is unable to prove

how much of the entire profit upon the machine is due to his patent, he can recover only nominal damages. * * * The invention is described as a rustic trunk, but in fact it consisted of nothing more than attaching to an ordinary frame strips of wood laid in close proximity to each other, at right angles to the grain of the trunk, thereby increasing its strength, durability and beauty, and diminishing to some extent the cost of its manufacture. These slats (for they were all that was claimed as new) composed but a small part of the entire trunk, and took the place only of an ordinary leather covering. There was still the frame, the lock, hinges, catches, lining, trays, boxes, and interior decorations unaffected by the patent. We are bound to infer there was a profit upon the manufacture and sale of these as well as the plaintiff's attachment."

In the leading case of *Garretson v. Clark*, supra, the court said:

"When a patent is for an improvement, and not for an entirely new machine or contrivance, the patentee must show in what particulars his improvement has added to the usefulness of the machine or contrivance. He must separate its results distinctly from those of the other parts, so that the benefits derived from it may be distinctly seen and appreciated. The rule on this head is aptly stated by Mr. Justice Blatchford in the court below. 'The patentee,' he says, 'must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature.' The plaintiff complied with neither part of this rule. He produced no evidence to apportion the profits or damages between the improvement constituting the patented feature and the other features of the mop. His evidence went only to show the cost of the whole mop, and the price at which it was sold. And, of course, it could not be pretended that the entire value of the mop-head was attributable to the feature patented."

To fully appreciate the significance of the language used by the Supreme Court in that case it is necessary to refer to what transpired in the court below. *Garretson v. Clark*, 15 Blatchf. 70, Fed. Cas. No. 5,248. The report of the master and the decree of that court allowed the complainant only nominal damages and this decree was affirmed. Infringement of two combination claims was found. Judge, afterwards Mr. Justice, Blatchford, among other things, said:

"The master states, and the record shows, that all the evidence offered by the plaintiff, has been with the view of showing the damages to him and the profits to the defendants, in the manufacture of the infringing mop as a whole. * * * The plaintiff has excepted to the master's report. The exceptions insist that the actual damages to the plaintiff, for the mops made and sold by the defendants in infringement, which the plaintiff would have made and sold but for the infringing manufacture and sale by the defendants, are the difference between what the manufacture and sale of such mops would have cost the plaintiff, and the amount for which the plaintiff would have sold such mops; and that the amount of the profits made and received by the defendants, by reason of the infringement adjudged, is the difference between what the manufacture and sale of the infringing mops made and sold by the defendants cost the defendants, and the amount for which the defendants sold said infringing mops. * * * It is a weak point in the argument for the plaintiff, that it assumes, without sufficient evidence, that the market for the plaintiff's mop was made solely by the fact that the mop contained the improvements patented by the plaintiff's patents. This would not follow, even from the fact that the mop, with such improvements, had driven other mops out of the market. Energy, diligence, business tact, supe-

rior facilities and skill, and fortuitous circumstances, contribute largely to the success in the market of even an article which has all the superiority in its line, that is claimed for the plaintiff's mop. * * * The argument on the part of the plaintiff leads to the conclusion, that, when an article or a machine, with a given patented improvement embodied in it, has a controlling preference in the market, over the article or machine which does not embody such improvement, it must be conclusively inferred that such preference is due to the improvement; and that the patentee, in case of infringement, is entitled to the profits made by the infringer from the manufacture and sale of the whole article or machine, and is entitled, as damages, to the profits he would have made on the manufacture and sale of an equal number of entire articles or machines made and sold by the infringer. This would often cause a small improvement on a costly machine to draw to itself very large profits, entirely out of proportion to the relation existing between the improvement and the rest of the machine, and, in cases where the unpatented parts of the machine were quite as indispensable to the machine as the patented improvements, and even more indispensable, the profit on the entire machine would virtually become the license fee for the use of the patented improvement. In the case of a machine embodying several patented improvements, in infringement of several patents belonging to several different persons, each patentee would claim that it was his particular patented improvement which caused the machine to dominate the market, and each would claim the profits of the manufacture and sale of the entire machine, and damages based on the same principle."

In *Westinghouse v. New York Air Brake Co.*, supra, it was held that the burden of proving apportionment of profits for infringement of a patent for a device which constitutes only one feature of the machine or structure sold by the defendant rests on the complainant. This case follows *Garretson v. Clark*, supra. Only nominal profits were allowed. Among other things, the court said:

"The cases are exceedingly rare in which the whole marketable value of a machine, or of a collection of devices, can in reason be attributable to a patented feature which embraces merely an improvement in one of its parts. Marketable value is ordinarily the result of various conditions independent of the normal value of the machine itself, and the contribution which the patented part gives to marketable value is necessarily dependent more or less upon these conditions. Enterprise, exploitation, and business methods in introducing and marketing the thing are generally as important a factor in its intrinsic value."

In *Westinghouse Co. v. Wagner Mfg. Co.*, supra, the court after referring to certain classes of cases in which the total profits should be recovered from the infringer, say:

"But there are many cases in which the plaintiff's patent is only a part of the machine and creates only a part of the profits. His invention may have been used in combination with valuable improvements made, or other patents appropriated by the infringer, and each may have jointly, but unequally, contributed to the profits. In such case, if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains. He must, therefore, give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature." *Garretson v. Clark*, 111 U. S. 120 [4 Sup. Ct. 291, 28 L. Ed. 371]."

[9] *Westinghouse Co. v. Wagner Mfg. Co.* has established an important modification of the doctrine of the earlier cases touching the burden resting on a complainant to apportion profits realized through infringement. But it is believed that case fully supports the following propositions. Where the essential nature of a case in which infringement has occurred precludes an apportionment of profits, the complainant, having shown profits, is entitled to recover all of them from the infringer as a trustee ex maleficio. But where the nature of the case does not per se exclude the possibility of a just apportionment, and whatever difficulty exists grows out of special circumstances, a complainant can recover the entire profits only after showing that the infringer has realized profits, and making every reasonable effort, though unsuccessfully, to apportion the amount attributable to the patented invention. A complainant "who has exhausted all available means of apportionment, who has resorted to the books and employes of the defendant, and by them, or expert testimony, proved that it was impossible to make a separation of the profits," may entitle himself to the total profits from the infringement, but the burden of proof is not shifted from the plaintiff to the defendant "until after the plaintiff has proved the existence of profits attributable to his invention and demonstrated that they are impossible of accurate or approximate apportionment." Some stress was laid by the counsel for the complainant on *Maimin v. Union Special Mach. Co.*, 187 Fed. 123, 109 C. C. A. 41, decided by the circuit court of appeals for the third circuit. That case, however, is clearly distinguishable from this and does not control the decision here. Elements of fraud and unfair competition largely entered into it and in other respects it differed in principle from the present case. The court said:

"This state of facts is unique, and complainant's equities must be determined with reference thereto. It is not necessary to dwell upon the moral delinquency involved by the purchase of old, second-hand machines, some with and some without the device characterizing the patent in suit, taking them apart, sending the parts to japanners to be rejapanned or renicked, reassembling the parts so as to change the machine from one gauge to another, and from one class to another, taking brass medallions from other machines broken too badly for repair and placing them upon the machines thus made up, renumbering them, in the effort to make them correspond with complainant's regular class numbers for that particular type of machine, so that they would look like new machines, and selling them specifically as complainant's own machines and under complainant's name. It is only necessary to observe that these are findings of fact unassailed by any assignments of error, and being facts, they render the infringement by the defendant, as found by the master, one of a peculiarly aggravated character."

Maimin v. Union Special Mach. Co. presents the case of an infringer clearly within the category of those referred to in *Westinghouse Co. v. Wagner Mfg. Co.*, "who had concealed or destroyed evidence or been guilty of gross wrong." Further, the utility of a patented improvement and its value do not of themselves establish as against an infringer the derivation by him of profits from its infringement. In *Westinghouse Co. v. Wagner Mfg. Co.*, supra, the court said:

"The plaintiff proved its patent, and that it had been infringed by the defendant in the manufacture of several thousand transformers which sold

for \$955,000. The patent was itself evidence of the utility of claim 4, and the defendant was estopped from denying that it was of value. *Lehnbeuter v. Holthaus*, 105 U. S. 94 [26 L. Ed. 939]. But no matter how great its presumptive or actual value, it did not follow that the defendant had made a profit by the sale of the infringing transformers. And so, having sued for profits, the Westinghouse company was under the burden of showing they had been made."

[10] It was necessary that the complainant in this case, in order to obtain a decree for more than a merely nominal amount, should prove that profits were made by the defendant from the manufacture and sale of the 16,032 freight refrigerator cars, by reason of the Bohn partition, in excess of such profits as might and probably would have been made by the defendant from the manufacture and sale of the same number of cars similar save for the use of a plain partition open to the public instead of the Bohn partition. It was further necessary that the complainant should prove or make all reasonable efforts to prove the amount of such excess of profits, if any, in order to ascertain the share of profits attributable to the patented improvement, and reach a proper basis for an apportionment. But the complainant did neither. No such apportionment or attempt at apportionment was made. On the contrary, the master assumed a position in accordance with the contention of counsel for the complainant that was fatal to the making of any logical or proper apportionment. On the unwarranted assumption, as it seems to me, that, from the mere fact that the defendant made and sold the 16,032 freight refrigerator cars under specifications requiring the Bohn partition, the complainant was entitled to recover the total profits on the entire car or car body, he discarded all idea of a legitimate apportionment of profits between the parties, stating—what might well be a corollary from that assumption—that:

"The equitable principle invoked, upon which defendants, who have mingled wrongful profits with rightful ones inextricably, are liable for the whole, does not, it is found, come into the present case."

Not only did this case require an apportionment if practicable, but the burden of showing the amount of profits realized attributable to the Bohn partition rested primarily on the complainant. The complainant failed to sustain the burden of proof, or of reasonable effort to apportion required of him by the law. At the commencement of the taking of evidence on the accounting April 11, 1910, the counsel for the complainant moved that the defendant be directed and required by the master to file a verified statement showing, among other things, the following particulars relating to infringing freight refrigerator cars manufactured and sold by the defendant during the accounting period:

"5. The price per car received on each sale. 6. The total cost per car on each sale, including a separate statement of each item going to make up such cost. 7. The profit per car made by the defendant on each sale. 8. The cost of the superstructure per car to the defendant on each sale. 9. The profit per car made by the defendant on the superstructure of the cars on each sale. 10. The cost to the defendant per car of the trucks, bolsters, brakes, etc., apart from the superstructure on each sale. 11. The profit made by the defendant on the trucks, bolsters, etc., and apart from the superstructure on each sale."

The term "superstructure" was defined in the motion as "the containing part of the said cars, including the outside case or walls as distinguished from the running equipment, consisting of the trucks, bolsters, brakes, etc." Thus the complainant, though applying for a statement showing the price received per car, its total cost and each item going to make up such cost, the profit on the entire car, the cost of and profit on the body of the car, and the cost of and profit on the running-gear, did not in terms or in substance ask whether any profit was made by the defendant by reason of and attributable to the use of the Bohn partition, or what was the amount of the profit so made and attributable, and whether, and to what extent, such profit was in excess of that which might and probably would have been made by the defendant if using a plain partition. The above mentioned application of the complainant elicited from the defendant a statement to the effect, aside from other things unnecessary to consider in this connection, that it had during the accounting period manufactured and sold 16,032 infringing freight refrigerator cars, besides a number of others excluded from the accounting; that excluding devices furnished by the railroad companies the average cost to the defendant of the 16,032 freight refrigerator cars was approximately \$914.38 per car, and their average selling price \$1,086.12 per car; and that it might be assumed for the purpose of the accounting that—

"of the total average cost of the refrigerator freight cars, namely, \$914.38, the cost of the 'car body' and its internal equipment (said 'car body' including beams of the floor known as 'sills' in a wooden car and as 'nailing strips' in a steel car, but excluding trucks, body bolster, brake mechanism, couplers, draft rigging, etc., and the parts below said sills and nailing strips), was, approximately, \$470.90."

In this statement there is absolutely nothing to show or calculated, directly or indirectly, to show, or furnish a basis for showing either the existence or amount of any profit to the defendant attributable to the use of the Bohn partition. As before stated in effect, the fact that the Quinn partition is the essence of the invention of the patent in suit does not prove that the defendant made a profit—much less its amount—through the infringement of its claims. *Westinghouse Co. v. Wagner Mfg. Co.*, *supra*. The master did not find the Bohn or Quinn partition indispensable to the salability of freight refrigerator cars, not manufactured under a stipulation that it should be used. There is no evidence that the amount of profits attributable to the use of the Bohn partition, if any existed, could not have been shown by the complainant. Evidence that such partition cost more than older forms of partition cannot of itself show profits on the manufacture and sale of the car or car body. The complainant did not show or attempt to show what, other things being equal, was the difference, if any, between the profits from the manufacture and sale of freight refrigerator cars containing the Bohn or Quinn partition and the profits from freight refrigerator cars provided with the older partitions not containing the V-shaped ports. The White Enamel Refrigerator Company made the Bohn partition, the use of which in the freight refrigerator cars manufactured and sold by the defendant involved the latter in infringement

of the combination of the patent in suit. It was probable that the officers and employes of the White Enamel Refrigerator Company, if any one, had some knowledge, actual or expert, of the profits on such cars or car bodies derivable from the use of the Bohn partition. Under the doctrine recognized by the Supreme Court the complainant would not have been held down to absolute accuracy or the strictest proof in establishing the existence of profits and the amount thereof, approximate or exact, as against an infringer. It might not only have resorted to the books and employes of the defendant, or to expert testimony, but also have examined the officers and employes of the White Enamel Refrigerator Company and of the railroad companies making use of the infringing combination in order to show, exactly or approximately, the profits attributable to the Bohn partition. But the complainant did none of these things. It made no serious effort to prove profits attributable to the Bohn partition, or to establish their amount and proper apportionment. It failed to comply with a condition precedent to its right to recover more than a merely nominal sum for the infringement. It does not occupy the position of one "who has exhausted all available means of apportionment, who has resorted to the books and employes of the defendant, and by them, or expert testimony, proved that it was impossible to make a separation of the profits" and "has proved the existence of profits attributable to his invention, and demonstrated that they are impossible of accurate or approximate apportionment." *Westinghouse Co. v. Wagner Mfg. Co.*, supra. What the master did was this: Taking the cost of the whole car, the cost of the car body, and the profits on the whole car, he arbitrarily applied the rule of three, reaching the result that the profit on each car body was \$88.44, and, the complainant having offered to deduct from such profit \$47.09, or 10 per cent. of the cost of the car body "for manufacturer's profits" allowed the remaining \$41.35 as profits recoverable on each car body, aggregating \$662,923.20, the amount awarded to the complainant. This was a purely "conjectural or speculative" and, as such, inadmissible finding of profits. Even were it assumed that such a method of computation could legitimately be resorted to under any circumstances in the case of infringement of mechanical devices or combinations it could be only after proper effort by a complainant to establish a just and approximately accurate apportionment.

I have reached the conclusion that the fifty-sixth exception of the defendant to the master's report, based upon his failure to find that the complainant was entitled to recover of the defendant only a nominal sum on the accounting, must be sustained and the report set aside. It is needless to refer to any of the other exceptions.

In view of this conclusion it is unnecessary to consider the Ames patent No. 625,309. The complainant is entitled to recover from the defendant the nominal sum of six cents, together with its costs of this suit, excepting such as are involved in the accounting, and the defendant is entitled to recover from the complainant its costs involved in such accounting. *Garretson v. Clark*, 15 Blatchf. 70, Fed. Cas. No. 5,248; *Dobson v. Hartford Carpet Co.*, 114 U. S. 439, 5 Sup. Ct. 945,

29 L. Ed. 177; *Dobson v. Dornan*, 118 U. S. 10, 6 Sup. Ct. 946, 30 L. Ed. 63. Let a decree in accordance with the views expressed in this opinion be prepared and submitted.

KLOCK PRODUCE CO. v. HARTSON, Internal Revenue Collector.

(District Court, W. D. Washington, S. D. April 2, 1914.)

No. 1848.

INTERNAL REVENUE (§ 38*)—PAYMENT UNDER PROTEST—ACTION—INTEREST.

An action against a collector of internal revenue to recover taxes and penalties paid under protest is not an action against the United States until after final judgment and a certificate from the trial court that there was probable cause for the collection of the tax, when it becomes a claim against the United States, prior to which time plaintiff is entitled to recover interest, unless a review of the judgment by an appellate court is obtained, in which event the judgment on the mandate of the appellate court will be treated as a final judgment, to the rendition of which interest will be allowed, unless plaintiff unduly delays the presentation of his claim.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. § 38.*]

At Law. Action by the Klock Produce Company against Millard T. Hartson, as Collector of Internal Revenue for the District of Washington. On motion for a new trial. Denied.

Frank S. Griffith, of Seattle, Wash., for plaintiff.

Clay Allen, U. S. Atty., of Seattle, Wash., and George P. Fishburne, Asst. U. S. Atty., of Tacoma, Wash., for defendant.

CUSHMAN, District Judge. Verdict was recovered by plaintiff against the defendant, who, as collector of internal revenue, under threats of distraint and over plaintiff's protest, wrongfully compelled the payment of certain taxes and penalties for the manufacture and sale of butter, claimed by the defendant to be adulterated. Appeal was taken by the plaintiff to the Commissioner of Internal Revenue, and, upon the failure of that officer to direct the refunding of the money so exacted, this suit was brought.

Interest is included in the verdict. The defendant now moves for a new trial; the main contention being that interest should not be allowed.

Plaintiff relies on the case of *Erschine v. Van Arsdale*, 15 Wall. 75, 21 L. Ed. 63, in resisting the motion for a new trial.

Defendant cites *Commissioners of the Sinking Fund of Louisville v. Buckner* (C. C.) 48 Fed. 533; *U. S. ex rel. Angarica v. Bayard*, 127 U. S. 251, 260, 8 Sup. Ct. 1156, 32 L. Ed. 159.

The latter case, cited by defendant, gives no support to his contention. In that suit the Secretary of State, pursuant to agreement between the United States and Spain for the settlement of certain claims, made by citizens of the United States, received a sum of money. One of the claimants sued to compel the payment of interest derived from

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the investment of the sum eventually paid the petitioner. In such case the suit was virtually against the United States. There was no claim of wrongful exaction under duress.

Neither does the case of the Commissioners of the Sinking Fund of Louisville v. Buckner (C. C.) 48 Fed. 533, support the motion. For, while that was a suit for the recovery from the collector of internal revenue of a tax wrongfully collected, yet the tax was paid without protest, demand for repayment, or appeal to the Commissioner of Internal Revenue for its refunding. The suit was brought under the authority of a special act of Congress for the relief of plaintiff. In the course of the opinion, it is stated:

"This claim must be considered as one against the United States, because, if it be regarded as one against the collector individually, it cannot be sustained at all. * * *

"We, however, think that, if the United States is liable for interest at all, it can only be from the time of a protest, if one is made, or from the refusal to refund, after the appeal to the commissioner under section 3220 [U. S. Comp. St. 1901, p. 2086]."

The case now before the court is rather controlled by the following authorities: *Erskine v. Van Arsdale*, 15 Wall. 75, 21 L. Ed. 63; *Cochran v. Schell*, 107 U. S. 625, 626, 628, 2 Sup. Ct. 827, 27 L. Ed. 543; *Redfield v. Ystalyfera Iron Co.*, 110 U. S. 174, 176, 3 Sup. Ct. 570, 28 L. Ed. 109; *Redfield v. Bartels*, 139 U. S. 694, 701, 11 Sup. Ct. 683, 35 L. Ed. 310; *Penn. Co. for Ins. on Lives, etc., v. McClain* (C. C.) 105 Fed. 371, affirmed 108 Fed. 618, 47 C. C. A. 529; *Shanley v. Herold* (C. C.) 141 Fed. 423, 430, affirmed 146 Fed. 20, 24, 76 C. C. A. 478; *White v. Arthur* (C. C.) 10 Fed. 80, 90. These cases hold that a suit, such as the present one, is, in effect, one not against the United States; that it will not be considered as such until after final judgment and a certificate from the trial court that there was probable cause for the collection of the tax; that, upon such certificate being given, it becomes a claim against the United States, stopping the right to further interest, unless a review of the judgment by an appellate court is obtained, in which event the judgment upon the mandate of the appellate court will be treated as a final judgment, to the rendition of which interest will be allowed, unless the plaintiff unduly delays the presentation of his claim.

The motion for a new trial is denied.

THE BALTIC.

(District Court, S. D. New York. March 21, 1914.)

1. SHIPPING (§ 115*)—CARRIAGE OF GOODS—LIABILITY FOR NONDELIVERY.

The failure of an importer, who had paid the duty on perishable goods billed to arrive on a designated vessel to adjust with the customs officers on the arrival of a part of the goods on a later vessel, and the failure to remove the later arriving goods within a reasonable time, were an abandonment of the goods, defeating a claim for nondelivery, though a bill of lading was not delivered.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 433; Dec. Dig. § 115.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. SHIPPING (§ 120*)—CARRIAGE OF GOODS—LIABILITY FOR LOSS.

Where imported goods were so negligently confused by being mixed with other shipments of a like character that the consignee could not find and remove all his goods, the carrier was liable for the loss sustained by the condemnation of the goods by the health department.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 226, 440-448, 466; Dec. Dig. § 120.*]

In Admiralty. Libel in rem for conversion of merchandise by William N. White and another against the steamship Baltic, White Star Line; the Oceanic Steam Navigation Company, claimant. Decree for libelants.

Charles Caldwell, of New York City, for libelants.

Burlingham, Montgomery & Beecher, both of New York City (George R. Allen and Roscoe H. Hupper, both of New York City, of counsel), for claimant.

HAZEL, District Judge. I think it is fairly shown that 93 of the missing bags of potatoes, marked W & S with B underneath, came on the Cedric, and that libelants had due notice of their arrival. The belief of the libelants that the entire shipment of 1,176 bags of potatoes arrived on the steamer Baltic, and that part of this consignment was mixed with other bags similarly marked, and delivery thereof made to Bennett, is, I think, erroneous.

[1] Forwarding the bags short shipped by the Baltic on the next departing steamer was within the legal rights of the claimant, and under the bill of lading it was libelants' duty to accept delivery thereof on the wharf and to remove same with reasonable promptitude. While it is true libelants sent their employés to receive the bags of potatoes which they were informed were at the pier, yet until the customs duty was specifically paid thereon the claimant was not obliged to deliver the commodity, and they cannot now excuse their failure to comply with the statute relating to the payment of duty by showing that they had previously paid the duty on 130 bags billed to arrive on the Baltic, 93 of which were the bags in question. They should have adjusted the question of duty with the customs officials on the arrival of the later shipment by transferring thereto the customs duties paid on the 130 bags expected on the Baltic, and should not have insisted that this task devolved upon the claimant. In my estimation the failure to pay the customs duty on the potatoes arriving on the Cedric and to remove them within a reasonable time constituted an abandonment. The cargo was by its nature perishable, and libelants are presumed to have been aware of the regulations of the Health Department authorizing seizure and destruction of decayed cargo, and of the provisions of the Treasury Department for the seizure by customs officials of goods upon which duty remains unpaid. Omission to specifically pay duty on the 93 bags is not excused by reason of the fact that a bill of lading therefor was not delivered to libelants, inasmuch as the so-called short shipped potatoes were included in the original bill of lading.

[2] It is, however, thought to be fairly shown that the 17 bags of potatoes arriving on the Baltic and condemned by the Health Depart-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ment should have been delivered to libelants' employés with the major portion of the consignment. Such delivery could easily have been made if the bags had not been mixed with other shipments of a like character when the cargo was discharged. If it had not been for such negligent confusing of consignments, libelants' employés no doubt would have found and removed all the bags marked W & S with B underneath.

My conclusion is that libelants should recover from the claimant, the Oceanic Steam Navigation Company, Limited, the value at the New York market price, \$42.50, of the 17 bags of potatoes condemned by the health department, which concededly arrived on the Baltic and were not promptly delivered, together with the sum of \$10 carting expenses incurred by delayed delivery, for which amount libelants may have a decree, with one-half costs.

In re WATERS-COLVER CO.

(District Court, E. D. New York. March 14, 1914.)

BANKRUPTCY (§ 244*)—PROCEEDINGS—WITNESSES—EXAMINATION—EXAMINATION OF TESTIMONY.

Bankr. Act July 1, 1898, c. 541, § 39 (9), 30 Stat. 555 (U. S. Comp. St. 1901, p. 3436), and General Order 22 (89 Fed. x, 32 C. C. A. xxv), provides that the referee shall make a record of proceedings before him, and shall take the substance of examinations down in longhand, unless they are taken stenographically, if the testimony is to be preserved, and also requires that the testimony, after being taken down, shall be read over and signed by the witness in the presence of the referee. *Held*, that the transcript of the testimony so taken becomes a record as a filed paper in the bankruptcy proceedings only when signed and sworn to, and the witness is entitled to read it before he is compelled to sign it.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 244.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Waters-Colver Company. Application by one McElroy to examine the minutes of his testimony taken before the referee under Bankr. Act, § 21a. On application to review. Referee's decision that the application should be granted sustained.

See, also, 206 Fed. 845.

Frederick L. Cramer, of New York City, for applicant.

Alexander & Ash, of New York City, for trustee.

CHATFIELD, District Judge. Application has been made by one McElroy to examine the minutes of his testimony taken under section 21a in the above-entitled proceeding.

It appears that certain litigation is pending with this party, and that the trustee has objected, upon the ground that the witness is not a creditor of the estate, but, on the contrary, owes money to the estate, and that he has made no attempt to prove a claim within the time for so doing.

The referee has reported that, while McElroy is not a party in interest, nevertheless he should be allowed to examine the testimony, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

upon the application to review his decision the trustee cites such cases as *In re Sully*, 152 Fed. 619, 81 C. C. A. 609, and *In re Chandler*, 138 Fed. 637, 71 C. C. A. 87, to show that a person having no claim against the estate is not a party in interest.

The statute provides—sections 47 (5) and 49—that parties in interest may inspect the records in the hands of the trustee and that the trustee must give information to parties in interest at any time. The applicant points out the fact that the words “party in interest” may include persons entitled to appear, even though they have no provable claim (such as a party opposing discharge). *In re Nathanson* (D. C.) 155 Fed. 645; *In re Meyer* (D. C.) 181 Fed. 904.

In this sense a person using what would have been a provable claim as a set-off to a debt owed by him to an estate is certainly a party interested in the proceedings, and would have the right to inspect any pertinent records or papers on the subject of the claim against which he is urging his own claim as set-off. But, further than this, the statute requires the referee to make a record of proceedings before him, and by section 39 (9) and General Order 22 (32 C. C. A. xxv, 89 Fed. x) he must have examinations taken down in substance in longhand, unless they are taken stenographically, if the testimony is to be preserved. By General Order 22 the referee is required to have the testimony taken, read over, and signed by the witnesses in the presence of the referee. This testimony then becomes manifestly a filed paper, so far as the record of the proceedings is concerned, and the witness should be given the right to read the testimony before he is compelled to sign it.

The General Order could hardly contemplate that testimony should be taken by a stenographer, the witness given no chance to sign it, and then that the trustee insist on treating the typewritten copy as a part of the record of the case, before it has been read over and corrected. This does not affect at all proof in a proper way of the testimony as given, where a charge of perjury or contradiction of the testimony as taken is involved.

The referee's action in allowing the witness to inspect his testimony will be upheld, and, if any question arises, the witness should be directed to sign and swear to the testimony before it is treated as a record capable of proving itself.

In re BEAHN.

(District Court, D. Massachusetts. December 17, 1912.)

No. 18,436.

BANKRUPTCY (§ 143*)—LIQUOR LICENSE—ASSIGNMENT.

A bankrupt would not be compelled to assign his liquor license or assist the trustee in disposing of it for the benefit of the estate, when it neither appeared that it was the custom of the licensing board to allow a licensee to surrender his license and nominate his successor, nor that it was the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

custom of the licensing board to issue a new license in place of the one surrendered and, having done so, to grant a refund.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213–217, 223, 224; Dec. Dig. § 143.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Joseph L. Beahn. On application for an order to compel the bankrupt to surrender a liquor license. Referred back to referee, with instructions to take further evidence.

Marvin M. Taylor, of Worcester, Mass., for trustee.

William C. Mellish, of Worcester, Mass., for bankrupt.

MORTON, District Judge. The peculiar custom of the Boston Licensing Board allowing a licensee not only to surrender his liquor license, but also to nominate his successor, referred to in *Re Fisher*, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292, has never prevailed generally throughout the state. No such custom is found to exist in the city of Worcester. The usual practice is, I believe, for licensing boards upon the unconditional surrender of such a license to grant a new one in place of it, and, having done so, to refund part of the fee paid for the surrendered license. The effect of the Boston custom is to make the license itself salable, which is not the case when the surrendering licensee has no voice in the selection of the person to whom the new license shall be granted.

The *Fisher* Case holds that when a bankrupt, by doing some merely formal act, can in all probability obtain assets for his estate, he is bound to take such action upon the trustee's request therefor. If the usual custom, as I understand it, were found to exist in Worcester, I should feel bound by the *Fisher* Case to order the licensee to surrender his license and assign his rights in the refund to his trustee in bankruptcy. The referee's report, however, does not state that it is the practice or custom of the Worcester Licensing Board either to issue a new license in place of one surrendered, or, having done so, to grant a refund. The Licensing Board cannot be compelled to do either, and in the absence of a custom to do both it does not appear that the surrender will probably benefit the estate. The most that can be said on the report is that the surrender possibly might do so, which is not enough. The attention of the referee seems to have been directed chiefly to the assignment or transfer of licenses. No investigation appears to have been made as to the usual custom when licenses are merely surrendered. Until that is stated, I do not see how the case can be rightly decided.

The report is recommitted to the referee, with instructions to take evidence and state the facts as to the custom, if any, in Worcester, of granting another license in place of one surrendered, and of refunding from the proceeds of the new license a part of the fee paid for the original license, and as to the probability of the bankrupt's estate benefiting by his surrender of his liquor license.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In re BROCKTON IDEAL SHOE CO.

In re C. A. AUFFMORDT & CO.

(District Court, D. Massachusetts. November 18, 1912.)

No. 17,836.

1. BANKRUPTCY (§ 211*)—ADMINISTRATION OF ESTATE—POSSESSION OF GOODS—REPLEVIN.

Property in the possession of a bankrupt's trustee and alleged to belong to the estate is under the control of the bankruptcy court, and cannot be taken on a writ of replevin without the bankruptcy court's consent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321, 323; Dec. Dig. § 211.*]

2. BANKRUPTCY (§ 211*)—ADMINISTRATION OF ESTATE—CLAIM TO PROPERTY—REPLEVIN.

Where personal property in the hands of a bankrupt's trustee is claimed by him and also by another, the bankruptcy court will not grant permission to the latter to institute replevin proceedings against the trustee to recover the property; a simple, speedy, and inexpensive procedure having been provided for the trial of such claims in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321, 323; Dec. Dig. § 211.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Brockton Ideal Shoe Company. Petition by C. A. Auffmordt & Co. for leave to replevy certain shoes claimed by petitioner and by the trustee. Denied.

Friedman & Atherton, of Boston, Mass., for petitioners.
Thomas F. Dolan, of Boston, Mass., pro se.

MORTON, District Judge. Part of the property now in the possession of the trustee in bankruptcy of the Brockton Ideal Shoe Company consists of certain shoes which the petitioner claims to own and which are also claimed by the trustee. The petitioner desires to try the title to these goods by a replevin action in the state courts, and makes this application for the permission of this court to take the goods from the possession of the trustee in such proceedings. No special reasons are shown, except that the petitioner desires to retake the property at once and also prefers to try the title to it before a jury, instead of before a referee in bankruptcy.

[1] The property, being in the possession of the trustee, is under the control of the bankruptcy court. That it cannot be taken on such replevin proceedings without the consent of this court is settled by *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183; see, too, *Crosby v. Spear*, 98 Me. 542, 57 Atl. 881, 99 Am. St. Rep. 424. The parties do not disagree about the law.

[2] The petitioner says that I ought, in the exercise of my discretion, to grant the permission requested. As a general rule, the law contemplates the settlement of bankrupts' estates in the bankruptcy court. A simple, speedy, and comparatively inexpensive procedure is provided, especially adapted to the determination of just such questions of own-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ership as are here involved. The custom is to try such questions in connection with the bankruptcy proceedings. To grant the petitioner's request would complicate the settlement of the estate, without any compensating advantage to the other creditors, and would establish a far-reaching and, I think, a bad precedent.

The petition is denied.

In re BAKER.

(District Court, D. Massachusetts. July 28, 1913.)

No. 17,572.

BANKRUPTCY (§ 226*)—REPORT OF REFEREE—RECOMMENDATIONS.

Where any matter is referred to a referee in bankruptcy to find the facts, it is proper for him in his report to state his conclusions on the facts found.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 226.*]

In Bankruptcy. In the matter of Hyman Baker, bankrupt. On motion to strike out referee's recommendation. Motion denied.

Thomas H. Sullivan, of Worcester, Mass., for bankrupt.

Friedman & Atherton, of Boston, Mass., for objecting creditor.

MORTON, District Judge. Whether a master, to whom a matter is referred to find the facts, should state his conclusions upon the case, is a question upon which, in the superior court at least, there has been a difference of opinion among the judges. It seems to me proper and helpful for the master to do so; and I understand this to be the usual practice in all bankruptcy matters referred to referees.

Motion to strike out denied.

SAWYER v. OSTERHAUS et al.

(District Court, N. D. California, Second Division. February 7, 1914.)

No. 15,069.

1. EJECTMENT (§ 9*)—TITLE TO SUPPORT ACTION.

In ejectment, plaintiff must recover on the strength of his own title, regardless of the weakness of his adversary's title, and must show a legal title as distinguished from a mere equity.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. § 9.*]

2. PUBLIC LANDS (§ 58*)—SWAMP LAND ACT—PASSING OF TITLE TO STATE.

While Swamp Land Act Sept. 28, 1850, c. 84, 9 Stat. 520 (U. S. Comp. St. 1901, p. 1586), was by its terms a grant in present, the legal title to the lands granted thereby vests in the state only upon definite identification of the lands to which it attached in the manner provided in the act, and, until the ascertainment of that fact, and the issuance of a patent as provided in section 2, the legal title remains in the government, and that of the state is merely inchoate.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 180-183, 187-191; Dec. Dig. § 58.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. PUBLIC LANDS (§ 61*)—CLAIMANT UNDER SWAMP LAND GRANT.

Where no steps have been taken, either by the land department or by a state, to have a tract of land identified and patented to the state under Swamp Land Act Sept. 28, 1850, c. 84, 9 Stat. 520 (U. S. Comp. St. 1901, p. 1586), a plaintiff in ejectment, claiming through a conveyance from the state, but who has never been in possession, cannot sustain his title under that grant by parol evidence to show that the land was in fact swamp and overflowed land at the date of the passage of the act.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 192-213; Dec. Dig. § 61.*]

4. PUBLIC LANDS (§ 59*)—LANDS INCLUDED IN SWAMP LAND GRANT—"TIDE LANDS"—"SWAMP LANDS."

Lands which are wholly subject to the tidal action of the waters of a bay, tributary to the sea, which overflow them at high tide, cannot be classed as "swamp lands" under Swamp Land Act Sept. 28, 1850, c. 84, 9 Stat. 520 (U. S. Comp. St. 1901, p. 1586), but are "tide lands."

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 184, 185; Dec. Dig. § 59.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6836, 6970.]

5. PUBLIC LANDS (§ 58*)—DEVOTION TO PUBLIC USE—EFFECT OF PRIOR GRANT.

Notwithstanding a grant to a state of public lands under a generic description, but dependent upon ascertainment and definition by survey or patent to pass the legal title, until such title is vested in the state, the United States retains full and complete power to devote any portion of such lands to any necessary public purpose, leaving the state to be indemnified for the loss in such manner as Congress may have provided.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 180-183, 187-191; Dec. Dig. § 58.*]

At Law. Action by E. H. Sawyer against Hugo Osterhaus and Henry T. Mayo. Trial to court, and judgment for defendants.

See, also, 195 Fed. 655.

This is an action of ejectment to recover the possession of a tract of land in the county of Solano in this state. The land is physically a part of the body of land officially known and designated as "Mare Island," now, and for many years, a government reservation as a naval station, which lies in a northerly arm of the bay of San Francisco technically known as San Pablo Bay. Historically speaking, and as depicted upon the maps of the state, Mare Island was apparently at one time a territory comprising several thousand acres. As thus shown, its southerly projection, resting in San Pablo Bay, consists of a compact body of high land, bearing a general resemblance to the low hill or rolling land found upon the adjacent mainland, from which higher part or head there extends to the northwest a low, narrow neck or strip connecting it with a much larger body of low, swampy land, spreading out fanlike for several miles in the same general direction. This body of land, as thus described, was bounded by San Pablo Bay on the south and west, by Mare Island Straits and Napa Bay on the east, and Sonoma creek on the north—all navigable. At the date of the reservation of the island as a naval base, this entire territory was supposed to be embraced within its limits, and the evidence tends to show that during the early years of its occupancy steps were taken by the government authorities looking to the assertion of dominion over the whole of this area for such purpose. Subsequently, however, an action was brought in the Circuit Court for this district by a private party against the then commandant of the navy yard for the recovery of the possession of the larger tract of lowland above described, the plaintiff claiming title from the state under the Swamp Land Act, so-called, of September 28, 1850 (9 Stat. 519, c. 84) and in this action the plaintiff prevailed, the court holding that the land claimed was swamp and overflowed land passing to the state under that act, and was not a part of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the island proper, nor included within the naval reservation. *San Francisco Savings Union v. Irwin* (C. C.) 28 Fed. 708. The area thus lost to the government embraced some 7,000 acres, more or less, and was included within what was designated as swamp and overflowed land survey No. 569.

The tract involved in the present controversy is all of the land embraced in the long, narrow neck above referred to, running from the northerly limits of the high land of the island to the southern boundary of swamp and overflowed land survey No. 569, just referred to, being bounded on the west by San Pablo Bay and on the east by Mare Island Straits, comprising 164.55 acres. It is referred to in the complaint as being the same land embraced in swamp and overflowed land survey No. 34 of Solano county, and is sometimes called the "Darlington Tract."

At the time of the commencement of the action the defendant Osterhaus, a Rear Admiral in the United States navy, was in possession of the premises in his official capacity as commandant of the Mare Island Navy Yard, and claimed the right of possession only by virtue and by reason of his authority as such commandant, and as representing the rights of the United States. Thereafter this defendant was superseded as such commandant by Henry T. Mayo, then a captain in the navy, who took possession with like authority and for the same purposes as his predecessor, and, this fact being suggested to the court, the latter was brought in as a defendant, and was yet in such possession at the trial and submission of the cause.

Prior to the general appearance for the defendant, the United States attorney appeared specially and filed a suggestion of the Attorney General of a want of jurisdiction in the court on the ground that the real defendant in interest was the United States, and the nominal defendant but its officer or agent, holding in its name and right, and upon this ground moved that the action be dismissed for the reason that the United States may not be sued without permission of Congress. This motion was denied (*Sawyer v. Osterhaus* [D. C.] 195 Fed. 655), and thereafter the cause came to issue and was tried to the court, a jury being waived.

The complaint is in the usual form, alleging that the plaintiff is the owner and seised in fee of the premises, and that defendant is in possession, and excluded plaintiff therefrom. The answer admits defendant's possession—in the capacity and for the purposes above stated—denies plaintiff's ownership, and sets up: (1) Title in the United States; (2) that the action is barred by the statute of limitations; and (3) an estoppel in pais.

Plaintiff's asserted title to the premises in dispute is founded upon the claim that the tract was swamp and overflowed land at the date of the passage of the Swamp Land Act of 1850, above adverted to, which passed to the state under that act, and the subsequent acquisition of the title of the state under proceedings had in conformity with an act of the Legislature of the state providing for the sale of such lands, approved April 28, 1855 (St. Cal. 1855, p. 189). To sustain this claim plaintiff introduced evidence of a survey of the tract designated as swamp and overflowed land survey No. 34, and other steps required by the last-mentioned act, culminating in a patent from the state to one David N. Darlington, bearing date March 18, 1857, followed by sundry mesne conveyances, vesting in plaintiff any title carried by that patent. When the patent was offered in evidence it was objected to by defendant on the ground, among others, that it does not appear that the state had title to the land at the date of the patent; that there is no evidence that the United States ever in any way recognized the land as swamp and overflowed, or that the Secretary of the Interior has ever segregated or listed the land to the state, as required by section 2 of the Swamp Land Act, or that a patent has ever issued therefor from the United States to the state, as provided by that act. In response to this objection, while admitting there has never been an identification of the character of the land, or any listing thereof by the Secretary of the Interior, or a patent to the state from the government, plaintiff offered parol evidence to show that at the date of the Swamp Land Act the land was in fact of the character granted by that act. This parol evidence was objected to as incompetent to establish the fact, but it was tentatively admitted, subject to the objection, and was put in, with the result to be hereinafter noted.

In response to plaintiff's case the defendant introduced evidence which, together with the treaty with Mexico, acts of Congress, and public acts of the Chief Executive, of which the court takes judicial cognizance, shows these facts: That by the Treaty of Guadalupe Hidalgo in 1848 Mexico granted to the United States all the land in the present state of California not theretofore granted in private ownership; that prior thereto in 1841 title to the body of land known as Mare Island was granted by the Mexican government to Victor Castro, and thereafter, through mesne conveyances, became vested in William H. Aspinwall and George W. P. Bissell, in whom it was thereafter, on May 8, 1852, confirmed by a decree of the United States Land Commission for the settlement of land titles in California, the premises being thus described: "The place of which confirmation is hereby given is situated in the bay of San Francisco and is called the 'Isla de la Yegua,' or 'Mare Island,' and, being an island, is bounded by the water's edge." That on December 2, 1851, President Fillmore in his Second Annual Message to Congress (volume 5, Messages and Papers of the Presidents, pp. 113, 133) made a recommendation that a navy yard be established on the bay of San Francisco; thereafter Congress, in section 3 of "An Act making appropriations for the naval service for the year ending June 3, 1853," approved August 31, 1852 (chapter 109, 10 Stat. 100), made an appropriation for such purpose, and authorized its location and survey by the Secretary of the Navy; and a board of location and survey was appointed, who in due time made a survey and report. On January 4, 1853, Aspinwall and Bissell conveyed the land known as Mare Island to the United States, the conveyance describing it as: "All that tract of land called and known as 'Mare Island,' in the bay of San Pablo, as recently surveyed by the board of officers of the United States sent to California for the selection of a site for the navy yard there, including all the tule or low and marsh land belonging to the same, or which has ever been reputed or claimed to belong to the same." Thereafter, on February 11, 1853, the President made an executive order that Mare Island, "together with all its appendages of tule or marsh lands belonging to said island, and the harbors, waters, and anchorages," etc., be reserved for public uses as a navy yard.

The evidence further shows that immediately upon, or soon after, its reservation as a naval station the United States government took possession of Mare Island, including the premises in dispute, established an extensive navy yard, with shops, docks, and other works connected therewith, and has maintained such possession unbrokenly down to the present time for use as a naval station, to the exclusion of all other occupancy thereof, the buildings and other main structures being maintained at the southern end of the island on the higher ground above referred to, while the land in dispute has been used for dumpage, storage, and like purposes, with a railway running from the main yard out to the dumps; that levees have been constructed to keep back the flow of tide waters; that the land has been partially filled in and reclaimed by dredging from Mare Island Straits; that roads are maintained thereon; that a line of dolphins on the eastern side is established for anchorage purposes in Mare Island Straits, and sentries are maintained on the land to protect the premises from intrusion and the property of the government from being stolen or carried away.

The defendant also introduced evidence in support of the special defenses set up, which may be considered in connection with the subject-matter of those defenses if it be deemed necessary to notice them.

Frank R. Devlin, of Vallejo, and M. W. McIntosh, of San Francisco, for plaintiff.

Robert T. Devlin, John L. McNab, John W. Preston, U. S. Atty., and Earl H. Pier, Asst. U. S. Atty., all of San Francisco, Cal., for defendants.

VAN FLEET, District Judge (after stating the facts as above).
[1] Upon the facts several obstacles present themselves as standing

in the way of a recovery by the plaintiff. His whole case, as indicated, rests primarily upon the construction and effect of the Swamp Land Act, which is the essential basis of his title, if he have any. The action being in ejectment, the first inquiry is whether plaintiff has shown legal title to the premises involved, since he must recover, if at all, upon the strength of his own title, regardless of the weakness of that of his adversary (*Christy v. Scott*, 14 How. (U. S.) 282, 14 L. Ed. 422; *Fussell v. Gregg*, 113 U. S. 550, 5 Sup. Ct. 631, 28 L. Ed. 993; *McGuire v. Blount*, 199 U. S. 144, 26 Sup. Ct. 1, 50 L. Ed. 125), and it must be a legal title as distinguished from a mere equity (*McCormick v. Hayes*, 159 U. S. 332, 339, 16 Sup. Ct. 37, 40 L. Ed. 171).

[2] The plaintiff's theory is that the Swamp Land Act was an absolute grant in præsentī, vesting at once in the state, and subject to its immediate disposition, legal title to all the lands falling within the class therein described, dependent only on their identification as such and without the necessity of a patent from the United States to the state; that this identification, if not had through the Secretary of the Interior and the formal issuance of a patent to the state, as provided by section 2 of the act, may be shown by one holding evidence of title under the state through the introduction of parol evidence establishing the character of the land as swamp and overflowed at the date of the taking effect of the act; and, upon that fact being shown, a perfect legal title is made out upon which ejectment may be maintained.

I am of opinion that neither proposition involved in this contention can be sustained. While the construction thus claimed for the granting clause of the act finds countenance in an early opinion of the Attorney General (9 Opinions, Attys. Gen. 254), and in cases from the Supreme Court of California, and while there is some language tending more or less directly to support it in *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. 985, 30 L. Ed. 1039, and in *San Francisco Savings Union v. Irwin*, *supra*, which followed it, it must now be regarded as definitely settled by the later cases from the Supreme Court that, while concededly the act was by its terms a grant in præsentī, the legal title to the lands granted thereby vests in the state only upon definite identification of the lands to which it attached in the manner provided in the act, and that, until the ascertainment of that fact and the issuance of patent, the legal title remains in the government, and that of the state is merely inchoate. *Rogers' Locomotive Works v. Emigrant Co.*, 164 U. S. 568, 17 Sup. Ct. 188, 41 L. Ed. 552; *Michigan Land, etc., Co. v. Rust*, 168 U. S. 589, 18 Sup. Ct. 208, 42 L. Ed. 591; *Brown v. Hitchcock*, 173 U. S. 476, 19 Sup. Ct. 485, 43 L. Ed. 772; *United States v. Chicago, etc., Ry. Co.*, 218 U. S. 242, 31 Sup. Ct. 7, 54 L. Ed. 1015; *McCormick v. Hayes*, 159 U. S. 338, 16 Sup. Ct. 37, 40 L. Ed. 171; *Chapman & Dewey Lumber Co. v. St. Francis Levee District*, 232 U. S. 186, 34 Sup. Ct. 297, 58 L. Ed. —, decided January 26, 1914.

Thus in *Rogers v. Emigrant Co.*, after a full review of the authorities, it is said:

"While, therefore, as held in many cases, the act of 1850 was in præsentī, and gave an inchoate title, the lands needed to be identified as lands that passed under the act; which being done, and not before, the title became per-

fect as of the date of the granting act. *Wright v. Roseberry*, 121 U. S. 488, 494 [7 Sup. Ct. 985, 30 L. Ed. 1039] et seq.; *Tubbs v. Wilhoit*, 138 U. S. 134, 137 [11 Sup. Ct. 279, 34 L. Ed. 887]; *Chandler v. Calumet & Hecla Mining Co.*, 149 U. S. 79, 91 [13 Sup. Ct. 798, 37 L. Ed. 657]."

In *Brown v. Hitchcock* the question is put in these plain and unequivocal terms:

"Under the Swamp Land Act the legal title passes only on delivery of the patent. So the statute in terms declares. The second section provides that the Secretary of the Interior, 'at the request of said Governor' [the Governor of the state], shall 'cause a patent to be issued to the state therefor; and on that patent the fee simple to said lands shall vest in the said state.'"—citing cases.

"In this case the record discloses no patent, and therefore no passing of the legal title. Whatever equitable rights or title may have vested in the state, the legal title remained in the United States."

And again in *Michigan Land Co. v. Rust*:

"It will be perceived that the act contemplated the issue of a patent as the means of transferring the legal title. In *Rogers' Locomotive Works v. Emigrant Co.*, 164 U. S. 559, 574 [17 Sup. Ct. 188, 192 (41 L. Ed. 552)] it was said, speaking in reference to this matter, and after a full review of the previous authorities: 'When he [that is, the Secretary of the Interior] made such identification, then, and not before, the state was entitled to a patent, and "on such patent" the fee-simple title vested in the state. The state's title was at the outset an inchoate one, and did not become perfect, as of the date of the act, until a patent was issued.'"

Logically, the principles there announced would end plaintiff's case at the threshold, it being conceded that in this instance no patent has ever passed from the United States to the state for this land, and as a consequence the legal title still remains in the United States.

[3] Plaintiff very strenuously contends however that in *Railroad Co. v. Smith*, 76 U. S. (9 Wall.) 95, 19 L. Ed. 599, and in *Wright v. Roseberry*, recognition was given to the title of the state or its grantee to such lands in the absence of a patent or of any formal identification or listing by the Secretary of the Interior, and countenanced a resort to parol evidence to establish the character of the land, and that the doctrine of those cases has application in the present case. But a careful consideration of the real questions involved in those cases will, I think, show clearly that they lend no substantial support to this claim.

Railroad Co. v. Smith was one of two companion cases, decided at the same term, the other being *Railroad Co. v. Fremont County*, 9 Wall. 89, 19 L. Ed. 563, immediately preceding the report of the *Smith Case*. As several references are made in the latter to the *Fremont Case*, it will be well to briefly state the facts of that case in order that such references may be more clearly appreciated. In the *Fremont Case* the county was the complainant in the court below, suing the railroad company to quiet its title to a large body of land which it claimed to have acquired from the state (Iowa) under the Swamp Land Act, and to which the railroad company laid claim under an act making a grant of a later date to the state in aid of the construction of railroads. Under neither grant had patent formally passed to the state from the United States, but it appeared that under the Swamp Land Grant the

lands had been definitely identified and listed to the state by or under the authority of the Secretary of the Interior, at a date prior to the definite location of the line of the defendant's road; and, as the railroad grant attached only on definite location of its line, and excepted from its operation any lands granted or appropriated to any other purpose prior to its taking effect, it was held that the title of the county, under the evidence adduced, must prevail.

In the Smith Case the controversy was again between rival claimants under the Swamp Land Act and a railroad grant, respectively. The railroad company was the plaintiff, and claimed under an act of Congress making a grant to the state of Missouri in aid of the railroad. This grant the state had accepted, and by statute had sought to vest the title in the railroad. The defendant Smith was in possession, claiming title through the state under the Swamp Land Act. As in the present case, it was conceded that no patent had issued to the state under that act, and that the Secretary of the Interior had not certified the lands as within the act; the evidence tending to show that that official, having no sufficient evidence to enable him to make such certificate, had refused it. Under these circumstances the defendant, in defense of his possession and claim of title, and to show that the land was not included in the terms of the railroad grant, was permitted, against objection, to put in parol evidence tending to establish that, at the date of the Swamp Land Act, the lands in suit were wet and unfit for cultivation. In passing upon the case, and distinguishing it from the Fremont Case, the court say:

"In that case the county of Fremont, claiming under the swamp land grant, was plaintiff, and the railroad company, claiming under the grant to the state for railroads, was defendant, and the main point in it related to the evidence which might be necessary to establish the fact that the lands claimed by plaintiff were swamp and overflowed within the meaning of the act of 1850. In the present case the position of the parties is reversed, the plaintiff claiming under the act of June 10, 1852, granting lands to the state of Missouri for railroad purposes, and the defendant claiming under the swamp land grant. In the former case it was necessary for the plaintiff, who must succeed on the strength of her own title, to show satisfactory evidence that the title of the United States had, under the swamp land grant, become vested in Fremont county. The opinion of the court shows how this was successfully done in that case. In the present action it was incumbent on the railroad company to show that the title of the United States had become vested in the company under the grant for railroad purposes. It is admitted that this has been done, unless the land is of that class reserved from the grant as swamp land; for the act under which plaintiff claims has an exception in precisely the same terms with the act for the benefit of the Iowa railroads. In the former case the plaintiff, claiming under the swamp land grant, was bound to establish his title by such evidence as Congress may have determined to be necessary to make the title complete in the state, or the grantee of the state, to which the lands were supposed to be granted, otherwise the plaintiff established no legal title. In the present case it is not necessary to defeat the title under the railroad grant to show that all the steps prescribed by Congress to vest a complete title in defendant, under the swamp land grant, have been taken. It is sufficient to show that this land which is now claimed under the railroad grant, was reserved out of that grant, and this is done whenever it is proved by appropriate testimony to have been swamp and overflowed land, as described in the act of 1850."

And after a discussion of the question of the admissibility, under the circumstances, of the evidence offered, and holding it proper for the purpose, the court say:

"Any other rule results in this: That because the Secretary of the Interior has failed to discharge his duty in certifying these lands to the states, they, therefore, pass under a grant from which they are excepted beyond doubt; and this, when it can be proved by testimony capable of producing the fullest conviction that they were of the class excluded from plaintiff's grant."

It will be at once perceived that that case furnishes no warrant for a resort to parol proof in aid of plaintiff's title in the present case. That case furnishes but an application of the familiar principle that an equitable right may be resorted to, in defense of the bald legal title, to show that the latter should not prevail. The difference is in the position of the parties. Were plaintiff in possession here, resisting an assault upon his claimed rights under the Swamp Land Act, the cases would be perhaps analogous. But, as aptly said of the railroad company in that case, the plaintiff is here "the actor, not as in the last one a defending party merely," and he is bound, in making out his claim of legal title, to establish it by "such evidence as Congress may have determined to be necessary to make the title complete in the state," that is, by showing an identification of the character of the land by the Secretary of the Interior, or by a patent to the state, or both. It may be added that there is nothing in the present case, as in *Railroad Co. v. Smith*, to show that any effort or demand has ever been made by plaintiff or his predecessors to have the Land Department certify the character of the land, or that it has ever refused, upon proper application, to do so.

But, moreover, the decision in the *Smith Case* was the occasion for a sharp and vigorous dissent, as a dangerous departure from the express requirements of the Swamp Land Act, and the doctrine has been refused extension beyond the special circumstances there involved. Thus in *French v. Fyan*, 93 U. S. 169, 23 L. Ed. 812, which, like the present, was an action of ejectment, where the plaintiff, claiming title under a railroad grant, having made out his prima facie case, the defendant showed title to the land from the state, to which it had previously been listed and patented as swamp and overflowed under the act of 1850. Thereupon the plaintiff, to avoid the effect of defendant's patent, sought, on the authority of *Railroad Co. v. Smith*, to show that the land was not in fact swamp and overflowed at the date of that act. The Supreme Court, in sustaining the ruling of the lower court, holding that the certification and patenting of the land as provided in section 2 of the Swamp Land Act was conclusive, say:

"It was under the power conferred by this section that the patent was issued under which defendant holds the land. We are of opinion that this section devolved upon the Secretary of the Interior, as the head of the department which administers the affairs of the public lands, the duty, and conferred on him the power, of determining what lands were of the description granted by that act, and made his office the tribunal whose decision on that subject was to be controlling. * * * The case of *Railroad Co. v. Smith*, 9 Wall. 95 [19 L. Ed. 599] is relied on as justifying the offer of parol testimony in the one before us. In that case it was held that parol evidence

was competent to prove that a particular piece of land was swamp land within the meaning of the act of Congress. But a careful examination will show that it was done with hesitation, and with some dissent in the court. The admission was placed expressly on the ground that the Secretary of the Interior had neglected or refused to do his duty; that he had made no selection or lists whatever, and would issue no patents, although many years had elapsed since the passage of the act."

Again, in *Chandler v. Calumet & Hecla Mining Co.*, 149 U. S. 79, 13 Sup. Ct. 798, 37 L. Ed. 657, referring to the doctrine announced in the *Smith Case*, it is said:

"But aside from this, the rule as to oral evidence, recognized in that case, was afterwards explained, and limited in its operation to cases in which there had been nonaction or refusal to act on the part of the Secretary of the Interior in selecting lands granted, as appears in the subsequent cases of *French v. Fyan*, 93 U. S. 169, 173 [23 L. Ed. 812], and *Ehrhardt v. Hogaboom*, 115 U. S. 67, 69 [5 Sup. Ct. 1157, 29 L. Ed. 346], where parol evidence was offered to show that patented lands were not of the character described."

See, also, *McCormick v. Hayes*, *supra*; *Rogers Locomotive Works v. Emigrant Co.*, *supra*; and *United States v. Chicago, etc., Ry. Co.*, *supra*.

These considerations show very clearly that *Railroad Co. v. Smith* can have no proper application to the present case, where plaintiff is bound to establish a legal title as distinguished from a mere equitable claim.

As to *Wright v. Roseberry*, upon which plaintiff apparently places the greatest reliance for his contention, while there is some general language in the elaborate discussion there indulged in, tending to give support to plaintiff's view, a careful study of the case shows that what is there said as to the admissibility of parol evidence was without pertinency to the facts, and was simply *arguendo*, since the evidence showed that the land in controversy had been fully identified as swamp and overflowed land by a substitute method provided by Congress in an act specially intended to quiet land titles in California. The case, and the construction put upon it by the Supreme Court, is so aptly stated in the subsequent case of *McCormick v. Hayes*, 159 U. S. 339, 16 Sup. Ct. 39, 40 L. Ed. 171, that it will only be necessary to quote briefly from the latter to show that it is to be given no such effect as that contended for. The court first states the question involved before them thus:

"The controlling question, therefore, in this case, so far as the plaintiff is concerned—and he must recover upon the strength of his own title, even if that of the defendant be defective—is whether, under the circumstances disclosed by the record, the particular lands in controversy, in the absence of any selection and certification of them by the United States to the state, under the Swamp Land Act, can be shown by parol testimony to have been, in fact, at the date of that act, swamp and overflowed lands. Congress having made it the duty of the Secretary of the Interior to make out accurate lists and plats of the lands embraced by the Swamp Land Act, and transmit the same to the Governor of the state, and at the request of the latter to cause a patent to be issued to the state therefor, and having provided that 'on that patent the fee simple to said lands shall vest in said state subject to the disposal of the Legislature thereof,' did the title vest in the state, by *virtue alone*, and immediately upon the passage of the act, without any selection by or under the direction of the Department of the Interior, so that

the state's grantees could maintain an action to recover the possession of them?"

And after a full discussion of the decided cases, and distinguishing the case of *Railroad Co. v. Smith*, and reaffirming the doctrine of *French v. Fyan*, it is said:

"It is supposed by counsel that these principles were modified in *Wright v. Roseberry*, 121 U. S. 488, 511, 512, 518 [7 Sup. Ct. 985, 30 L. Ed. 1039]. But such is not the fact. In that case the plaintiff sued to recover possession of a tract of land in California. He asserted title under that Swamp Land Act, claiming by conveyance from parties who had purchased from the state, the defendants, under patents of the United States issued under the pre-emption laws to them, or to parties from whom they derived their interest. The particular point to which the court directed its attention was whether an action could be maintained upon the title to swamp and overflowed lands in *California* until they had been certified as such pursuant to the fourth section of the act of Congress of July 23, 1866, entitled 'An act to quiet land titles in California.' In determining that question it became necessary to examine the course of legislation and of judicial decision under the Swamp Land Act of 1850. Referring to the act of July 23, 1866, 14 Stat. 218, c. 219, the court said that 'Congress changed the provisions of law for the identification of swamp and overflowed lands in that state. It no longer left their identification to the Secretary of the Interior, but provided for such identification by the joint action of the state and federal authorities.' * * * It appeared in proof that the lands there in controversy had been segregated as swamp and overflowed lands by the authorities of the state of California, that their designation as such lands on a plat of the township made by the surveyor general of the United States was approved by that officer, and forwarded to the General Land Office, pursuant to the act of 1866, and that such plat was approved by the Commissioner, as shown by its official use of it. 'The act of Congress,' the court said, 'intended that the segregation maps prepared by authority of the state, and filed in the state surveyor general's office, if found upon examination by the United States surveyor general to be made in accordance with the public surveys of the general government, should be taken as evidence that the lands designated thereon as swamp and overflowed were such in fact, except where this would interfere with previously acquired interests.' So far from modifying the rule announced in *French v. Fyan*, the court recognized the authority of that case, and distinguished it from the one then under consideration."

It should be stated that in the present case no claim was advanced that there had been a compliance with the act of 1866 referred to in the above case. It will thus be seen that there is nothing in *Wright v. Roseberry*, as supposed by plaintiff, justifying, in a case like the present, a resort to parol evidence to show the character of the land.

It may be added with reference to that case that the more closely it is read the more clearly it appears that it was really decided upon the theory that the effect of the Swamp Land Act was to vest complete legal title in the state as of its date immediately upon the identification of the land in some appropriate manner as being embraced in the grant, without the necessity of a patent from the United States; but, as we have seen, that theory or doctrine has since been repeatedly repudiated by the Supreme Court, and can no longer be regarded as obtaining.

So far as the case of *San Francisco Savings Union v. Irwin* is concerned in its effect upon this point, it was decided on circuit by the same distinguished jurist who wrote the opinion in *Wright v. Roseberry*, and very manifestly proceeded upon the same theory of the

act indicated by the opinion in that case. For the reasons already sufficiently given it cannot be regarded as authority upon the point under consideration.

It follows from what has been said that the parol evidence offered and conditionally received to show the character of the land in suit was inadmissible for the purpose, and may not competently be considered.

[4] It may be added, however, in this connection that if this evidence were admissible, I should be compelled to find against the plaintiff's contention as to its effect. In my judgment its tendency is to establish practically without controversy that the lands in suit were at the date in question, and continued to be down to a period long after their survey for plaintiff's predecessors, strictly within the definition of tide lands, as distinguished from swamp lands. I say this with due deference as to what was held as to the lands involved in *San Francisco Savings Union v. Irwin*. I cannot know what the evidence was in that case, but am circumscribed by what was shown in this; and, moreover, the respective situations of the tracts involved in the two cases are in some essential respects quite different, and especially as to the effect of the flow of the salt tides. The lands in the *Savings Union Case* were undoubtedly, from their situation, affected largely by fresh waters from the streams which partially surround them, while the present premises were, until leveed, wholly subject to the tidal action of the waters of the bay, which daily flowed over them back and forth between San Pablo Bay and Mare Island Straits, completely submerging them at its highest flood, and largely so at its ordinary stage. Lands so situated cannot be classed as swamp and overflowed; they are tidelands. *Eichelberger v. Mills Land Co.*, 9 Cal. App. 639, 100 Pac. 117; *Ward v. Mulford*, 32 Cal. 365; *People v. Morrill*, 26 Cal. 354; and see the very full discussion of the subject in *People v. California Fish Co.*, 138 Pac. 79, decided December 20, 1913, by the Supreme Court of California.

My conclusion is therefore that plaintiff has wholly failed to make out, as was incumbent upon him, a legal title to the premises in suit.

[5] But there is a further proposition arising, I think, upon the facts, which it seems to me would of itself preclude a recovery of the premises by plaintiff in this action, and upon which, but for the consideration that it was not urged upon the attention of the court, I should have felt strongly inclined to rest my decision. It appears that the reservation of Mare Island as a naval base was made by the President at a time when the legal title to the lands in dispute, whatever their character, was, as to the plaintiff at least, still in the United States, and indeed, as we have seen, still rests there; and this reservation was in terms sufficiently broad to include this land, and it was in fact taken possession of in pursuance thereof, and has been so held since. That the President had ample power to reserve and set aside any part of the public domain, whatever its character, for a purpose such as that involved, which is regarded as a paramount use, there can be no question. *Grisar v. McDowell*, 6 Wall. 363, 18 L. Ed. 863; *Wilcox v. Jackson*, 13 Pet. 498, 10 L. Ed. 264; *Rus-*

sian-American Trading Co. v. United States, 39 Ct. Cl. 460; s. c., 199 U. S. 570, 26 Sup. Ct. 157, 50 L. Ed. 314; volume 1, Land Dec. Dept. Int. page 702. Under these circumstances I am of opinion that the case falls within the principles recently applied here in Cobban v. Hyde, 212 Fed. 480, based upon Heydenfeldt v. Daney G. M. Co., 93 U. S. 634, 23 L. Ed. 995; Minnesota v. Hitchcock, 185 U. S. 373, 22 Sup. Ct. 650, 46 L. Ed. 954; Wisconsin v. Hitchcock, 201 U. S. 202, 26 Sup. Ct. 498, 50 L. Ed. 727. These cases are to the effect that, notwithstanding a grant to a state of public lands under a generic description, but dependent, as here, upon ascertainment and definition by survey or patent to pass the legal title, until such title is vested in the state the United States retains full and complete power to devote any portion of such lands to any necessary public purpose, leaving the state to be indemnified for the loss in such manner as Congress may have provided. These cases, it is true, have particular reference to the school land grants, but no good reason is perceived why a like principle should not apply to lands falling within the Swamp Land Act. If it be said that the school grants made provision for indemnity to the states by lieu selections for any lands lost through other disposition, it may be answered that Congress has, in the act of 1855 (10 Stats. at L. 634, c. 147), provided for the indemnity of purchasers and locators of swamp lands where the land is found to have been taken for other purposes. But whether this principle of indemnity would or would not apply to an instance where the United States has reserved the land for its own public purposes need not be considered, since the exercise of that power for an imperative use, such as military or naval purposes, cannot be made to depend upon that question.

These considerations, I think, render it unnecessary to notice the special defenses set up in the answer, since enough has been said to show that plaintiff's action cannot prevail.

Let judgment be entered in favor of the defendant, dismissing the action, and for his costs.

MISSISSIPPI VALLEY TRUST CO. et al. v. WASHINGTON NORTH-
ERN R. CO. et al.

(District Court, W. D. Washington, S. D. March 27, 1914.)

No. 9.

1. MORTGAGES (§ 183*)—PRIORITIES—ESTOPPEL.

Where a junior mortgage expressly recognizes the priority of other mortgages and bonds issued and sold thereunder, the junior mortgagee is estopped to deny the priority.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 442-445, 447, 448; Dec. Dig. § 183.*]

2. CORPORATIONS (§ 480*) — MORTGAGES — PAYMENT — MISAPPROPRIATION OF FUNDS.

Where the proceeds of corporate mortgage bonds were misappropriated or wrongfully diverted, a subsequent mortgagee could not rely on the misappropriation or wrongful diversion as a payment, unless the mort-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gagors had asked that the diversion or misappropriation should be applied as a payment.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 480;* Mortgages, Cent. Dig. § 290.]

8. CORPORATIONS (§ 479*)—MORTGAGES—FAILURE OF CONSIDERATION—MISAPPROPRIATION OF FUNDS.

Where a corporation executed a mortgage to secure its bonds, and received the cash payment for the bonds called for, the mere fact that the proceeds were misappropriated in violation of a collateral agreement did not affect the rights of the bondholders acquiring the bonds in good faith and not acting in a fiduciary relation, and their subsequent misconduct, if any, could only be the subject-matter of an independent cause of action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872-1874; Dec. Dig. § 479.*]

4. CORPORATIONS (§ 480*)—MORTGAGES—LIEN AND PRIORITY—COUNTERCLAIM.

In a suit by prior mortgagees to foreclose, a subsequent mortgagee cannot complain, by way of set-off or counterclaim, for a diversion of the funds acquired through the prior mortgages, though the mortgagors are insolvent.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 480;* Mortgages, Cent. Dig. § 290.]

5. CORPORATIONS (§ 480*)—MORTGAGES—BONDS—PRIORITIES.

Where a railroad company executed a mortgage to secure \$1,000,000 of its bonds which were purchased by a timber company, which executed a mortgage to secure \$600,000 in bonds, and which deposited with the trustee in the two mortgages \$600,000 of the railroad bonds as further security, the provision in the timber company's mortgage that on the payment of any of its bonds a like amount of the railroad bonds transferred to the trust company should be canceled and returned to the railroad company, or delivered to it uncanceled, at the option of the railroad company, did not give to a second mortgagee, obtaining an assignment of the railroad company's bonds to be delivered on their release from the prior mortgage, the right to bonds surrendered from time to time under the terms of the prior mortgage, but the prior creditors were entitled to the security given by the prior mortgage to the full amount until the debt was fully paid.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 480;* Mortgages, Cent. Dig. § 290.]

In Equity. Suit by the Mississippi Valley Trust Company and another against the Washington Northern Railroad Company and others. On motion to strike out allegations of answer of defendant William W. Crawford. Motion granted.

Snow & McCamant, of Portland, Or., and Huffer & Hayden, of Tacoma, Wash., for complainants, rely on the following authorities: *Bronson v. La Crosse R. R. Co.*, 2 Wall. 283, 310, 17 L. Ed. 725; *Jerome v. McCarter*, 94 U. S. 734, 736, 24 L. Ed. 136; *Central Bank v. Hazard* (C. C.) 30 Fed. 484, 486; *Pratt v. Nixon*, 91 Ala. 192, 8 South. 751; *Horton v. Davis*, 26 N. Y. 495; *Freeman v. Auld*, 44 N. Y. 50; *Johnson v. Thompson*, 129 Mass. 398, 400; 34 Cyc. 758; *Gillespie v. Torrance*, 25 N. Y. 306, 311, 82 Am. Dec. 355; *Force v. Age-Herald Co.*, 136 Ala. 271, 33 South. 866, 868; *Allis v. Jones* (C. C.) 45 Fed. 148, 150; *Old Dominion Co. v. Lewisohn*, 210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025; *Williams Co. v. Kinsey Co.* (D. C.) 205 Fed. 375, 376; 34 Cyc. 719, 720; section 3443, Rem. & Bal. Code;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2 Randolph on Commercial Paper, § 986; New York Security Co. v. Equitable Co. (C. C.) 77 Fed. 64; Dooley v. Virginia Co., 7 Fed. Cas. page 913, No. 3999; In re Burton (D. C.) 29 Fed. 637, 638, 640; White v. Fisher, 62 Ill. 258, 259, 261; Gordon v. Wansey, 21 Cal. 77, 79; Schinkel v. Hanewinkel, 19 La. Ann. 260; Thompson's Adm'r v. George, 86 Ky. 311, 5 S. W. 760; Eastman v. Plumer, 32 N. H. 238; Wallace v. Bank, 1 Ala. 565, 570; Winans v. Wilkie, 41 Mich. 264, 1 N. W. 1049; Brosseau v. Lowry, 209 Ill. 405, 70 N. E. 901, 904; Lawson v. McKenzie, 44 Iowa, 663; Swem v. Newell, 19 Colo. 397, 35 Pac. 734, 735; Kneeland v. Miles (Tex. Civ. App.) 24 S. W. 1113, 1115; First Nat'l Bank v. Maxfield, 83 Me. 576, 22 Atl. 479, 480; First Nat'l Bank v. Harris, 7 Wash. 139, 142-144, 34 Pac. 466; 4 Am. & Eng. Enc. of Law (2d Ed.) p. 310; 2 Randolph on Commercial Paper, § 289; Storey on Promissory Notes, § 120; Muller v. Pondir, 55 N. Y. 325, 14 Am. Rep. 259; O'Mulcahy v. Holley, 28 Minn. 31, 8 N. W. 906; Central Trust Co. v. First Nat'l Bank, 101 U. S. 68, 25 L. Ed. 876-878; Thompson-Houston Elec. Co. v. Capitol Electric Co. (C. C.) 56 Fed. 849; Spinning v. Sullivan, 48 Mich. 5, 11 N. W. 758; Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417; Osgood's Adm'rs v. Artt (C. C.) 17 Fed. 575.

Kerr & Crawford, of Seattle, Wash., for defendant Crawford, rely upon the following authorities: Section 848, vol. 3, Cook on Corporations; Drury v. Cross, 7 Wall. 299, 19 L. Ed. 40.

CUSHMAN, District Judge. Complainants interpose a motion to strike out certain paragraphs of the amended answer of the defendant William W. Crawford. For a proper understanding of the matter, a brief outline of the complaint and answer is necessary.

Complainants ask the foreclosure of two mortgages, executed January 4, 1910—one upon the property of the Washington Northern Railroad Company, hereinafter referred to as the "railroad company," and the other upon the property of the Oregon-Washington Timber Company—both given to the Mississippi Valley Trust Company, the first of which is now held by it and the second by it and its cotrustee, Union Trust Company, one of the plaintiffs herein.

The railroad company's mortgage was given to secure bonds to the amount of \$1,000,000, all of which have been issued. The Oregon-Washington Timber Company's mortgage was given to secure \$600,000, in bonds. All of the railroad company's bonds were purchased by the Oregon-Washington Timber Company, and \$600,000 worth of these bonds were surrendered to the Mississippi Valley Trust Company, as part of the security for the payment of the \$600,000 of the Oregon-Washington Timber Company's bonds. The Oregon-Washington Timber Company's mortgage provides that, upon the payment of any of its bonds, a like amount, par value, of the railroad company's bonds, so conveyed to the trust company, should be also canceled and returned to the railroad company, or delivered to it uncanceled, at the option of the railroad company. The \$600,000 of the Oregon-Washington Timber Company's bonds were sold. On the same date (June 4, 1910), the Oregon-Washington Timber Company executed a second

mortgage to the same trustee to secure a bond issue of \$400,000, sold by it to the railroad company, and also transferred to the railroad company, to secure the payment of the \$400,000, a like amount of the railroad company's bonds, which latter bonds are held by the trustee. The second mortgage, in like manner, provides for the surrender of the railroad company's bonds, upon payment of those of the Oregon-Washington Timber Company. The railroad company and the two defendant timber companies, on March 1, 1912, gave a further mortgage to the defendant Crawford, as trustee, by which the railroad company assigned to him the said \$400,000 second mortgage bonds of the Oregon-Washington Timber Company and the \$1,000,000 of the railroad company's bonds, the latter to be delivered upon their release under the prior mortgages. By an agreement between the railroad company and the Oregon-Washington Timber Company, the proceeds of the second mortgage bonds of the Oregon-Washington Timber Company, secured by the \$400,000 of the railroad company's bonds, were to be used in building additional railroad lines, but were pledged to the trustee, Crawford, who, it is charged, had notice of the terms of this agreement. Thirty thousand dollars, only, of the Oregon-Washington Timber Company's bonds have been paid. Upon which, \$30,000 of the railroad company's bonds were released and delivered to the mortgagee, Crawford, uncanceled.

The complainants ask, upon the decree, a determination whether the \$430,000 railroad company's bonds claimed by Crawford are equal in dignity, or postponed to the \$570,000, held as security by complainants.

The defendant Crawford, trustee, answers that a proposition made June 4, 1910, by the Oregon-Washington Timber Company was accepted by the railroad company, the material parts of which proposition were:

"We understand that you are proposing to make certain extensions to your railroad (formerly owned by the Cape Horn Railroad Company), the result of which will be to increase our facilities for marketing the timber from our lands, in Skamania county, Washington, and that you have authorized an issue of one million dollars (\$1,000,000) par value first mortgage six per cent. gold bonds, dated the 4th day of June, 1910, due on the first day of May, 1928, and secured by a first mortgage on your railroad property.

"We propose to buy from you the entire issue of one million dollars (\$1,000,000) par value of said bonds and pay you therefor four hundred thousand dollars (\$400,000) par value of our bonds as hereinafter described, and the sum of five hundred and forty thousand dollars in money, said money to be used for the following purposes:

* * * * *

"\$125,000 to be used for the payment of the present floating indebtedness of the Cape Horn Railroad Company.

"\$215,000 to be used for extensions, betterments and equipment to your railroad property.

* * * * *

"As a further consideration for the sale to us of said one million dollars (\$1,000,000) of your bonds, and without any new or further consideration, we agree to sell and deliver to you four hundred thousand dollars (\$400,000) par value six per cent. gold bonds issued by us, dated the 4th day of June, 1910, due serially \$30,000 par value every six months, beginning May 1st, 1922, the last \$40,000 thereof maturing May 1st, 1928, and secured by second mortgage on our lands and timber in Skamania county, Washington, and

secured also by \$400,000 par value of the \$1,000,000 par value of bonds now proposed to be purchased by us from you; said \$400,000 par value of our bonds so sold to you; however, or the proceeds of the sale thereof, to be used by you only for future extensions, betterments or equipment to your railroad, after the expenditure of the said sum of \$540,000 above mentioned.

"The \$1,000,000 par value of your bonds hereby proposed to be purchased by us are all to be executed and delivered by you to the trustee in the mortgage securing the same, and to be by said trustee duly authenticated, and \$600,000 par value thereof to be deposited with the Mississippi Valley Trust Company of St. Louis, Missouri, to be by it held in trust as security under the terms of a certain first mortgage dated June 4, 1910, executed by us to said Mississippi Valley Trust Company to secure an issue of \$600,000 par value of 6% gold bonds issued by us, and the remaining \$400,000 par value of your bonds hereby proposed to be purchased are to be deposited with the said Mississippi Valley Trust Company to be by it held in trust as security under the terms of a certain second mortgage dated June 4th, 1910, executed by us to said trust company to secure an issue of four hundred thousand dollars (\$400,000) par value second mortgage 6% gold bonds issued by us, which latter \$400,000 par value second mortgage bonds are the bonds hereinabove agreed to be sold and delivered to you.

"The said sum of \$540,000 to be deposited as needed for the purposes mentioned above to your credit at said Mississippi Valley Trust Company and to be paid out in checks signed by you and countersigned by said trust company for said purposes."

It is averred: That the \$600,000 timber company bonds mentioned were sold to a syndicate, together with \$999,300 par value of the corporate stock of the railroad company, for \$540,000. That the members of the syndicate and trust company knew, at the time of the purchase, of the purposes to which, by the agreement, the money raised was to be applied. That a large portion of these bonds are still held by the members of this syndicate. That, instead of the money being expended as agreed, the proceeds of the sale of the bonds were spent, in part as follows:

"\$175,000 for the payment of timber lands acquired by the Oregon-Washington Timber Company from the Whitney estate. An amount in excess of \$100,000, as this defendant believes and charges to be the fact, in building camps and in buying additional logging equipment for the Oregon-Washington Timber Company."

—That the railroad company was without power to issue bonds for such purpose, but this was done by the trust company at the direction of the present holders of the \$570,000 bonds upon which suit is brought, \$300,000 of which bonds are still held by the members of the syndicate. That complainants are estopped from sharing in the proceeds of the sale of the railroad company's property to the extent of such unauthorized expenditure.

This defendant further avers that in February, 1911, the Blazier Timber Company was incorporated; that subsequently the two timber companies and the railroad company authorized the execution, by the three companies, of two series of notes; Series A to consist of \$100,000, joint collateral trust notes, series B, of \$150,000, joint collateral notes. These notes were secured by an indenture of the three companies to the Mississippi Valley Trust Company, conveying all of the property of the Blazier Timber Company and the railroad company, and assigned to the trustee the \$400,000 second mortgage bonds of the

Oregon-Washington Timber Company and \$400,000 of its own bonds, deposited as collateral security for those of the timber company.

The proceeds of the series A notes were used as authorized; but it is alleged that the series B notes were delivered to the syndicate for the purchase of the railroad company's stock, sold to the syndicate with the first mortgage bonds of the Oregon-Washington Timber Company; that the stock was not sold to either of the three companies, but to J. E. Blazier, individually; that the amount of these notes has been paid to the members of such syndicate by the railroad company and the Blazier Timber Company, for which purpose the funds of such companies have been unlawfully diverted. These transactions are alleged as an offset herein. To have an accounting of such funds, defendant asks that the members of the syndicate be brought into the suit, or, if beyond the jurisdiction, that they be denied the right to participate in the proceeds of the sale upon foreclosure herein.

The motion to strike is directed to the foregoing allegations of the answer.

[1] The mortgage to the defendant Crawford expressly recognizes the priority of the mortgages being foreclosed herein and the \$600,000 of bonds issued thereunder. As a subsequent mortgagee, the defendant Crawford is estopped to deny such priority.

"At the time this third mortgage was executed, and thus made subject to the second mortgage bonds, all these bonds had been negotiated by the company, and were in circulation, in the business community. They were all negotiated in the months of September, October, November, and December, 1857. This the company, of course, well knew at the time of the execution of the third mortgage, and knew, also, of the circumstances attending the negotiation of them. They had received and were in the enjoyment of the avails of them, and with this knowledge, and under these circumstances, the third mortgage, and the bonds issued under it, were made in express terms subject to the payment and satisfaction of the bonds issued under the second. All persons, therefore, taking these third mortgage bonds, or coming in under the mortgage, took them and came in with a full knowledge that the mortgagor had made the security subject to the prior lien and indebtedness. Even if there had been any valid objection to these bonds under the second mortgage, it was competent for the obligor to waive them, and no better proof could be furnished of the waiver than the acknowledgment of the full indebtedness, by making the subsequent security subject to it. This was a question that belonged to the obligor to determine for himself when giving the third mortgage; but, besides this, what right have those coming in under it to complain? They come in with full notice of the acknowledgment of the indebtedness and previous lien; and, especially, what right have the Milwaukie and Minnesota Company to complain, who purchased the equity of redemption through Barnes, their agent, subject to the previous incumbrances of \$1,000,000. They have the benefit of that incumbrance by an abatement of that amount in the price of the purchase." *Bronson v. La Crosse Railroad Co.*, 2 Wall. 283, at page 311 (17 L. Ed. 725); *Jerome v. McCarter*, 94 U. S. 734, 24 L. Ed. 136.

[2] Clearly the matters set up do not amount to payment of the bonds. To constitute payment something of agreement, or consent, actual or constructive, as to the application of credits, either on behalf of the trust company, or the bondholders, or the mortgagor would be necessary. Consent of the mortgagor might take the form of asking the application of payment of the funds theretofore wrongfully diverted

or misappropriated, but where one claims through the debtor, such consent in some form is essential.

[3] The diversion of the funds from their authorized purpose is not a failure of consideration. The \$540,000 agreed to be paid for the bonds was the consideration therefor. It was paid and received by the mortgagor, and, if the agreement collateral to the mortgage between the railroad company and the Oregon-Washington Timber Company, as to its expenditure, was violated and more money expended for the benefit of the timber company than agreed, it cannot be said to be a failure of consideration for the bonds or mortgage securing them. When the money was paid for the bonds, the bondholders were not thereafter concerned or responsible for its disposition. If they were subsequently guilty of misconduct—having acquired the bonds in good faith—and not acting in a fiduciary relation thereto, it would not avoid the bonds, but be the subject-matter of an independent cause of action.

[4] Considering the matters set up in the answer as in the nature of a set-off or counterclaim, and putting to one side the question whether they are of such a nature as to warrant their pleading by the proper party, under Equity Rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi), yet it is clear that they are causes of complaint which concern the railroad company in the one instance, and the railroad company and the Blazier Timber Company in the second instance, and that Crawford, as a subsequent mortgagee, does not control them; that they are not asserted by the holder of the right of action thereunder, if any.

"Mutual cross-demands do not, as a general rule, extinguish each other by the mere operation of the law regulating set-offs, without the acts of the parties, and a defendant holding a claim against plaintiff is not compelled to avail himself of it, but has the option of pleading the same by way of set-off in an action against him, or of making it the ground of an independent action, and the rule is the same in regard to recoupment and counterclaim; and plaintiff has no option or power to require him to do so, or to apply the subject of the set-off as a payment on his demand, in the absence of any agreement authorizing such application." 34 Cyc. 758.

The allegations that the debtor companies are insolvent are not sufficient to warrant the court in giving to a particular creditor, where there may be many interests affected, the right to speak and make election for the alleged insolvents.

[5] The defendant urges that his defense is not controlled by the foregoing reasons, because of the fact that, while his mortgage, executed by the three defendant companies, expressly recognized the priority of the mortgages herein sought to be foreclosed and the bond issues thereunder, yet, as part of his security, there were assigned to him the railroad company bonds held by complainants, to be delivered to him as they were, from time to time, surrendered, under the terms of the first mortgage; that therefore defendant, as a holder of bonds secured by the first mortgage of the railroad company, is not estopped to question the amounts due other bondholders of the same issue. This position is untenable. Defendant cannot now be considered as the innocent holder of negotiable paper before maturity, for he did not come into possession of the bonds at the time he parted with his money. He has

not possession now of the bonds. They are in the possession of complainants to secure another's claim. But \$30,000 of them have been released. Defendant can have no right to them until they are released. 2 American & English Encyc. of Law (2d Ed.) 310; 7 Cyc. 926; *Muller v. Pondir*, 55 N. Y. 325, 335, 14 Am. Rep. 259. To accomplish their surrender may take the entire property securing them, and, so far as the first bond issue is concerned, he gets them, if at all, after they have matured and, in effect, been paid.

It is not necessary to consider whether, under the circumstances of this case, the railroad company's bonds are held as collateral security, or otherwise. The effect upon this defense is the same. The recognition by an unsecured creditor of the right of the debtor, upon payment, to obtain, uncanceled, the written evidence of the debt would justify the conclusion that such unsecured creditor contemplated the effective re-issue of such obligation. But that is not this case.

The railroad company was interested in having its bonds surrendered to it, and not surrendered to the timber company, the party pledging the railroad company's bonds, and, ordinarily entitled, upon the payment of its debt, to a surrender of the collateral securing it. By the surrender of its bonds to the railroad company, the size of its debt was lessened. To say it might, at its option, receive these bonds uncanceled would get around, so far as the parties to the agreement are concerned, the reasoning embodied in that line of decisions holding that their surrender would absolutely extinguish them for all purposes, as evidences of existing obligations. In *re Burton* (D. C.) 29 Fed. 637. But, in the absence of a more clearly expressed intention than appears in the first mortgages, it could not fairly be assumed that it was intended that the surrendered bonds, if reissued, should assume even rank with those not surrendered. The prior creditor is entitled to its security to the full from both mortgagors, and this right is undiminished until its debt is fully paid. *N. Y. Security & T. Co. v. Equitable Mortgage Co.* (C. C.) 77 Fed. 64.

If the money paying the timber company's bonds was realized from the property of the railroad company, and a railroad company bond was surrendered and reissued of equal rank with those unsurrendered, the security for the remaining bonds would be lessened and diluted. Such a proceeding would effect a partial release of the mortgage. By surrendering, or agreeing to surrender, to the obligor uncanceled bonds discharged from the mortgage securing them, no right under the mortgage is assigned or given. By that transaction, they are severed and separated from the mortgage, originally securing them, and, unless some innocent purchaser, ignorant of their reissue, held them for value, they could not again be held to share under the lien of the mortgage.

Whether such circumstances would affect such reinstatement of such bonds under the mortgage, it is not now necessary to determine; but, if such was the result, it would primarily depend upon equitable principles not here present. Under the circumstances of this case, to warrant such an effect, the language should be clear and positive.

Whatever the effect of the reissue of these bonds to Crawford, on

debts, contracted subsequent to the first mortgage and prior to their delivery, may be, every reason is against their being held of equal rank with unpaid and unsurrendered bonds of the same issue.

All of the matters moved against will be stricken.

In re KRETZ et al.

(District Court, W. D. Washington, S. D. April 9, 1914.)

No. 1206.

1. BANKRUPTCY (§ 408*)—REFUSAL OF DISCHARGE—FALSE STATEMENTS TO OBTAIN CREDIT.

Under Bankruptcy Act July 1, 1898, c. 541, § 14, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act June 25, 1910, c. 412, § 6, 36 Stat. 839 (U. S. Comp. St. Supp. 1911, p. 1496) authorizing the discharge of a bankrupt unless he has obtained property on credit upon a materially false statement in writing, made to any person or his representatives for the purpose of obtaining credit from such person, a false statement to a mercantile agency does not prevent a discharge, in the absence of any showing that the agency was a representative of any creditor, or that the representation to the agency was communicated to or relied upon by any creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. § 408.*]

2. BANKRUPTCY (§ 405*)—REFUSAL OF DISCHARGE—FALSE STATEMENTS TO OBTAIN CREDIT.

Under Bankruptcy Act July 1, 1898, c. 541, § 14, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427) as amended by Act June 25, 1910, c. 412, § 6, 36 Stat. 839 (U. S. Comp. St. Supp. 1911, p. 1496), relative to refusing a discharge because of false statements made to obtain credit, creditors may object to the discharge of a bankrupt because of a false statement made to another creditor, who does not object to the discharge for the purpose of obtaining credit from the nonobjecting creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 709-711; Dec. Dig. § 405.*]

3. BANKRUPTCY (§ 413*)—OBJECTIONS TO DISCHARGE—VERIFICATION.

Where the specifications of objections to a bankrupt's discharge were filed October 20th, and no objection was made to the sufficiency of the verification until the beginning of the taking of testimony before a special master on December 2d, when it was agreed that the objection should be made to the district judge, and the testimony was taken and briefs were filed up to and including December 6th, upon which day the president of one of the objecting creditors verified the specifications, his verification was in time, and it was immaterial whether the original verification was sufficient.

[Ed. Note.—For other cases, see Bankruptcy Cent. Dig. §§ 712-718, 725, 727; Dec. Dig. § 413.*]

In Bankruptcy. In the matter of Thore W Kretz and another, co-partners doing business as the Hoquiam Hardware & Supply Company, bankrupts. On exceptions to the special master's report. Report disapproved, and discharge denied.

Morgan & Brewer and W. E. Campbell, both of Hoquiam, Wash., for objecting creditors.

Charles W. Smith, of Hoquiam, Wash., for bankrupts.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CUSHMAN, District Judge. This matter is before the court upon the exceptions of certain creditors to the special master's report, recommending that the creditors' objections to the bankrupts' discharge be not allowed, with costs against the creditors. The character of the issue is fully disclosed by the master's report.

"The proof shows that the bankrupts made statements to the Bradstreet Company and R. G. Dun & Co. as to their financial condition. These statements were materially false, in that they did not own real estate to the amount mentioned in these statements to the mercantile agencies. In one of these statements the bankrupts listed notes and accounts receivable, actual value, at \$5,000. This also was false. On November 21, 1911, the bankrupts made a statement entitled 'Confidential Statement made to Western Hardware & Metal Company, Seattle, Washington, by Hoquiam Hardware & Supply Company.' This statement was materially false, in that the bankrupts did not own real estate (store building and lot) of the value of \$2,500. The testimony of the bankrupts shows that the statement to the Western Hardware & Metal Company, of Seattle, Wash., was made for the purpose of obtaining credit, and that credit was actually obtained from the Western Hardware & Metal Company after this statement had been furnished. There is no evidence that the statements furnished the mercantile agencies, R. G. Dun & Co. and the Bradstreet Company were furnished by the bankrupts with a view of obtaining credit, or that any credit was ever actually extended to the bankrupts on the basis of these false statements. The Western Hardware & Metal Company is not one of the objecting creditors in this proceeding. The only question with respect to false statements is whether or not the making of a false statement to a mercantile agency is a bar to a discharge, and whether or not the making of a false statement to an individual, with a view to obtaining credit, and on which credit was actually subsequently extended, is such a matter as can be taken advantage of by other creditors, where the creditor to whom the statement was made makes no objection to the granting of the discharge. The act prevents a discharge where any bankrupt has obtained property on credit from any person upon a materially false statement in writing, made to such person for the purpose of obtaining such property upon credit.

"In re Foster (D. C.), reported in 186 Fed., at page 254, definitely decides that the furnishing of a false statement to a mercantile agency is not such a statement as was contemplated by the provision of the Bankruptcy Act just referred to, and in conclusion of his findings, Referee West in that case made use of the following language:

"It is indeed unfortunate that a bankrupt may make false statements of his financial condition to a mercantile agency, and that a creditor, relying upon the faith of such a statement, may not succeed in defeating a discharge because of such a statement, but such is the law."

"As to the report furnished the Western Hardware & Metal Company, I find that while that statement was materially false, and was such a statement as would fall within the provisions of the Bankruptcy Act before referred to, the only creditor in a position to take advantage of this false statement is the creditor to whom it was made, and who relied thereon and extended the credit; and, inasmuch as the Western Hardware & Metal Company is not a party to this proceeding as an objecting creditor, this ground of objection is not available to the objecting creditors, and that specification must be denied."

The objecting creditors rely upon the following authorities: In re Harr (D. C.) 143 Fed. 421; In re Shaffer (D. C.) 169 Fed. 726; Gilpin v. Nat'l Bank, 165 Fed. 607, 91 C. C. A. 445, 20 L. R. A. (N. S.) 1023; Talcott v. Friend, 179 Fed. 676, 681, 103 C. C. A. 80, affirmed 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. 718; Loveland on Bankruptcy (4th Ed.) vol. 2, 1323, § 730; Act of 1903, § 14, Subd. 3.

The bankrupts rely on the following cases: *In re Foster* (D. C.) 186 Fed. 254; *In re Russell*, 176 Fed. 253, 100 C. C. A. 77; *Novick v. Reed*, 192 Fed. 20, 112 C. C. A. 408; *In re Miller* (D. C.) 192 Fed. 730; *In re Blankfein* (D. C.) 97 Fed. 191; *In re Richards* (D. C.) 103 Fed. 849; Chapter 5, § 14, Bankruptcy Law of 1898.

The Bankruptcy Act of 1898 contained no provision touching this question. The act of 1903 provided:

"The judge shall * * * discharge the applicant (the bankrupt) unless he has * * * (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit. * * *" Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1911, p. 1496).

The act of 1910 provides:

"* * * (3) Obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person. * * *" Act June 25, 1910, c. 412, § 6, 36 Stat. 839 (U. S. Comp. St. Supp. 1911, p. 1496).

[1] As the false representations under the last act must be made to the person, or the representative of the person, from whom money or property was obtained on credit, without a finding or evidence that the mercantile agencies were, in some sense, the representatives of a creditor from whom money or property was obtained, or the representations made to them were, in some way, communicated to the creditor, or relied upon by the creditor, the report of the master is approved as to the insufficiency of the objection to discharge, so far as based upon the false representations made to the commercial agencies.

[2] The objecting creditors were clearly parties in interest, and therefore entitled to object, under the statute, to the discharge, for the statute reads that the false statements, if made to "any person," prevent discharge, and are therefore sufficient to require the refusal of the bankrupts' discharge, although not made to one of the objecting creditors. *In re Harr* (D. C.) 143 Fed. 421; *In re Miller* (D. C.) 192 Fed. 730, at 733; *Talcott v. Friend*, 179 Fed. 676, at 681, 103 C. C. A. 80, affirmed 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. 718; *In re Shaffer* (D. C.) 169 Fed. 724, at 726; *Gilpin v. Nat'l Bank*, 165 Fed. 607, 91 C. C. A. 445, 20 L. R. A. (N. S.) 1023; *Collier on Bankruptcy* (9th Ed.) 350B; *Black on Bankruptcy*, 665, note 42.

In re Burke, Fed. Cas. No. 2,157, 4 Fed. Cas. page 731, was one construing a provision of Act March 2, 1867, c. 176, 14 Stat. 517, and is therefore of a less controlling character than the foregoing.

[3] As shown by the special master's report above, this matter was disposed of upon its merits. The bankrupts now object to the consideration of the question upon its merits, contending that the objections to the discharge are defective, in that they were sworn to by the attorney of the creditors, with no power of attorney on record authorizing him to make affidavit for them.

The specifications were filed October 20, 1913. No objection was made to the sufficiency of the verification until the beginning of the taking of testimony, December 2, 1913, upon which objection it was agreed by the attorneys for the bankrupts and the objecting creditors

that this objection should be made to the District Judge. Thereupon the testimony was taken. Briefs were filed up to and including the 6th day of December, 1913, upon which day the president and manager of F. G. Foster Company, a corporation, one of the objecting creditors, verified the specifications of objections. The report of the special master was filed on the 24th day of February, 1914. Without ruling on the sufficiency of the original verification, or that of the power of attorney to authorize such verification, I am of the opinion that, under the proceedings in this cause, the verification by the president of the above-named company was in time. Collier on Bankruptcy (9th Ed.) 329D.

The special master's report is disapproved, as above indicated, and the discharge and costs will be denied. Leave will be denied the Western Hardware & Metal Company to now file its objection to discharge.

In re WENATCHEE HEIGHTS ORCHARD CO.

(District Court, W. D. Washington, N. D. April 3, 1914.)

No. 5025.

1. **BANKRUPTCY (§ 272*) — ADMINISTRATION OF ESTATE — EXPENDITURE OF FUNDS BY TRUSTEE.**

Where a bankrupt orchard company platted certain irrigable land and sold the same for orchards, agreeing to plow the ground, plant the orchards, cultivate and irrigate the same, and pay taxes until the price was fully paid or the purchasers had taken possession, and before bankruptcy certain judgments were recovered against the bankrupt by purchasers because of a shortage of water, and other purchasers had filed large claims for damages for the same reason, a petition by the trustee, representing that such claims, which were unliquidated, had been filed in excess of \$100,000, and stating that in his opinion it would be to the best interests of a large majority of the persons interested in the estate if additional water stock and water rights could be purchased on condition that the unliquidated claims for damages should be released, was insufficient to warrant an order authorizing the expenditure of the funds of the estate to purchase further water rights.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 572, 573; Dec. Dig. § 272.*]

2. **BANKRUPTCY (§ 249*)—ORCHARDS—CULTIVATION BY BANKRUPT—CONTINUANCE BY TRUSTEE.**

Where a bankrupt orchard company had contracted to plow, plant, cultivate, and irrigate orchards on tracts sold by it until the purchase price was paid or the purchasers had taken possession, but at the time bankruptcy intervened the bankrupt was the owner of only one of such contracts, its interest in the remainder having been assigned to others, and the trustee, with the consent of all the creditors, did the work necessary for the cultivation of the orchards during 1913, he was not justified in further cultivating the land against the objection of a creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 347; Dec. Dig. § 249.*]

3. **BANKRUPTCY (§ 314*)—TAXES—"OWING BY BANKRUPT."**

Bankruptcy Act, July 1, 1898, c. 541, § 64a, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), provides that the court shall order the trustee to pay all taxes legally due and owing by the bankrupt in advance of payment

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of dividends to creditors, etc. *Held*, that where a bankrupt orchard company transferred contracts for the purchase of orchard tracts, agreeing that, in case of forfeiture by reason of the purchasers' failure to pay the price, the bankrupt would deed the tract or tracts to whom the assignee might elect, the title to the land remained in the bankrupt; and hence, taxes assessed against the land during such period were "owing by the bankrupt," within such section, and payable by the trustee, though according to the state law the remedy for the collection of taxes was enforceable only against the land.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469-473, 478, 483-487, 489, 490; Dec. Dig. § 314.*]

4. TAXATION (§ 79*)—ASSESSMENT—"OWNER."

Rem. & Bal. Code, Wash. § 9113, provides that, in assessing real estate, the assessor shall make out a complete list of all lands or lots subject to taxation, showing the names of owners if known to him, and, if unknown, shall be so stated. *Held*, that the word "owner" signifies the owner of an estate in possession at the time of assessment, and not a prior owner, or the owner of an estate in expectancy, or of any executory or contingent interest.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 139, 166; Dec. Dig. § 79.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5134-5151; vol. 8, p. 7744.]

5. TAXATION (§ 509*)—PAYMENT OF TAXES—MARSHALING ASSETS.

While the marshaling of assets may be decreed between individuals and between governments and public corporations, a state will not be delayed, hindered, or embarrassed in obtaining its revenues thereby nor directed to pursue another to obtain them at the petition of an individual.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 943-945; Dec. Dig. § 509.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Wenatchee Heights Orchard Company. On petition to review orders of the referee with reference to certain claims for damages against the bankrupt for failure to furnish water for irrigation to the holders of certain orchard contracts, and for the payment of taxes. Modified.

Walter Schaffner and Raymond D. Ogden, both of Seattle, Wash., for trustee.

Harry E. Wilson, of Seattle, Wash., for H. P. Johnston and others.

Geo. H. Bailey, of Seattle, Wash., for F. E. Reyes.

H. C. Belt and Corwin S. Shank, both of Seattle, Wash., for S. V. Wells.

McClure & McClure, of Seattle, Wash., for G. Beninghausen.

Alexander Stewart and W. P. McElwain, both of Seattle, for W. P. McIlvain.

Douglas, Lane & Douglas, of Seattle, for James H. Douglas.

CUSHMAN, District Judge. This matter is before the court upon petition to review two orders of the referee. The same proceeding has been considered, in other phases, upon former hearings. 204 Fed. 674, and decision of December 3, 1913, 209 Fed. 84. The bankrupt, upon its organization, acquired some 1,200 acres of land near Wenatchee, Wash., together with shares of stock in an irrigation company. The land was largely platted into 5 and 10 acre tracts, devoted to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the cultivation of orchards, and sold under contracts, a portion of which have been fully paid out and deeds given. A considerable number of the contracts are still outstanding. Under these contracts, the grantor, the bankrupt, was to plow the ground, plant the orchards, cultivate, irrigate, and care for them and pay the taxes until the purchase price was fully paid, when deeds would be given. The purchasers under these contracts complain that less water is being furnished than agreed. After the obtaining of certain judgments for damages, on account of the shortage of water, bankruptcy intervened. A petition was denied by the referee, which asked for the expenditure, by the trustee, of funds of the estate to comply with the order of the Public Service Commission of the State of Washington, requiring the now bankrupt to increase the supply of water for irrigation of the land sold by it. This court heretofore sustained the referee's order, and the cause is now before the Court of Appeals of this circuit.

[1] Upon the former proceeding it was asked that these funds be expended in impounding further water by increasing the height of the dam of the irrigation company, which was urged as the only practicable means of complying with the Commission's order. The present petition asks the referee to authorize the expenditure of the funds of the estate for the purchase of further water rights.

To the present petition the creditor Wells objects. The nature of his interest in and past relations with the bankrupt are disclosed in the court's former opinion. 209 Fed. 84.

The court is asked to distinguish the present matter from that formerly considered, as a justification for which the present petition asks for the purchase of water rights, to be used in effecting the settlement of unliquidated claims for damage on account of the failure of the bankrupt to furnish the amount of water promised under the contracts of sale. To this end, the petition recites:

"Your petitioner further represents that a large number of claims have been filed by the purchasers of property from the said bankrupt, demanding damages for the failure of the bankrupt company to supply sufficient water as provided for by the contracts hereinbefore mentioned, that said claims now filed are unliquidated, and that the amount claimed thereunder is in excess of \$100,000.

"Your petitioner further represents that in his opinion the hearing upon the liquidation and allowance of the unliquidated claims for damages hereinbefore referred to will consume a large amount of time, and will entail a large expense upon this estate; that in the opinion of the trustee it would be to the best interests of a large majority of the persons interested in said estate if the additional water stock and water rights hereinabove referred to could be purchased upon the condition that the unliquidated claims for damages should be released; that your petitioner believes that it is essential for a proper administration of said estate that the question as to whether or not your petitioner shall purchase any additional water stock or rights should be speedily determined."

These allegations, even when supplemented by the full record of the proceeding, are clearly insufficient to warrant the making of the order asked. The referee's order denying this petition is approved and sustained.

The further order of which a review is asked, refused, upon the trustee's petition for instructions, to direct him to pay the taxes upon

and cultivate for the season 1914 the lands under sale contracts. The bankrupt sold the tracts of its platted lands under contracts providing for monthly payments over a period of from five to seven years, the bankrupt to care for, cultivate, and irrigate the lands and to pay all taxes and assessments levied thereon, until the lands were paid for, unless the purchaser should elect to take possession thereof. The purchase price of many of the tracts has been fully paid and deeds have been given; but, in a large number of cases, the price has not been fully paid, in which cases the lands have been in the successive possession of the bankrupt, its receiver and the trustee herein, and up to this time have, by them, been cultivated and irrigated, according to the terms of the contracts. During the season 1913 the trustee did this work with the consent of all of the creditors. The creditor Wells objects to its being further done by the trustee. The trustee represents that the costs of such work will equal the crop return accruing to the estate. A large amount of general taxes are due, and in great part delinquent, exceeding, upon the lands covered by the contracts, \$3,000. At the time of filing the petition for adjudication, the bankrupt was the owner of only one of these contracts; its interest in the remainder having been assigned to others, who joined in the petition for review.

[2] In the assignment of the contracts, it was provided that the bankrupt should, notwithstanding the assignments, perform all of the conditions of the original contracts, which would include the cultivation, irrigation, and payment of the taxes until full payment for the lands was made. It is clear, under the foregoing conditions, the further cultivation of the lands by the trustee is not justified. The care and cultivation of the tracts by those separately interested therein should not only produce substantially greater material benefits, but be more equitable to all parties interested in the estate.

[3] The statute concerning taxes provides:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court." Section 64a.

The effect of the sale of the contracts and the subsequent assignments is that the bankrupt, having contracted to deed to the several purchasers the platted tracts when the full contract price was paid, thereafter, upon the assignment of its interest under these contracts, agreed, in case of forfeiture under any contract by reason of failure to pay the purchase price of the land, that it would deed such tract, or tracts, to whom the assignee of its interest thereunder might elect, and to that end executed deeds in blank for that purpose, placed in escrow, with power of attorney to complete by filling the blanks. This arrangement clearly leaves the title to the property in the bankrupt.

The taxes are owing by the bankrupt. It is argued that they were not owing, that the lands owed the taxes, and that they were no more owing by the bankrupt than they were by the contract holders, and

the assignees of the bankrupt, entitled to its interest under the contracts. The language of the statute "any taxes owing by the bankrupt," is to be interpreted according to its ordinary meaning when used in this connection. The bankrupt owes these taxes as between the parties, for, under these contracts, it promised and agreed to cultivate the lands and pay the taxes.

The exemptions allowed by law to churches, hospitals, and other similar institutions, as well as to heads of families, to a certain amount, shows that the ownership of property has some effect upon the amount owing, even though a personal judgment may not be recovered against the owner for the taxes.

[4] The Washington law provides that, in assessing real estate, the assessor shall make out a "complete list of all lands or lots subject to taxation, showing the names and [of] owners, if to him known, and if unknown, so stated." Rem. & Bal. Code, § 9113; Pierce's Code 1912, tit. 501, § 115.

"Owner," as used in this connection, signifies the owner of an estate in possession at the time of the assessment, and not a prior owner, or the owner of an estate in expectancy, or any executory or contingent interest. *Hopper v. Malleson's Ex'rs*, 16 N. J. Eq. (1 C. E. Green) 382, 387. The legal title and right of possession in the lands taxed here at the time of filing the petition were in the bankrupt.

Form should not be allowed to obscure the substance. Property is assessed to the owner. If it is so, and the assessment creates a lien against his property, out of which payment can be compelled, of what use is it to argue that the owner does not owe the tax? As language is ordinarily understood, the owner of property, to whom it is assessed, owes the tax, whether the remedy given for its collection is solely confined to his taxed property or not. If he does not owe the tax, no one does. *Hecox v. Teller County*, 198 Fed. 634, 117 C. C. A. 338. Even where the remedy for the collection of a debt is entirely taken away, as by the exemption from suit of the sovereign, the statute of limitations, or a discharge in bankruptcy, one may still be said to owe the debt, payment of which cannot be enforced.

[5] The arguments opposing the payment of the taxes as doing violence to equities in favor of the general creditors lose sight of the reason for the statute, which must afford the safest guide to its interpretation. While the marshaling of assets may be decreed between individuals and between governments and public corporations, which are instrumentalities of government, yet a state will not be delayed, hindered, or embarrassed in obtaining its revenues or directed to pursue another to obtain them, at the petition of an individual.

This is but the effect of a general rule of public policy, favoring the state in the collection of its revenues. Summary remedies are provided for its collection, where an individual would have to proceed in limine. The strength of this policy overrides ordinary equities.

The national government, by the foregoing provision of the bankruptcy law, while taking the administration of insolvent estates from the control of the state, recognized its obligation not to impede, by such administration, a state in the collection of its revenues, and to

that end made the positive provision for payment in the above section.

The mandatory language of the section (64a) recognizes a comity that would not require the assertion by the state of its claim for taxes in all cases to warrant the order for their payment; but a suggestion that taxes are owing by one interested in the estate should be sufficient.

"It is the duty of the court, not only to respect this paramount right (to taxes) and to make no order for distribution of assets in custodia legis, except in subordination thereto, but also to make such orders as will compel the receiver to discharge this obligation." 34 Cyc. 347.

"It is not necessary for the public authorities to appear in a court of bankruptcy as ordinary claimants. They have no right in the administration as creditors, and no voice in the selection of trustee, and the liability for taxes is in no way affected by the discharge of the bankrupt. On the other hand, the duty of affirmative action rests upon the court of bankruptcy. It is the duty of the trustee to ascertain from the public records the amount due for taxes and bring the matter to the attention of the court, and thereupon it is the duty of the court to order their payment if there are sufficient funds in the estate for that purpose." *In re Kallak* (D. C.) 147 Fed. 276, at 277.

"And section 1, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3419), declares that the word 'debt' shall include any debt, demand, or claim provable in bankruptcy. Of course, a tax is provable in bankruptcy. It thus appears that taxes legally due and owing by the bankrupt must be paid before distribution to creditors, and the injunction of section 64 is that the court 'shall order' the trustee to pay them. It seems to be the duty of the court to require such payment, even though no claim for the same shall have been presented in the manner or within the time prescribed by the bankruptcy act for the filing of claims. It is true that section 64 does not, in express words, refer to taxes assessed or becoming due after the institution of bankruptcy proceedings. But it is settled law that the bankrupt's estate is taxable while it is in the hands of the bankrupt's trustees." *In re William F. Fisher & Co.* (D. C.) 148 Fed. 907, at 912.

The conclusion reached finds further support in the following cases: *In re Tilden* (D. C.) 91 Fed. 500; *City of Waco v. Bryan*, 127 Fed. 79, 62 C. C. A. 79; *City of Chattanooga v. Hill*, 139 Fed. 600, 71 C. C. A. 584, 3 Ann. Cas. 237; *In re Baker*, 1 Am. Bankr. Rep. 526.

The referee's order is modified to conform to the foregoing.

THE CASTENET.

(District Court, N. D. New York. March 2, 1914.)

MARITIME LIENS (§ 37*)—SUIT FOR ENFORCEMENT—VALIDITY AND PRIORITIES.

Various claims for liens on a libeled steamer for wages, supplies, and on mortgages considered, and determined, with their priorities.

[Ed. Note.—For other cases, see *Maritime Liens*, Cent. Dig. §§ 58-70; Dec. Dig. § 37.*]

In Admiralty. Suit by Walter L. Visger, Walter S. Visger, and Kenneth Visger, by his guardian ad litem, against the steamer Castenet, to recover seaman's wages. Decree establishing and foreclosing liens.

White & Stanley, of Buffalo, N. Y., for libelants.

John Conboy, of Watertown, N. Y., for George H. Burtch, lienor.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

RAY, District Judge. Carrie E. Visger is the wife of Walter L. Visger and the mother of Walter S. Visger and Kenneth Visger, the libelants, and the owner of the steamer Castenet running for several years among the Thousand Islands, St. Lawrence river, a vessel some 110 feet in length and of 16-foot beam, measuring some 54 tons.

On or about August 1, 1910, Carrie E. Visger borrowed of Francis Wilson of Philadelphia, Pa., the sum of \$1,500, the payment of which was secured by a first mortgage on the Castenet. September 1, 1910, \$300 was paid thereon, and no other payments have been made. This mortgage draws interest at the rate of 6 per cent. On the same day, August 1, 1910, Carrie E. Visger gave a second mortgage upon the boat to J. Frank La Rue of Philadelphia, Pa., to secure the sum of \$300, due him for legal services. This draws interest at the rate of 6 per cent., and no part of it has been paid. These mortgages were duly recorded.

During the season of 1912, George H. Burtch of Alexandria Bay, N. Y., furnished coal and other necessary supplies and materials for use in running the boat, and filed liens therefor. Thereafter, with the consent of the owner and prior mortgagees, these liens were canceled and in consideration therefor on the 1st day of July, 1913, said Burtch took a mortgage on the Castenet for \$782.94, and it was agreed by all the parties that this should be a first mortgage on said boat. This was done to enable the boat to be operated during the season, as otherwise Burtch would have had to foreclose his liens and sell the boat. This mortgage draws interest at the rate of 6 per cent.

On or about the 6th day of July, 1913, Walter L. Visger, the husband of Carrie E. Visger, the owner, and who represented her, said La Rue, John T. De Laney, representing Mr. Burtch, and said Burtch met by appointment at Alexandria Bay, and it was there agreed that Burtch would furnish the paints, etc., necessary to fit out the boat for running the season of 1913, and also a few of her first coalings until the boat was well started. It was agreed by said Walter L. Visger in behalf of himself and Carrie E. Visger that if Burtch would permit the boat to be run the season of 1913, he would pay Burtch all of the expense or indebtedness necessary for the running of the boat for that season, 1913, and would apply the surplus of the earnings of the boat upon the interest upon the mortgages, and also in reduction of the principal, so far as possible. Burtch permitted the boat to run, but was not paid for the supplies furnished by him. On the 26th day of August, 1913, Burtch filed a lien on the Castenet for coal, wood, and fitting-out supplies, in the sum of \$286.33. August 26, 1913, Thomas Thurston filed a lien on said boat for \$37.50, and on the same day Olin Snyder filed one for \$35. These were duly assigned to Burtch, making his claim on such three liens \$358.83. In September, 1913, said George H. Burtch duly filed a libel against said Castenet, her boilers, etc., for that sum. On the 11th day of September, 1913, William Morford filed a lien on said boat for \$31 for seaman's wages, and October 14, 1913, Cornwall Bros. filed a lien thereon for dockage in the sum of \$25. January 6, 1914, and during the trial of that case, libels were filed on such liens.

At the close of the season of 1913, and on or about September 1, 1913, said Walter L. Visger laid up the said boat at Ivy Lea, Canada, and stripped her. Later it was agreed between the Visgers and Mr. Burtch that Burtch should go to Canada and bring the boat to Alexandria Bay, where she should be sold under the libel so filed by said Burtch. On the 25th day of September, 1913, pursuant to said agreement, Burtch, John T. De Laney, and Snyder brought the boat back from Canada to Alexandria Bay. She was advertised for sale, and all necessary things were done to protect her while in the possession of Mr. Burtch. Mr. Burtch thereafter filed a bill of his expenses under and pursuant to the enforcement of his libel, amounting to the sum of \$115.43. On the 5th day of November, 1913, and before any sale of the said boat Castenet under the Burtch libel, or otherwise, Walter L. Visger, Walter S. Visger, and Kenneth Visger filed a libel against said boat for wages claimed to be due and unpaid to them, respectively, for seamen's wages earned during the season of 1913, and from March to about September, 1913. Walter L., the husband of the owner, claims wages due him to the amount of \$360.50, Walter S. claims wages due him to the amount of \$120, and Kenneth Visger claims wages due him to the amount of \$313, making a total, claimed by the three, of \$793.50.

The contention of these libelants is that in February or March, 1913, in the city of New York, it was agreed between Carrie E. Visger and the husband and sons that they would run the boat the coming season, and that Walter L., the husband, should be paid \$3.50 per day, Walter S., the oldest son, then 26 years of age, \$2.50 per day, and Kenneth Visger, then 17 or 18 years of age, \$75 per month. The boat commenced running July 26, 1913, and the last trip was August 31, 1913, and hence Kenneth, if such an agreement was made, worked one month and five days and earned \$87.05. August 8, 1913, he was paid \$5, August 13, \$10, August 19, \$15, August 31, \$15, and September 2, \$17. This was paid by the father, Walter L., and all of them testify that the mother also paid him at one time \$70 in seven \$10 bills, and that he gave back \$8. This was presumptively in settlement of all claims. Conceding that he did some work in getting the boat ready and laying her up, he was paid for all he did, and I so find. There was put in evidence a Weekly Time Book, The Castenet, 1913, Exhibit A, in which Walter L. claims to have kept the time of those working in cutting out and getting the boat ready for the season. The first entries are under date of "Sat. April 12, 1913," and the last Saturday July 19, 1913, except this entry, "Wednesday July 23, '13. Went to Alex. Bay with Castenet." In this book the name of Kenneth Visger does not appear, and it is evident that he did no work until the boat commenced running, and he was not hired to work on this boat as a seaman, or in any other capacity, if hired at all, until she did commence running. It was not competent to hire Kenneth in February or March, 1913, as a seaman on the Castenet at \$75 per month, nothing being done by him until she commenced running, and charge up \$75 per month for April, May, June, and July, prior to the 26th, when he was doing nothing, and libel the boat therefor as against others.

There is some evidence that he did some work at odd spells prior to July in painting, although he was not a painter, etc., and perhaps he did, but the evidence is conclusive that he was fully paid for all he did on or in and about this boat. He sold many tickets and collected fares, and in this way was in constant receipt of money.

A book, Exhibit B, purporting to have been kept by the husband and father, is in evidence, but I give it little credit, as it is self-evident that it was all made up at one time, except some pencil memorandums, in the same ink. This is accentuated by the fact that the names of the employes do not come in the order they would if the names and accounts had been entered as they were employed and paid, and as the transactions occurred. For instance, at the top of the third page containing individual accounts we find, "Capt. S. Lee, 1913, Sunday, Aug. 10th, began work at \$3.25 per day." At the top of the next page is "Frank Roberts, 1913, Began work Aug. 4th, at \$25.00 per month." On the next page but one we find "D. La Rue, 1913, Began work Aug. 12, at \$2.00 per day and board," and a first debtor charge of August 23, while on the next page appears the account of "Kenneth Visger, 1913," and a first debtor charge of "Aug. 8, Cash \$5.00," etc. Three pages later comes the account of Walter S. Visger, the elder son, which contains credit entries for work, commencing in March and ending in July, and which also has a debtor charge \$10 and \$116.25 (afterwards erased) just balancing the credit accounts for work. This account on its face shows that Walter S. Visger was credited with all his work for March, April, May, June and July, amounting to \$126.25, and then charged with cash in full payment, which charge was erased. I have no doubt that Walter S. Visger was fully paid for all he did, and so find. We then come to the claim of Walter L. Visger, the father. He kept these accounts, or rather made up these books. In Exhibit B he kept no account with himself, except on the first page, under "Castenet," is entered evidently all entries having been made at the same time, a sort of summary of payments, and the last entry is "Paid Walter Visger, Sr., 10 days, Captain at \$5.00, \$50.00." When Walter L. Visger started in the season of 1913, aside from what he may have done in fitting out the boat, it was as captain. After some days his license was taken from him, and he claims to have acted as a sort of general helper. It is conceded that for services as captain he can have no lien. If he was employed by Mrs. Visger at all, it was as captain. Under the alleged employment, if any, he cannot recover anything here. He concedes he had no agreement that he was to have \$5 per day as captain. But it is contended that he did some work in getting out and fitting up the boat prior to July 26th, when she was taken to Alexandria Bay and commenced running, and that after he lost his license he worked as a general assistant or seaman in running the boat with the knowledge of Mrs. Visger, his wife, and that he should be paid, and that there is no evidence he was paid anything for such work. The earnings of the boat all went into and through his hands, if in fact Kenneth Visger paid over the sums collected by him. In the time book referred to there are entries made by Walter L. Visger, which he

claims are correct, showing work on this boat done by himself as follows:

April, 1½ days.....	\$ 5 25
April, 6 "	21 00
April, 4½ "	15 75
May, 3 "	10 50
June, 6 "	21 00
June, 5 "	17 50
June, 6 "	21 00
June, 6 "	21 00
July, 5 days, last of June, 1 day.....	21 00
July, 6 "	21 00
July, 6 " to 19th.....	21 00
In all 55 days in preparing this boat,	\$192 50

He has also entered 40½ days' work during the same time as having been done on the boat by Walter S. Visger, aggregating \$101.50. The evidence is such as to satisfy me that all this alleged work on the boat was not done. In addition it is claimed that Kenneth during most of the time, during those months, was working on the boat. Its proved condition on arrival at Alexandria Bay, late in July, shows that the work claimed was not done. However, it is clear that some work was necessarily done in fitting up the boat.

On the book, Exhibit B, page 1, the receipts for the 32 days the boat actually ran are put down as \$1,352.25, and the expense, including firemen, captain, excluding the \$50 paid himself as captain, etc., at \$1,223.90. Balance in hand \$128.35, and including such payment, balance is \$78.35, to apply on such work as he actually performed.

Assuming that Walter L. Visger did the work charged for in fitting up the boat, \$192.50, and also performed 35 days' work while the boat was running, \$122.50, and only \$235.65 is due him in any event.

If Walter L. Visger, acting as captain of this boat for a time actually, and then really in charge of her as the manager and agent for his wife, and in view of the agreement made with Burtch and Mr. De Laney, by virtue of which he was permitted to run the boat at all, had kept a daily account of receipts, the sources from which derived and by whom collected, and also a daily account of expenses paid, and when, where, and to whom paid, his claims would stand much better and appeal more strongly to the consideration of this court. Still it may be that there is due to Walter L. Visger \$150, including such help as he had from his minor son prior to the 26th day of July, for work done on this boat while fitting her up, and while she was running, although this is questionable.

My conclusion is that the claim of Walter L. Visger be allowed and established on a quantum meruit at the sum of \$150; that the claims of Kenneth Visger be wholly disallowed on the ground he was fully paid for all he did and all he earned, and that the claim of Walter S. Visger be wholly disallowed and rejected on the ground he was fully paid for all he did. I find that neither Walter S. nor Kenneth did as much work as claimed.

The claim of William Morford is allowed and established at the sum of \$31.

That of Cornwall Bros. at \$25.

That of Burtch on his lien for coal, etc., filed August 26th, and including the assigned claims of Olin Snyder and Thomas Thurston at \$358.83.

The claim of Walter L. Visger may draw interest from November 5, 1913, and stand as the first lien or claim.

That of William Morford may draw interest from September 11, 1913, and stand as the second lien or claim.

That of George H. Burtch, on his lien (not mortgages) may draw interest from August 26, 1913, and stand as the third lien or claim.

That of Cornwall Bros. may draw interest from October 14, 1913, and stand as the fourth lien or claim.

The next lien in order is that of George H. Burtch on his mortgage of \$782.94, with interest from July 1, 1913.

The next lien and claim in order is that of the mortgage of Francis Wilson, dated August 1, 1910, for \$1,500, and interest thereon to September 1, 1910 when the payment of \$300 will be deducted and interest on the balance added thereto to the date of decree.

The next lien and claim in order is that of Frank La Rue of \$300, with interest from August 1, 1910.

There will be a decree or judgment establishing these claims and liens accordingly, and for a condemnation and sale of the boat, her engines, etc., and for the payment of the costs of such sale, etc., and then of such liens in the order named, out of the proceeds.

As to the libelants Kenneth Visger and Walter S. Visger, the libel is dismissed. No costs will be allowed.

In re SHON.

(District Court, D. Massachusetts. January 11, 1913.)

No. 18,310.

BANKRUPTCY (§ 482*)—INVOLUNTARY PETITION—DISMISSAL—COSTS.

On dismissal of an involuntary petition in bankruptcy it is at least doubtful if the court has power to allow a motion to so tax respondent's costs as to include an allowance for counsel fees therein; and in the exercise of discretion such taxation was refused, although it was assumed that the proceedings were not brought in good faith, and that alteration of a promissory note and perjury had been resorted to in an effort to sustain them.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874-876, 897; Dec. Dig. § 482.*]

In Bankruptcy. In the matter of bankruptcy proceedings of A. J. Shon. On respondent's application for taxation of costs in his favor, so as to include an allowance for counsel fees. Denied.

John A. Kerns, of Fall River, Mass., for petitioning creditors.
Friedman & Atherton, of Boston, Mass., for respondent.

MORTON, District Judge. An involuntary petition in bankruptcy which was brought against the respondent having been dismissed, the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

respondent now moves that costs in his favor against the petitioners be so taxed as to include an allowance for counsel fees. He says that the referee's report clearly shows that, as to the intervening petitioner Labbe, the proceedings were not brought in good faith, and that alteration of a promissory note and perjury were resorted to in an effort to sustain them, and he contends that under such circumstances a further sum ought to be allowed in the way of costs beyond those which regularly follow the dismissal of a petition.

There was no seizure of property, and it is at least doubtful whether the court has power to allow the motion. In *re Ghiglione* (D. C.) 93 Fed. 186; In *re Morris* (D. C.) 115 Fed. 591; In *re Williams* (D. C.) 120 Fed. 34; In *re Hines* (D. C.) 144 Fed. 147; Collier on Bankruptcy (9th Ed.) pp. 116, 1084. But see *Andrews v. Barnes*, 39 Ch. D. 133, as to the general power of courts of equity over costs. I have not found it necessary to decide that question, because it seems to me that I ought, in the exercise of my discretion, to deny this motion.

Such costs were refused in the cases above cited; no American decision granting them has been called to my attention. To allow this motion would open the door to inquiry as to the good faith of the losing party in prosecuting or defending almost any equity suit or bankruptcy petition, and would establish a far-reaching precedent. The case is no doubt a hard one for the respondent, who has been put to much trouble and expense; but his situation is no worse than it would be if an unwarranted and fraudulent action at law had been instituted against him, in which event only a small part of his loss could be recovered as costs. It seems to me unwise to establish a different rule in bankruptcy or equity, or to attempt to determine on this motion questions which can be more properly raised by an action for malicious prosecution of the bankruptcy petition. *Wade v. Nat. Bank of Commerce* (C. C.) 114 Fed. 377; *Pierce v. Thompson*, 6 Pick. (Mass.) 193.

The motion is denied, and the respondent takes the usual costs on a dismissed petition.

THE METIS.

(District Court, E. D. Virginia. March 17, 1914.)

COLLISION (§ 96*)—VESSELS IN HARBOR—STEAMSHIP AND LIGHTER.

A collision occurred in the daytime in Havana harbor between the steamship *Metis*, which had just left her loading berth and was passing out between two anchored steamships, and the sail lighter *Gen. Prim*, appearing from the opposite side of one of such steamships which it was unloading. *Held*, on the evidence, that the *Metis* took the only practicable way out of the harbor, as other vessels had done; that she gave proper signals of her departure and did all that was possible to avoid collision after the *Prim* was seen; that the latter was entirely concealed behind the steamship and was solely in fault for the collision because of her failure to give warning or signal.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 203–205; Dec. Dig. § 96.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Admiralty. Suit for collision by the Mannheim Insurance Company and others, assignees, against the steamship Metis. Decree for respondent.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones, of New York City, of counsel), and J. Westmore Willcox, of Norfolk, Va., for libellant.

Hughes, Little & Seawell, of Norfolk, Va., for respondent.

WADDILL, District Judge. The libelants mentioned in the caption, as assignees of the owners of the cargo loaded on board the lighter Gen. Prim, which was sunk in the harbor of Havana, Cuba, on the afternoon of the 20th of March, 1912, in collision with the respondent ship, filed their several libels, which were heard together, against the Metis, to recover for the loss of the cargo aforesaid.

The facts, briefly, are: That at the time in question the Metis had been anchored up in the harbor taking on cargo; and three steamers, the Kronprinzessin Cecilie, the Havana, of the Ward Line, and a Spanish Mail steamer, were severally at anchor lower down in the harbor, and at a point slightly below the San Francisco wharf or pier, which extended out some distance into the channel. These were all large vessels, the Havana a large passenger and freight steamer, with a superstructure which almost entirely obstructed the view of outgoing craft on the inland side of her; and all three were tailing across the channel under the influence of a northeast wind, well-nigh filling the entire passageway; the Spanish ship being furthest to the starboard-side of the channel, the Havana slightly to the southward and westward of her, and the Kronprinzessin Cecilie slightly to the southward and westward of the Havana. A short time prior to the collision, the Metis, a ship some 340 feet long, which had been taking on a cargo of sugar for three or four days, raised anchor and proceeded down the harbor, intending to pass out to sea between the Cecilie and the Havana, and, just when approaching and about to pass under the stern of the Havana, the Gen. Prim, a sail lighter engaged in unloading freight from the Havana to be taken to the dock, piled high with boxes, emerged from behind and on the port side of the Havana, and but a short distance therefrom, coming into collision with the Metis, as a result of which the Gen. Prim was sunk.

The case turns upon the question of whether the two vessels came into collision as a result of the Gen. Prim's imprudently emerging from behind the Havana, or the failure of the Metis to properly pass out of the channel, as well in the matter of where she should have navigated, as in giving timely warning of her movements, and properly maneuvering immediately preceding and at the time of the collision. The question at issue is one of fact, the correct solution of which determines the responsibility for the disaster.

After much consideration, the court has reached the conclusion that the Metis was not negligent in either failing to pass to starboard round the bow of the Spanish ship, or inshore round the stern of the Cecilie, for the reason that it was impracticable, in the then condition of the harbor, to pass in safety either way, and that it was entirely feasible,

and indeed the only way to go out, to pass in between the Cecilie and the Havana, as other shipping did in passing in and out of the channel at and about the time. There was between the two ships a space of about 200 feet, which was ample to navigate in with prudence. Nor was the Metis in fault in failing to give due and timely signals indicating that she had raised her anchor and was moving down the channel. There is considerable conflict in the testimony in this respect, several witnesses at least testifying that they did not hear such signals from the Metis, and members of the Metis' crew, who were examined shortly after the collision, and when apparently the then pleading did not specifically raise this question, were not interrogated as to these signals; but the preponderance of the evidence, and the better, and that of disinterested witnesses, makes clear the fact that such signals were given, which, being true, relieves the Metis from responsibility for the collision, unless she then failed to exercise due care in discovering the presence of the Gen. Prim, or to navigate prudently and safely after her presence became known. On these two last propositions, the court thinks likewise that the Metis was free from fault. The Gen. Prim was on the opposite side of the Havana from that being approached by the Metis. The Havana was a large passenger ship, high out of the water, with a tall superstructure on her upper deck which obscured the presence of the Gen. Prim, and the fact of her moving out from behind the Havana when it was too late in the exercise of due care and caution on the part of the Metis, or those navigating her, to avoid the collision, was gross negligence on her part. There is some conflict of testimony just when the Gen. Prim was discovered, but it is entirely clear that she neither proceeded aft, alongside of, or emerged from behind the stern of the Havana, until it was too late for the Metis, in the exercise of every precaution at her command, to avoid colliding with her. Upon the presence of the Gen. Prim being discovered, the Metis promptly and vigilantly did everything possible to avoid the collision, but without avail. She stopped, put her engines full speed astern, sounded danger signals, and cast out the port anchor, but all too late to prevent the vessels coming together. The evidence seems undisputed that neither the Gen. Prim nor the Havana, whose cargo she was taking off, gave any signal to passing ships to indicate the Prim's movements, and this neglect was what brought about the collision.

It follows from what has been said that the collision was solely through the fault of the Gen. Prim, and a decree will be entered so ascertaining.

THATCHER v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. April 17, 1914.)

No. 2314.

1. APPEAL AND ERROR (§ 4*)—DISBARMENT PROCEEDINGS—REVIEW.

An order disbarring an attorney from practice in the federal courts is reviewable on writ of error and not by appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8-21; Dec. Dig. § 4.*]

2. APPEAL AND ERROR (§ 10*)—RIGHT TO WRIT—NATURE OF REMEDY.

Mandamus is not an exclusive remedy for review by the Circuit Court of Appeals of an order disbarring an attorney from practice in the federal courts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 34-38; Dec. Dig. § 10.*]

3. ATTORNEY AND CLIENT (§ 53*)—DISBARMENT OF ATTORNEY—CHARGES.

Respondent, an attorney, having been disbarred from practice in the state courts, proceedings were also instituted to disbar him from practicing in the federal courts; one of the charges being that he published a libelous attack on a judge of the state court, and, after reciting the proceedings in the Supreme Court of the state, concluding, "Your committee charges that said matters, of which said" respondent "was so found and adjudged guilty, are and constitute malpractice and sufficient to strike his name from the rolls of the court." *Held*, that respondent was not entitled, in such proceeding, to invoke the strict rules governing indictments and proofs in criminal cases, and a holding that the state court findings were prima facie proof, and that respondent, attacking them, must produce the transcript of evidence there given, was not prejudicial, even if erroneous, where in the end it appeared that all essential facts were undisputed.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 74, 75; Dec. Dig. § 53.*]

4. ATTORNEY AND CLIENT (§ 43*)—MISCONDUCT—CRITICISM OF CANDIDATE FOR JUDGE.

An attorney may freely criticise a candidate for re-election to a judicial office, so far as the facts justify, and may give expressions of opinion adverse to the candidate's qualifications, if made in good faith, and is not confined to such statements as are "decent and respectful."

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 59, 60; Dec. Dig. § 43.*]

5. ATTORNEY AND CLIENT (§ 43*)—MISCONDUCT OF ATTORNEY.

Where the publication by a lawyer of a circular attacking a judge, who is a candidate for re-election, is alleged to be a libel, justifying the publisher's disbarment, the circular must be read against its composers with the same meaning they intended its expected readers should draw; and it cannot be considered as if composed by laymen or put before an audience of lawyers.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 59, 60; Dec. Dig. § 43.*]

6. ATTORNEY AND CLIENT (§ 43*)—DISBARMENT—GROUNDS.

Where a respondent, an attorney, in order to prevent the re-election of a judge of a state court, issued and procured the distribution of a circular charging that the judge was and would be a corrupt tool for the corporations directing verdicts and granting injunctions in their favor without caring for the right of the case, and supported such charge by statements of only fractional truths, so that the circular, according to its ordi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 212 F.—51

nary meaning, was willfully false, and no attempt was made to show either that it was true or that respondent had reasonable grounds to believe that it was true, he was guilty of gross professional misconduct warranting his disbarment.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 59, 60; Dec. Dig. § 43.*]

7. ATTORNEY AND CLIENT (§ 44*)—MISCONDUCT OF ATTORNEY—DISBARMENT.

R. having loaned M. and H. \$2,400 on their joint notes, M. employed respondent as his personal attorney in certain controversies with H. and to bring about an exchange of the notes for certain other notes belonging to M., secured by collateral. Respondent, after accomplishing this result, accepted professional employment as attorney for R. in an attempt to overturn such exchange without notice to M. Held that, though respondent was successful in this, and a verdict was had based on the theory that M., through respondent, had committed a fraud on R., respondent was guilty of misconduct warranting disbarment.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 55, 56, 62; Dec. Dig. § 44.*]

8. ATTORNEY AND CLIENT (§ 38*)—MISCONDUCT OF ATTORNEY—DISBARMENT.

Where respondent, an attorney, presented a bill of exceptions for signature, altered from the condition in which it was when the opposing attorneys stipulated for its allowance, caused his client to execute a pleading charging fraud against another attorney, when there was nothing to indicate the existence of any fraud, or that respondent had any reason to suppose he could obtain evidence to establish same, and also obtained judgment against his own ignorant client, without the latter's understanding and knowledge, such acts were so reprehensible as to justify disbarment.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 51, 61; Dec. Dig. § 38.*]

In Error to and Appeal from the Circuit and District Courts of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

Proceeding for the disbarment of Charles A. Thatcher, an attorney at law, from practicing in the federal courts. From a judgment in favor of the United States, respondent appeals and brings error. Appeal dismissed and order (190 Fed. 969) affirmed.

R. P. Cary, of Memphis, Tenn., for plaintiff.

G. P. Kirby and C. A. Seiders, both of Toledo, Ohio, for defendant.

Before DENISON, Circuit Judge, and COCHRAN and SANFORD, District Judges.

PER CURIAM. Charles H. Thatcher was an attorney and counselor of the Supreme Court of Ohio and of the United States District Court for the Northern District of Ohio and of this court. The Supreme Court of Ohio found him guilty of professional misconduct and disbarred him. A transcript of that action was presented to this court and a motion made for the entry of a similar order here. That motion was founded wholly upon the action of the Supreme Court of Ohio and did not independently charge the existence of those facts upon which the order of that court depended. This court, Judges Lurton, Severens, and Warrington sitting, held, upon the authority of *Ex parte Tillinghast*, 4 Pet. 108, 7 L. Ed. 798, that the proposed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

action could not rest merely upon the judgment of a court of another jurisdiction, but must be based upon allegation and proof of the actual offense. Accordingly a committee of the bar was appointed by this court to formulate and file charges against Mr. Thatcher, either in this court or in the District Court. Later, the District Court, upon due suggestion, appointed a committee for a similar purpose, and that committee filed, in that court, a petition containing five charges,¹ which may be thus briefly summarized: (1) Publishing a libelous attack on a judge of a state court, by statements which respondent knew to be untrue; (2) bringing suit upon notes which he knew had been paid, and as part of a scheme to defraud a former client; (3) misleading District Judge (now Circuit Judge) Knappen by a proceeding analogous to forgery (altering an executed stipulation), whereby an irregular bill of exceptions was obtained; (4) causing an illiterate client to sign and file a pleading which charged fraud against other attorneys while respondent knew there was no evidence to support such a charge, and knew that the client did not understand the paper he was signing; and (5) bringing suit for his fees and obtaining a judgment by default against the same illiterate client, knowing that the client did not comprehend what was going on. The first two charges had been sustained by the Supreme Court of Ohio and formed a part of the basis of its action; the other three were first made in this proceeding.

We must first pass upon a motion made by the prosecuting committee to dismiss both appeal and writ of error. This motion is based upon the theory that only by mandamus can we review a disbarment order, and hence the motion denies that such an order is included within the classification, "Final decisions of the District Courts in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court," found in the statutory grant to this court of jurisdiction to review by appeal or by writs of error. Section 128, Judicial Code; Act March 3, 1911, c. 231, 36 Stat. 1133 (U. S. Comp. St. Supp. 1911, p. 194).

[1] It is now settled that an order or decree of the District Court inflicting a fine or imprisonment as a punishment for contempt, as distinguished from such infliction intended to compel action for the benefit of a party, is a final decision or judgment subject to review by writ of error to the Circuit Court of Appeals. *Bessette v. Conkey*, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997; *In re Christensen*, 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072. It is held also, by this and other Circuit Courts of Appeals, that a judgment of deportation by the District Court is reviewable on appeal. *United States v. Hung Chang* (C. C. A. 6) 134 Fed. 19, 20, 67 C. C. A. 93; *Gee Cue Beng v. United States* (C. C. A. 5) 184 Fed. 383, 385, 106 C. C. A. 493. Neither the contempt nor the deportation proceeding is strictly criminal nor wholly civil. Each is well described as quasi criminal. In contempt, the criminal element, in deportation, the civil, is the dominant one. The disbarment proceeding is not the same as either

¹ Another charge, which the District Court found not sustained, is not here recited.

of these, but bears strong analogy to each. In disbarment, as in contempt, the inherent right and necessity for the court to protect itself against matters incompatible with its power and dignity is the underlying principle; in each, the judgment is a punishment inflicted to insure that protection. In disbarment, as in deportation, it is charged that respondent is not entitled to the status he is claiming, and the effect of the judgment is to deprive him of that status. Neither in contempt nor deportation matters is there any greater formality than here. The practice in contempts is often the same as in disbarments; charges are filed by some attorney acting at the order or suggestion of the court; a summary issue is made up and an informal trial is had before the court without a jury. In deportation the hearing before the District Court is summary and informal. We are unable to appreciate the force of the argument which admits, as it must, that each of these matters is a "case" included within the "all other cases" which we must review, and which yet denies the same name to a proceeding in which a general or special public prosecutor moves against an individual and procures from the court a final decision which imposes on the respondent punishment for his misconduct and banishment from his profession. Most of the reasoning in *Bessette v. Conkey* is clearly applicable to disbarment; and, for discussion of what constitutes a "case," see *I. C. C. v. Brimson*, 154 U. S. 447, 475, 155 U. S. 3, 14 Sup. Ct. 1125, 15 Sup. Ct. 19, 38 L. Ed. 1047, 39 L. Ed. 49; *Fong Yue Ting v. United States*, 149 U. S. 698, 728, 729, 13 Sup. Ct. 1016, 37 L. Ed. 905; *Madisonville Co. v. Bernard Co.*, 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462.

[2] Respondent's contention that mandamus is the exclusive remedy is based on *Ex parte Burr*, 9 Wheat. 529, 6 L. Ed. 152; *Ex parte Secombe*, 19 How. 13, 15 L. Ed. 565; *Ex parte Bradley*, 7 Wall. 364, 19 L. Ed. 214; *Ex parte Robinson*, 19 Wall. 513, note, 22 L. Ed. 205; and *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552. What is said to be the essential holding is found in *Ex parte Bradley*, in which the opinion, in demonstrating that mandamus will lie because there is no other adequate remedy, says:

"The order disbarring them or subjecting them to fine or imprisonment is not reviewable by writ of error; it not being a judgment in the sense of the law for which this writ will lie."

This pronouncement applies as well to orders inflicting fine or imprisonment as to orders of disbarment; and, as to the former, the reference must be to punishments inflicted in contempt proceedings. Hence these decisions amount only to holding that neither appeal nor writ of error would lie to enable the Supreme Court to review contempt or disbarment orders. This is clearly true, since the jurisdiction of the Supreme Court, on appeal or writ of error, was always limited to "civil actions where the matter in dispute exceeds the sum or value of" a certain amount (section 13, c. 20, 1 Stat. 565, Act of Sept. 24, 1789; R. S. § 691), until the Act of March 3, 1891, c. 517, 26 Stat. 828 (U. S. Comp. St. 1901, p. 549), section 6 of which substituted "in all cases" for "in civil actions," but retained a minimum value limitation. The effect of these limitations was that the court

had no power to hear, on writ of error, any matter that did not involve a money value, and hence no power to review criminal cases (*U. S. v. More*, 3 Cranch, 159, 173, 2 L. Ed. 397; *O'Neal v. United States*, 190 U. S. 36, 38, 23 Sup. Ct. 776, 47 L. Ed. 945. Clearly, therefore, a decision that a writ of error to review disbarment did not lie from an inferior court to the Supreme Court, under the statutes involved in the foregoing cases, is not at all inconsistent with the conclusion that such a matter is within the grant (in this respect unrestricted) of appellate jurisdiction to the Circuit Courts of Appeals by the act of 1891 and the present Judicial Code.

We find no exact precedent. The Circuit Court of Appeals for the Ninth Circuit heard such a case on writ of error (*Cobb v. U. S.*, 172 Fed. 641, 96 C. C. A. 477), but the precise point was not made (*Barnes v. Lyons*, 187 Fed. 881, 886, 110 C. C. A. 15). In the state courts, there is a multitude of cases. Review of disbarment orders has been had by writ of error, by appeal, by mandamus, and by certiorari, often without any discussion as to the proper remedy, and often evidently by virtue of special statutory provisions. We get no help from these decisions, save as demonstrating the universality of some suitable appellate remedy.

The choice of method, as between appeal and writ of error, is not clear, but we think the analogy is closer to contempt proceedings than to the deportation hearing, and it is clear that neither the hearing nor the final order was distinctively on the equity side of the court or involved a controversy within ordinary equitable jurisdiction. We therefore hold that error, and not appeal, is the proper remedy. *Parish v. Ellis*, 16 Pet. 451, 454, 10 L. Ed. 1028; *Ormsby v. Webb*, 134 U. S. 47, 65, 10 Sup. Ct. 478, 33 L. Ed. 805; *Rode & Horn v. Phipps* (C. C. A. 6) 195 Fed. 414, 419, 115 C. C. A. 316. It follows that the appeal is dismissed, and the motion to dismiss the writ of error is denied.

[3] Before reaching the merits, we must also meet another preliminary question, and this is an objection urged by respondent. He says that charge 1 did not amount to an allegation of the original offenses, but only that he had been, by the Ohio Supreme Court, convicted of these things. Hence he insists that his demurrer to this charge should have been sustained. In the same connection, he complains that he was compelled to put in evidence the transcript of the testimony taken before the State Supreme Court, and thus was compelled to give evidence against himself, and was tried, in part, upon proofs not taken in this case. Charge 1, as filed in this case (covering charges 1 and 2, as we have described them), recited the proceedings in the Supreme Court, and its order, and concluded:

"Your committee charges that said matters, of which said Charles A. Thatcher was so found and adjudged guilty, are and constitute malpractice and sufficient to strike the name of the said Charles A. Thatcher from the rolls of this court."

In overruling the demurrer to this charge and in the course of the hearing on this subject-matter, it was the theory of the District Judge, repeatedly announced, that, while the mere judgment of the state

court did not require the United States Court to take similar action, yet that the finding of facts, made by the former court, raised at least a prima facie presumption that the finding was correct; and the District Judge further thought that the full rights of the respondent in the United States Court would be preserved if he was permitted, as he was, to go as fully as he desired by himself and other witnesses into the whole subject-matter covered by the findings of the Ohio court, so that the entire question should be re-examined. It was as a corollary to this position that respondent, when proposing to show the error of these findings, was required to put in evidence a transcript of the proofs upon which those findings had been based, so that the United States Court, in reviewing the findings of the state court, could do so intelligently. We are not satisfied that the considerations governing a disbarment proceeding and the rules of comity as to the decisions in the highest court of the state in which the United States Court is sitting would have justified giving any less force than was thus given to the fact findings of that court; but, however that may be, respondent was not substantially prejudiced by the course taken. His error lies in supposing that he is entitled to invoke the strict rules governing indictments and proofs in criminal cases. There is no such strictness. No formal charging papers filed in court, preliminary to a rule to show cause, are necessary. *Ex parte Wall*, 107 U. S. 265, 271, 2 Sup. Ct. 569, 27 L. Ed. 552; *Randall v. Brigham*, 7 Wall. 523, 539, 19 L. Ed. 285. Proceedings may be summary; the only essentials are that the respondent should know what is to be the basis of the proposed action, and that he should have his day in court; i. e., fair opportunity to present his side of the controversy. *Ex parte Burr*, 2 Cranch, C. C. 379, Fed. Cas. No. 2,186; s. c., 9 Wheat. 529, 6 L. Ed. 152; *U. S. v. Parks* (C. C. Colo.) 93 Fed. 414; *Ex parte Steinman*, 95 Pa. 220, 40 Am. Rep. 637; *Randall v. Brigham*, *supra*. Respondent here fully understood what was charged; he had full opportunity to be heard and to offer proof on every point; his proofs taken in this case cover 150 pages. That the concluding paragraph of charge 1 alleges that the matters of which respondent had been by the state court found guilty "are cause to strike his name from the rolls," instead of alleging that it should be stricken from the rolls because he was guilty of the matters which had been so found, made no difference to him in his preparation and defense, after the court overruled the demurrer and announced the theory on which the case would proceed. That the transcript of the proofs before the Supreme Court of Ohio was put in evidence by him under compulsion did him no harm, since, at the conclusion of the hearing, nothing depended upon it. Every substantial thing there appearing and which is at all essential to support the order below was expressly or impliedly conceded to be true by respondent or by his witnesses in this proceeding, and was not, upon the hearing below or the hearing in this court, a matter of dispute. If there was any abstract error (and this we do not intend to intimate) in giving, for the time being, prima facie effect to the Supreme Court findings and in requiring respondent to put in the Supreme Court transcript, it was error without prejudice. In

a proceeding like this, where the court is investigating the professional fitness of one of its attorneys, and where it is the duty, at least the ethical duty, of that attorney to co-operate with the judge in getting at the truth, we cannot think that the final order must be reversed merely because facts, which are and always have been unquestioned by any one, got into evidence in an irregular way.

This brings us to what we may call the merits of the case, the question whether the proofs justified the final order, and we will briefly review the evidence on the respective charges.

[4] Mr. Thatcher's *prima facie* or underlying right, as a citizen, to criticise and attack a candidate for an elective office must be recognized, so long as the right is not abused. That the office is judicial, and that the candidate is then serving as judge, can make no difference in the basic principle involved. A judge who is a candidate for re-election must expect to have his qualifications freely discussed and summarily decided by an electorate which may not be well informed or discriminative. However unfortunate this, in specific instances, may seem, it is an essential part of the elective system, and as such it must be accepted. Nor does a citizen lose this right to criticise because he is a lawyer. We cannot think that a lawyer citizen's criticism of such a candidate must needs be confined to what is "decent and respectful." His criticism may be as indecent and disrespectful as the facts justify. The rule governing such campaign utterances must be that of qualified privilege: Where expressions of opinion, they are permitted, if in good faith; and, where statements of fact, they may be made, if true, or in good faith and with reasonable cause believed to be true, but they are forbidden if the derogatory fact allegations are false, and are by the utterer known, or with ordinary care should be known, to be false. In this modified form, the rule is accepted in all jurisdictions. 18 Am. & Eng. Encyc. 1041, 1042. This court has adopted the stricter rule that good faith and probable cause will not make a falsehood privileged. *Post v. Hallam*, 59 Fed. 530, 539, 8 C. C. A. 201. While we see no reason for not applying here what was held in *Post v. Hallam*, we assume, for the purpose of this case, the more liberal criterion and say that, as this is found one way or the other, Mr. Thatcher must be justified or condemned.

[5, 6] Charge No. 1 relates to the libelous circular. The matter developed in this way: In the fall of 1908, L. W. Morris had been one of the common pleas judges for 14 years. Mr. Thatcher, as attorney for plaintiff, had tried many personal injury cases before him, and a bitter personal antagonism between them had arisen. Judge Morris was a candidate for re-election; Mr. Thatcher opposed him, and in good faith, as we assume, thought the judge unsuitable for the office. Shortly before, one Henry Gravelle had sued the street railway company for personal injury, and Judge Morris had directed verdict for defendant. The appellate courts had held the direction erroneous and awarded a new trial. Using the Gravelle case as a foundation, Mr. Thatcher participated in preparing the anti-Morris circular hereafter described, paid \$160 for printing 40,000 copies, hired a trumpeter, and employed Gravelle, and took them in his automobile through

the factory districts at noon. When the trumpeter had drawn a crowd, Gravelle told his story and passed out the circulars.

The circular carries, on its title page, a picture of the "legless cripple" whom Judge Morris has "thrown out of court," and first gives a résumé (untrue in part) of the Gravelle case. It says that Judge Morris is a "foe of jury trials" and of "human rights," and that "for 14 years he has held for defendant in the case 'Man v. Dollars.'" Over a picture of the widow and children of a railroad man killed at his work, and with reference to whose death Judge Morris had held there was no liability, it has the caption, "No Jury Trial for Them;" and it prints, in contrast, pictures of the "Residence and Stables of Judge Morris" and of the "Cottage Rented by H. Gravelle." It says that to direct verdicts for the corporations and trusts was a "plan to undermine the jury system" and "has been a favorite practice of Judge Morris." "Many times has he thrust juries to one side and decided in favor of railroads, traction companies, and the corporations which are so careful of dollars and so careless of life and limb." Having made these general charges, the circular proceeds to its proofs; "from the records of a hundred cases, we select a few at random." Then follows Gravelle's statement, composed by Thatcher, in which Gravelle is made to say:

"My family and I have nearly starved. * * * Judge Morris is living in a mansion. * * * I want to save other poor cripples from his power. * * *

Then are cited brief particulars of 10 personal injury cases against corporations in which Judge Morris had directed verdicts for defendant. On another page it is said:

"Gravelle's case and the others are only a few among many. Some of them are as follows."

Then follow two parallel columns, one headed "Corporations Deprived of Jury Trial by Judge Morris," and entirely blank; the other headed "Human Beings Deprived of Jury Trial by Judge Morris," and containing the docket numbers of 70 cases besides the 10 already mentioned.

Here is a charge in substance and effect that Judge Morris habitually and commonly and because of his hostility to the jury system directs verdicts for the defendant in personal injury cases against corporations; that the records show 100 such cases, 80 of which are identified by number. The intention is too plain for doubt to have the reader understand that the judge did this, not because it was the law or because he thought it was the law, but because of hostility to the jury system and favoritism to corporations—dishonorable and dishonest motives. The truth was that, in this class of cases, the judge had directed verdicts for defendant not more than twice a year on the average, that the 10 described cases had been selected from more than 20,000 cases in the common pleas courts, and from more than 2,000 cases by Judge Morris, and that the 70 further cases specifically identified were, it is true, instances of verdicts directed for defendant, but they were mostly not against corporations; they included cases

on contract and all varieties of torts, and only 10 personal injury cases against private corporations, in 7 of which 10 the judgment had been affirmed by the reviewing court. It is entirely clear that these facts neither support the charge nor furnish to an intelligent lawyer any reason to believe that the charge was true. This charge is a mixture of opinion and of fact. Its general derogatory terms might be construed as only opinion; but, while this view would lead towards immunity for the author, it would also weaken his convincing force to the reader. So there must be facts to support the conclusion; these facts were furnished "from the court records," and to the extent of 75 per cent. were falsely stated. To claim only one or two instances a year, or only 20 for the 14-year period, would be to weaken the charge, to make it absurd; to claim 100, or 80, and to suppress the length of time covered, would naturally impress the intended reader as strong proof. This cannot be overlooked as an incidental or immaterial statement, particularly in connection with the baseless and misleading parallel column display.

Another paragraph of the circular was entitled "Law is Against the Unfortunate," and says:

"The law is against the unfortunate," said Judge Morris in one case where he directed a verdict. * * * In Judge Morris' court, the law is against the unfortunate only because Judge Morris considers it and declares it against the unfortunate."

The only pretended foundation for this charge is that, in directing a verdict upon the ground of contributory negligence (or assumed risk), the judge had once said that, in this particular, the law was against the unfortunate. The implication that the judge had not applied the established rule, but some new and vicious rule of his own, stands without justification.

Another charge to which much space is given is that Judge Morris was "an injunction judge." The circular recites that the street railway company's franchise will soon expire and the company will want injunctions against the city and that it knows by electing Judge Morris it "will have a friendly judge ready to issue the injunction and tie the city's hands." The language used in this part of the circular in connection with other parts and with the large type headings, "Purify the Bench," "Standard Oil Influence," "Know Their Friend," etc., are an allegation that the judge had been and would be ready to issue injunctions, not because of the law, but because of some favoritism to these corporations. There is no effort to justify this allegation. An illustration of the circular's method of telling untruths is this: The truth was that an injunction bill had been presented to the judge, who had required some defect to be supplied before he would act upon it, the correction had been made, and he indorsed the bill, "Injunction allowed as prayed." The circular says:

"Union officials say that the judge went so far as to suggest to the attorney how to make his petition stronger. * * * He did not even draw his own order, but simply wrote down, 'Injunction allowed as prayed.' The corporation attorneys say they drew the order as strong and as broad as possible."

This ingenious narrative is entitled "Attorneys Draw Order."

We have sufficiently reviewed the circular. (It may be seen in full in *Re Thatcher*, 80 Ohio St. 561, 581, 89 N. E. 39.) The argument that it is not libelous or is not untruthful depends upon the mistaken view that it cannot be condemned if skilled dialecticians can point out how each sentence or half sentence, standing alone, is not necessarily inconsistent with the facts. It is impossible to consider such a publication from that standpoint. It was drafted by Mr. Thatcher and his associates, skilled in the nice use of language and in the leaving of pegs whereon they might hang technical justifications; it was prepared and published to be read by and to influence a class of the community not skilled in these things, and which would take it to mean what it seemed to mean; and it must be read against its composers with the same meaning which they intended its readers should draw. Its authors clearly intended that the voters should take it as a charge that Judge Morris was and would be a corrupt tool for the corporations, directing verdicts and granting injunctions in their favor without caring for the right of the case; and they supported this charge by statements of fractional truths which constitute the worst kind of falsehood. It cannot be considered as if it had been put before an audience of lawyers who would not be misled by its absurdities, or as if composed by laymen who could be excused by their ignorance. True, the use of the word "corrupt" and a direct, square charge of corruption are industriously avoided, but in a libel suit it would be for the jury to say whether the charge was made by innuendo; and an intelligent jury could give but one answer to that question.

Giving this meaning to the circular, there is no attempt to show either that it was true or that Mr. Thatcher had any reasonable grounds to believe it was true; nor can it be disputed that Mr. Thatcher's doings relating thereto were gross professional misconduct. *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552; *U. S. v. Green* (C. C. Col.) 85 Fed. 857; *Cobb v. U. S.* (C. C. A. 9) 172 Fed. 641, 96 C. C. A. 477; *Myers v. State*, 46 Ohio St. 473, 489, 22 N. E. 43, 15 Am. St. Rep. 638.

As to charge 2, these things are the undisputed facts:

[7] Reiter had loaned to Milburn & Hudson, on their joint notes, about \$2,400. The two debtors were involved in a number of joint liabilities, and each became uncollectible. Milburn employed Mr. Thatcher as his attorney in the resulting controversies with Hudson, and the attorney persuaded Reiter to exchange these notes for certain Murray notes belonging to Milburn and secured by collateral. Thereupon the Milburn & Hudson notes were delivered to Mr. Thatcher, and he, as Milburn's attorney, held them for several years. Murray never paid anything on his notes so transferred to Reiter; Murray was irresponsible; and the collateral was exhausted with trifling results, whereby Reiter got little. Milburn was entitled to demand from Hudson, by suit or on settling accounts, contribution of one-half the consideration which he had paid to Reiter; but Mr. Thatcher planned to bring suit in Reiter's name against Hudson on these notes,

not disclosing Milburn's title, to collect from Hudson the whole amount, and thus to earn the 66⅔ per cent. fee which Milburn was willing to give him if this could be done. The trouble was that, if Hudson was compelled to pay the notes to Reiter, Milburn would be liable over for contribution, and so would lose all benefit of his cheap purchase of the notes. Milburn apparently understood the nature of this danger; at any rate, he refused to allow Mr. Thatcher to sue the notes in Reiter's name, unless and until Milburn was "protected" by satisfactory agreement. Two years after Milburn's last such refusal, and without his knowledge, Mr. Thatcher entered into a contract with Reiter acknowledging holding the notes as attorney for Reiter, and agreeing to undertake collection for Reiter against Hudson; and later he caused suit to be brought on these notes in Reiter's name and as if nothing had ever been paid and as if they had always been Reiter's. In this suit Hudson and Milburn were defendants, but only Hudson was served. It was Mr. Thatcher's conduct in bringing this suit which was condemned by the Ohio Supreme Court as an attempt to deceive the court, defraud Hudson, and injure Milburn.

Obviously this conduct cannot be squared with any high professional standard; but Milburn had, at one time, said he was willing (if himself protected) that Reiter and Thatcher should have all they could collect from Hudson, and Mr. Thatcher may have thought he could so manipulate the matter as to guard Milburn against ultimate harm from the judgment to be obtained by Reiter. In view of these last considerations, and if the matter is to be treated on the theory that whatever rights there were under the notes really belonged to Milburn, we are not satisfied that the bringing of suit thereon in Reiter's name, as if they were wholly unpaid, of itself called for so severe a penalty as disbarment; but before leaving this subject we must notice the position in which Mr. Thatcher is put by the matter he now presents as a complete defense on this charge, viz.: That a jury has found a verdict for plaintiff in *Reiter v. Hudson*. Under the unquestioned situation so far recited, there was only one possible theory which could fully justify the prosecution of the Reiter suit on these notes for their full amount. That theory was first put forward by Mr. Thatcher in evidence which he offered in the Supreme Court, but which was not admitted (perhaps because in conflict with his answer); the same theory was embodied in the reply prepared and filed on behalf of Reiter in the suit so prosecuted after Hudson had answered and claimed that the notes had been paid and transferred to Milburn by the Milburn-Murray transactions; and upon that theory alone was based the judgment which Reiter in that case did eventually recover for the full amount of the notes. This theory was that Milburn knew the Murray notes and collateral to be practically worthless, that Reiter was deceived and defrauded in this exchange, and that, because of such fraud, Reiter had the right to rescind and had rescinded the exchange; and his later assertion of title in the notes depended on this fraud and this rescission. We may even accept Mr.

Thatcher's claim that he personally acted in good faith in persuading Reiter to take the Murray notes, and that acceptance makes no difference. The plain fact is that he was professionally employed by Milburn to bring about the Reiter-Murray exchange; that he accomplished this result; and that he then accepted professional employment in an adverse interest to attack and overturn his previous professional work. This was without notice to his former client, although notice would be of little importance. The fact that this effort was successful and that a verdict was had, based upon the theory that his former client had, through him, accomplished a fraud, Mr. Thatcher now puts forward as his full justification. Proof of such conduct supports a judgment of disbarment. *In re Boone* (C. C. Cal.) 83 Fed. 944.

[8] Charges 3, 4, and 5: It is sufficient to say that the evidence fairly supports the District Court's finding that these charges were established. As to the bill of exceptions, it is clear enough that, when presented to Judge Knappen, this was not in the same form as it was when the opposing attorneys had stipulated for its allowance, and it is not easy to understand how this could have been brought about without the deliberate action of Mr. Thatcher. As to causing his client to execute a pleading which charged fraud against another attorney, there is nothing to indicate the existence of any fraud or that Mr. Thatcher had any reason to suppose he could find evidence to establish the fraud; and he seems to have recklessly instigated an affidavit which was false and which he had no real reason to believe was true. At the same time, the situation was exasperating to him, and distinctly mitigates his reckless and wrongful charge of fraud against the other counsel. As to obtaining judgment against his own ignorant client without the latter's understanding knowledge of what was being done, there is nothing to be said in justification; that he did not actually enforce the judgment and perhaps never intended to, do not justify.

Several other errors are assigned besides those which involve the merits of the case and which we have discussed. It is not necessary to consider them in detail. We have examined these complaints, and we see no reason to think that there was any prejudicial error, or that the charges were not fairly tried, or that the finding of the court essentially rests upon anything not in the record.

We do not intend, by this opinion, any intimation that such an order as this can be set aside by writ of error in any case where there is evidence fairly tending to support the ultimate finding, or that the rule is different from that obtaining in ordinary trials before a United States District Judge without a jury. *Mason v. Smith* (C. C. A. 6) 191 Fed. 502, 112 C. C. A. 146. We have thought best in this case to consider the complaints more at large, but it need form no precedent in similar cases.

It is brought to our attention that, pending this writ of error, the Supreme Court of Ohio has readmitted Mr. Thatcher. That has no bearing here. If in due time an application is made in the District

Court for Mr. Thatcher's readmission, that court will give such force to the state court's action as may be thought proper.

The appeal is dismissed; and, on the writ of error, the order below is affirmed, without costs.

CONSOLIDATED ARIZONA SMELTING CO. v. HINCHMAN.

(Circuit Court of Appeals, First Circuit. March 30, 1914.)

No. 1000.

1. COVENANTS (§ 70*)—COVENANTS RUNNING WITH THE LAND—EQUITABLE CHARGE—PERSONAL COVENANTS.

A contract for the sale and purchase of several mining properties called for a payment of \$100,000 when the deed should be delivered, and for a percentage of the net earnings of mining operations until the vendor had received in the aggregate \$1,000,000. The purchaser assigned the contract, and his assignee obtained a deed conveying unqualified title, and he at the same time executed a contract calling for quarterly payments to the vendor of a percentage of net profits of mining operations until the vendor had received in the aggregate the \$1,000,000. Both contracts were made binding on the successors and assigns of the parties. The contracts were not recorded. *Held*, that the covenants to pay a percentage of the "net proceeds from the operation of said mining properties after deducting the cost of mining, necessary development work (but not including purchase of new machinery), transportation, sampling, treatment and smelting, plant superintendence, and all proper charges incidental thereto," did not run with the land, but were merely personal, and did not create an equitable charge on the land, and a purchaser from the assignee, pursuant to order of the bankruptcy court on the bankruptcy of the assignee, with notice of the agreements, was not bound to operate the properties and pay the vendor the percentage of the net profits.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 70, 71; Dec. Dig. § 70.*]

2. VENDOR AND PURCHASER (§ 265*)—VENDOR'S LIEN—COVENANTS RUNNING WITH THE LAND—SUBSEQUENT PURCHASER.

Where an agreement of a purchaser of mining properties to pay a percentage of the net profits of operations of the properties until the vendor was paid a specified aggregate sum was not a legal covenant running with the land, or an agreement expressly charging the land, equity could not intervene on the ground of a vendor's lien for the unpaid price of the land, and so charge a subsequent purchaser with liability to operate the properties and pay the percentage of net profits.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 492, 700-712; Dec. Dig. § 265.*]

3. COURTS (§ 365*)—CONTROLLING DECISIONS—DECISIONS OF STATE COURTS.

The decision of the highest court of Arizona that there is no implied lien for unpaid purchase money must be given effect by the federal courts in determining whether real estate located in Arizona is subject to a lien for the unpaid price, and no lien can arise at law or in equity from the mere fact that there is a document in writing evidencing an agreement to pay a further price for land situated in Arizona, but to create such lien the amount of the price due must be expressly charged on the land.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969-971; Dec. Dig. § 365.*]

Conclusiveness of judgment between federal and state courts, see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank v. City of Memphis, 49 C. C. A. 468; Converse v. Stewart, 118 C. C. A. 215.]

4. BANKRUPTCY (§ 268*)—TRUSTEE IN BANKRUPTCY—TITLE—PURCHASER.

Since a trustee in bankruptcy takes the property of the bankrupt with all the equities impressed on it by the bankrupt and with the equities in the bankrupt's favor, a purchaser from the bankrupt assumes no obligation not enforceable against the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 372-379; Dec. Dig. § 263.*]

Aldrich, District Judge, dissenting.

Appeal from the District Court of the United States for the District of Maine; Clarence Hale, Judge.

Suit by Charles S. Hinchman against the Consolidated Arizona Smelting Company. From a decree (198 Fed. 907) for complainant, defendant appeals. Reversed and remanded, with directions.

J. Markham Marshall and Alexander B. Siegal, both of New York City (Van Vorst, Marshall & Smith, of New York City, on the brief), for appellant.

Charles H. Burr, of Philadelphia, Pa. (Benjamin Thompson, of Portland, Me., and John Chipman Gray, of Boston, Mass., on the brief), for appellee.

Before DODGE, Circuit Judge, and ALDRICH and BROWN, District Judges.

BROWN, District Judge. The decree of the District Court is in part to the effect that the appellant, Consolidated Arizona Smelting Company, a Maine corporation, now holds its title to mines in Arizona known as the "Blue Bell Mines," subject to two agreements of the Arizona Blue Bell Copper Company; the first, of September 15, 1906, with John L. Elliot, the second, of November 15, 1906, with the Consolidated Arizona Smelting Company, a New Jersey corporation, and "especially subject to the payment of the balance of the purchase price of \$900,000, in accordance with the terms of said agreements."

The opinion of the District Court is reported in 198 Fed. 907.

The New Jersey corporation, party to the second agreement, was adjudged bankrupt April 27, 1908, and under direction of the bankruptcy court its mining property was sold; the purchaser took a deed from the trustee in bankruptcy and subsequently made conveyance to the appellant, the Maine corporation.

The principal question before us is whether, by reason of its acquisition of title to the mines, the Maine corporation, appellant, became chargeable with certain payments of a share of the net profits resulting from the operation of said mining properties, as provided in the said agreements of September 15 and November 15, 1906.

The case of the complainant, appellee, is put upon two grounds:

1. That said agreements contain covenants that at law run with the land.

2. That even if the covenants do not run at law they create an equitable charge.

The written agreement of September 15, 1906, was to the effect that the Blue Bell Company agreed to convey to Elliot, and Elliot to pur-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

chase, certain mines and mining property in Arizona, together with the appurtenances, machinery, tools, and utensils on said premises; the conveyance thereof to be "made by full, covenant warranty deed, and the title thereto shall be a good and marketable title and free from encumbrances," excepting, however, a certain lease and certain claims which are not material in the present case.

In connection with the finding of the District Court that there is an unpaid balance of the purchase price amounting to \$900,000, particular attention should be given to the second, third, and fourth paragraphs:

"Second. The price to be paid by Mr. Elliot for the said properties is the sum of one hundred thousand dollars (\$100,000), ten thousand dollars (\$10,000) of which shall be paid upon the signing of this agreement, the receipt whereof is hereby acknowledged, and the remaining ninety thousand dollars (\$90,000) shall be paid upon the delivery of the deeds to the said property, as hereinafter provided. Mr. Elliot further covenants and agrees to pay, or cause to be paid to the Blue Bell Company, until it shall have received the aggregate sum of one million dollars (\$1,000,000), twenty-five per cent. (25) of the net profits resulting from the operation of the said mining properties. The said payments shall be made quarterly on the first days of January, April, July and October, or as soon thereafter as the net profits for the preceding quarter can be conveniently ascertained. The net profits herein referred to shall be the net proceeds from the operation of the said mining properties after deducting the cost of mining, necessary development work (but not including purchase of new machinery), transportation, sampling, treatment and smelting, plant superintendence, and all proper charges incidental thereto, but not the rent payable under the said lease of the said mining property. Mr. Elliot will also procure, to be executed by the Arizona Smelting Company, a corporation of the state of New Jersey, operating at Humboldt, Arizona, a contract for the smelting of all the ores produced from the said mining property for a period of five years, substantially in the form hereto annexed, marked 'A.'

"Third. The deeds of the said properties shall be delivered, and the remaining ninety thousand dollars (\$90,000) of the purchase price, other than the twenty-five (25) per cent. of the net profits, shall be paid at the office of John L. Elliot, No. 71 Broadway, city and state of New York, on the fifteenth day of November, 1906, at 12 o'clock noon.

"Fourth. This agreement shall be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns."

The agreement of November 15, 1906, with the said New Jersey corporation (subsequently a bankrupt) recites that on or about September 24, 1906, the contract of September 15th and all rights thereunder were duly assigned by Elliot to the Consolidated Company (of New Jersey), that the Blue Bell Company executed and delivered a deed to the said Consolidated Company, and that "it is deemed advisable and necessary that the obligation of the Consolidated Company under said contract to make such further payments to the Blue Bell Company out of the net profits of said properties should be set forth in an agreement and form for record," and contains the following provision:

"Now, therefore, in consideration of the execution and delivery of said deed by the Blue Bell Company, and of the sum of one dollar (\$1) paid by the Blue Bell Company to the Consolidated Company, the receipt whereof is hereby acknowledged, the Consolidated Company hereby agrees to pay, or cause to be paid, to the Blue Bell Company twenty-five per cent. of the net profits resulting from the operation of the said 'Blue Belle,' 'Blue Coat' and

'Blue Buck' patented mining claims, until the said Blue Bell Company shall have received the aggregate sum of one million dollars (\$1,000,000). Said payments shall be made quarterly on the first days of January, April, July and October in each year, or as soon thereafter as the net profits for the preceding quarter can be conveniently ascertained. Such net profits shall be the net proceeds from the operation of the said mining properties, after deducting the cost of mining, necessary development work (but not including the purchase of new machinery), transportation, sampling, treatment and smelting, and plant superintendence, and all proper charges incidental thereto, but not including the rent payable under the lease of said mining properties, dated twenty-ninth December, 1905, to the Arizona Exploration Company.

"This agreement shall be binding upon and inure to the benefit of the successors and assigns of the respective parties hereto."

[1] Upon an examination of these two agreements, it appears that it is incorrect to say that the mines were sold for the sum of \$1,000,000, or that in addition to the sum of \$100,000 which was duly paid there was an agreement to pay a balance of the purchase price, amounting to \$900,000. The covenant is to pay 25 per cent. of the net profits resulting from the operation of the said "Blue Belle," "Blue Coat," and "Blue Buck" patented mining claims, until the said Blue Bell Company shall have received the aggregate sum of \$1,000,000.

This is an agreement for a share in the profits of mining operations. The payments are wholly contingent upon the success of these operations, and upon the earning of a profit, and are measured by the amount of profit. According to the success of the enterprise nothing may be payable, or any amount up to, but not exceeding the sum of \$900,000, which is a maximum beyond which the right of the Blue Bell Company to share profits ceases. Before profits can be shared, the operating company is entitled to reimburse itself for the expense of development and of operation, and also for the expense of transportation, sampling, treatment, and smelting of ores, plant superintendence, and all proper charges incident thereto.

We must not lose sight of the very substantial difference between an agreement to pay \$900,000 as an agreed value for land and an agreement to give a quarter share of profits, if there are profits, with a maximum of \$900,000. The present worth at the date of the deed of such a prospective share or chance in a mining venture is wholly conjectural. The covenantor does not acknowledge that the present value of the mines which have been conveyed to it is by any specific sum more than the cash payment. In addition to a satisfactory purchase price, it gives a share in the venture. It is, however, erroneous to treat the present case as if the grantor had parted with a consideration of the value of \$900,000 for which a debt of \$900,000 was created.

The operation of the properties from which it is contemplated that a profit may result includes not merely the winning of ore, but also the transportation and smelting of ores and the sale of metals. The contract of September 15th provides that Elliot will procure to be executed by the Arizona Smelting Company, a corporation of the state of New Jersey, operating in Humboldt, Ariz., a contract for the smelting of all the ores produced from the said mining property for a

period of five years, substantially in the form marked "A," which provides for the terms on which ores and concentrates are to be smelted. The covenants of Elliot and of the New Jersey corporation, his assignee, contain no express terms binding the covenantor to operate or restricting or controlling the use of the properties conveyed, and seem to us to relate rather to a share of the profits of the business to be conducted by the covenantor than to the lands or mines themselves.

The parties contracted upon the supposition that the business would in fact be carried on; nevertheless, it does not appear that the grantee was willing to bind either itself or its assigns that it should be carried on. There is a clear distinction between the expectation of the parties and the duty imposed by the contract, and the court would not be justified in going farther than the expressions used in the contract. *Maryland v. Railway Co.*, 22 Wall. 105, 112, 22 L. Ed. 713.

If from the agreement to share profits could be implied a further agreement to make reasonable efforts and reasonable expenditures for the development of the mines, this would be in its nature a personal agreement pure and simple. Ownership of mining land does not involve as a mere incident the ability to raise capital and to furnish machinery and labor for developing it.

If it can be said that these covenants "touch and concern the land" at all, it is but indirectly and partly. The covenants certainly do not wholly touch and concern the land, but relate immediately to a business to be conducted not only by the use of the mine, but by the use of personal property, and both on and off the land conveyed.

The contention that the contemplated profits will be the proceeds of the land, or issue out of the land, and that therefore an agreement concerning these profits concerns the land and runs with the land, involves a disregard of the proper scope of the terms of the agreement. What seems to us the error of this contention is made clear by the decision of the Supreme Court of the United States in the case of *Stratton's Independence, Ltd., v. Howbert*, 231 U. S. 399, 34 Sup. Ct. 136, 58 L. Ed. —. In that case it appears to have been argued that the proceeds of mining operations conducted by a mining corporation do not represent values created by or incident to the business activities of such a corporation, and therefore cannot be a bona fide measure of a tax levied at such corporate business activities; that the proceeds of mining operations result from a conversion of the capital represented by real estate into capital represented by cash, and are in no sense income. The court said, however:

"It is not correct, from either the theoretical or the practical standpoint, to say that a mining corporation is not engaged in business, but is merely occupied in converting its capital assets from one form into another. The sale outright of a mining property might be fairly described as a mere conversion of the capital from land into money. But when a company is digging pits, sinking shafts, tunneling, drifting, stoping, drilling, blasting, and hoisting ores, it is employing capital and labor in transmuting a part of the realty into personalty, and putting it into marketable form. The very process of mining is, in a sense, equivalent in its results to a manufacturing process. And, however the operation shall be described, the transaction is indubitably 'business' within the fair meaning of the act of 1909; and the gains derived from it are properly and strictly the income from that business; for 'income'

may be defined as the gain derived from capital, from labor, or from both combined, and here we have combined operations of capital and labor."

The error of attributing to the mine itself the entire profits of mining operations is sufficiently pointed out in that opinion. The observation that "the very process of mining is, in a sense, equivalent in its results to a manufacturing process," has a special application to the contemplated operations in the present case, which included not alone the winning of ore, but the production of metals from ore, and a profit from what is "rather a manufacture of art and labor resulting from the use and application of minerals" than proceeds of the realty. See *King v. Pomfret*, 2 M. & S. 139, 143; *Burdick v. Dillon*, (C. C. A. First Circuit) 144 Fed. 737, 741, 75 C. C. A. 603; *In re Chandler*, 1 Lowell, 478, 479, Fed. Cas. No. 2,591.

The uncertainty of the obligation is a strong indication that no present lien or security on the land was intended. If the parties understood they were merely to share profits, and profits were dependent upon success, it was natural not to contract for security.

The chief reliance of the complainant is the provision in the agreement of November 15th:

"This agreement shall be binding upon and inure to the benefit of the successors and assigns of the respective parties hereto."

It is argued that this shows an intention that one who should succeed the covenantor in the title to the mines should assume the obligation of paying a quarter of the net profits from their operation, and also that this shows an intention that the land should stand as security for the payment of the quarter share of profits.

This provision contemplates a succession or substitution of parties by the voluntary act of either of the contracting parties. We think, however, that no intention to enlarge the previous terms of the agreement can be deduced from it.

As the original covenantor has not expressly agreed that it will not alienate or encumber the land, and has not restricted its use, and has not expressly agreed that the land should stand as a security for the performance of the covenant, we are of the opinion that a voluntary conveyance of the mine by the original grantee, while it might have defeated the expectation of the grantor, would not have violated any right of contract and would not have released the covenantor from its personal obligations.

Successors and assigns were to be bound only as the original covenantor was bound, and it was contemplated that one who should succeed through voluntary assignment from the covenantor to the business from which the profit was to result should be placed in the same contractual relations as to that business.

The appellant is not in the proper sense a successor and assign of the bankrupt corporation so as to become, as its representative, substituted generally upon its obligations. It has merely succeeded in the title to a portion of the bankrupt's assets. It is by no means evident that it was intended that one to whom the mines alone might be leased or sold should be required to assume any obligation to the complain-

ant. Both Elliot and the bankrupt corporation agreed "to pay or cause to be paid" 25 per cent. of the net profits resulting from the operation of the said properties. This is not confined to operations conducted by any particular person. Alienation is not expressly prohibited, and in fact seems to be contemplated, and would not defeat the personal obligation of the covenantor.

The contract, having regard both to its express terms and to its nature, is one that is capable of performance by the original covenantor, although it may have leased or sold the mines for others to operate, and is one not capable of performance merely because of ownership of the mines.

The argument that because successors and assigns are to be bound as the original covenantor is bound, therefore the original covenantor has agreed that the land while in its hands shall be security for the performance of the personal covenant, seems unconvincing. We cannot infer from a provision for a substitution of parties to the contract an intention to enlarge the obligation of the original covenantor or to impose a burden on the land.

The use of this conventional phrase concerning successors and assigns is of slight significance, since that part of the agreement specifically setting forth the obligation to make payments makes no provision that the land is bound as a security. This phrase would be quite as appropriate in an agreement between two corporations touching a business entirely disconnected from the land as in an agreement relating only to land. It does not savor of the realty more than of personalty, and therefore does not prove an intention to charge the land as a security. It may be given the same significance as in an agreement concerning personalty or services.

The common sense of the matter is that if it had been intended to charge the land while in the covenantor's possession the lawyers who drew the agreement would have provided for this in plain language, and would not have left it to depend upon a doubtful inference from a clause whose purpose was not to state the terms of agreement, but merely to provide for substitution of parties.

Furthermore, it is very doubtful if in this contract we can interpret the words "successors and assigns" as including other than voluntary assigns, or as having any application when the bankrupt's estate passes by operation of law. *Gazlay v. Williams*, 210 U. S. 41, 28 Sup. Ct. 687, 52 L. Ed. 950.

In accepting as part consideration a contract for a share of profits from an enterprise which involved the investment of large capital in machinery and labor, and was not confined to the winning of ore, but included its reduction to metal at the expense of the operator, the grantor relied rather upon its hopes or upon its confidence in the ability of the grantee to furnish the necessary capital and to successfully develop the mine, and upon its interest in so doing, than upon any security afforded by the mine itself. It is difficult to so interpret these documents as to find an intention that the grantee should charge its land as security for the success of its own mining venture or the venture of successors in title who might be able to furnish further cap-

ital and conduct, under new superintendence, additional mining operations. It is equally difficult to infer such intention from the documents interpreted in the light of the circumstances. The grantee was vested with a full record title (a marketable title) to the mines. The grantor deliberately made choice between giving a deed conferring such title and a deed showing on its face a reservation of rights. It expressly elected not to reserve rights in the deed, and to withhold from record agreements containing the covenants upon which the present complainant now relies.

While the New Jersey corporation was operating the mines, it expended very large sums of money, and, while it was the owner of an unqualified title, it obtained loans from various bankers aggregating upwards of \$740,000. Having a share in the profits of the mining venture to an amount which was doubtless much larger than the purchaser would have agreed to pay in cash, it was for the interest of the grantor, as well as of the grantee, that the grantee should have the means of borrowing, and this was inconsistent with a lien. In *re* Brentwood Brick & Coal Co., 4 Ch. D. 562, 565.

The defendant contends that the deliberate withholding of the agreement from record and giving to the New Jersey Company the credit of being the owner of an unqualified title estopped the Blue Bell Company from setting up the agreement as against creditors.

Without now considering the question of estoppel, we think these facts may be legitimately considered as showing that there was no intention to charge the land as a security, and that it was for the mutual interest of the parties interested in the success of the mining venture that the land should stand unencumbered in order that the business of operating the mines, to which in terms the covenant relates, might be developed with capital acquired on the faith that the true ownership was the record ownership.

We should prefer to find that the grantor intended to take no security rather than that it intended to aid the development of the mines by holding out the grantee as owner while it was borrowing money for development and to first disclose a claim for security after the public had advanced its monies. As was said by Chief Justice Marshall, in *Bayley v. Greenleaf*, 7 Wheat. 46, 51 (5 L. Ed. 393) concerning a vendor's lien:

"A vendor relying upon this lien ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is, in some degree, accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien."

The defendant cites many cases, among them *Jackson Brick & Tile Co.* (D. C.) 189 Fed. 636, 649, and *In re Bothe*, 173 Fed. 597, 97 C. C. A. 547, to support its contention that there is estoppel.

We find it unnecessary, however, to consider at length the questions of estoppel and constructive fraud, though these are important, for we are of the opinion that upon the terms of these documents interpreted both literally and in the light of circumstances we must find that there is no sufficient evidence of an intention to create a security.

We have also to consider what seems a somewhat artificial argument

based upon implications and fictions from the ancient and technical law of real estate, whereby it is sought to charge the appellant as by a covenant at law running with the land.

In order that a covenant may run with the land, it must "touch and concern" the land.

This covenant as to its benefits to the covenantee is entirely personal; it benefits no lands of the grantor. As to its burdens, the land of the covenantor is not subjected to any restriction nor limitation as to use or mode of occupation, and no active duties are expressly imposed upon the covenantor to develop or operate the mines.

To show that the covenant "touches and concerns" the land, the complainant, appellee, argues as follows:

The complainant is vested with the title to a royalty; a payment of a royalty out of the profits of land is rent; a covenant in a lease to pay rent touches and concerns land, because rent is regarded as something rendered for the possession of land. If a covenant to pay money rent touches and concerns the land, a fortiori this covenant touches and concerns the land.

This argument seems in some particulars misleading. It is an historical fiction that rent issues out of land. Holmes, Common Law, 388, 391. But it will hardly be contended that purchase money to be paid for land issues out of land or is rent.

If rent be regarded as something rendered for the possession of land, it does not follow that what is rendered for the title to land is rent, though this seems to be implied in appellee's argument. In a vague sense both purchase money and rent may be said to be rendered for the possession of land; but this does not make them so identical that the fiction which attaches to rent must also attach to agreed purchase money, or to an additional sum conditionally payable for the same consideration for which the defined purchase money was paid.

Furthermore, the proposition that a payment of a royalty out of the profits of land is rent seems both inexact and inapplicable. Rent may assume the form of a royalty, or be determined in amount by a royalty; but a covenant to share the profits of land does not necessarily create a rent. Here, however, as we have seen, the covenant was not to share the profits of land, but of operations which the parties treated as the source of profit rather than the land.

Nor can we accept the statement that the complainant has the title to a royalty in the sense in which the term is ordinarily used. The typical illustration of a royalty is a fixed sum per ton for ore mined, or a fixed sum per patented article manufactured, used or sold. Where a royalty is agreed upon there is a contract as to value per unit, which affords a definite basis for computing proportionately to use a sum which may become due for the acquisition or use of a number of units.

An agreement for a royalty upon each ton of ore might possibly be said to touch and concern the land, not because it is in the nature of rent, but because the ore itself in place is part of the realty, and payment to the landowner for the ore per ton as removed is payment for precisely what comes out of the ground. When, however, the contract is not for a price for ore taken out, but for a share of the profits from

the operator's business of developing three different mines, the profits of one of which may be required to meet the losses of another, then the payments cease to be proportionate to the parts of the realty removed from place.

The appellee's proposition that "an obligation to pay the value of twenty-five per cent. of the ore taken out of the land touches and concerns the land" erroneously interprets the covenant.

With a typical royalty the grantor's income is computed upon the ore itself; in this case such computation is impossible, for what is to be shared is the profit of the operator from dealings with the ore, and products of the ore, as personalty, after deducting the expenses of excavating and all other expenses incident to dealing with the ore as personalty.

The nature of the ore in place, and considered as a part of the realty, is, of course, an important factor; but the ore when brought to the surface, severed from the realty, is the proceeds not of land alone, but of capital and labor as well, and as it is transported, smelted, and its metals extracted the whole operation is more and more characterized by its business features rather than by the character of the raw material in place as a part of the realty.

While the term "royalty" is sometimes used in a loose sense to denote merely a share, yet upon the question before us it tends to error, and is much less accurate than the expression used by the parties to express their intention—"twenty-five per cent. of the net profits resulting from the operation."

In seeking for the actual intention of the parties we must give their language a natural interpretation, and cannot attribute to them an understanding that a share of profits of a business is a royalty; that a royalty is a rent; that rent by legal fiction issues out of land; and that by like fiction the profits of the business of mining issues solely out of land, or is to be regarded as the proceeds of land because it is to be rendered for the title to land.

The appellee also proposes as a test the following:

"Where the nature of the covenant is such that naturally it can only be performed by the owner of the land, the covenant is one which touches and concerns the land, and therefore one which binds the successive assignees of the land."

This general proposition is not supported by authority, and we think it unsound. It does not follow because a covenant touches and concerns the owner of land that it touches and concerns the land itself. It is not enough that a covenant is to be performed by him who owns the land; it must affect the mode of occupation or enjoyment of the land. Nor is mere intention that a covenant shall run enough to make a covenant touch and concern the land. This must be determined from the subject-matter. It must be "capable in its own nature" of running with the land. 1 Smith's L. C. (7th Am. Ed.) pp. 217, 221, 226, 190, 191; Sims on Real Covenants, 115. The error of the appellee's proposition is pointed out, and well illustrated, in the appellant's brief in reply.

The learned counsel for the appellee have failed, we think, to find any case that supports its contention that a covenant like that before us creates at law an obligation which attaches to those who succeed to the title of the covenantor.

The appellant cites the following cases to support its contention that the covenant does not touch or concern the land, and that the use of the word "assigns," however clearly it may show an intention that the agreement should run with the land, is insufficient to accomplish this, or to make the covenant touch or concern the land: *Mygatt v. Coe*, 147 N. Y. 456, 467, 42 N. E. 17; *Brewer v. Marshall*, 18 N. J. Eq. 337, 341; *Wilmurt v. McGrane*, 16 App. Div. 412, 417, 45 N. Y. Supp. 32; *American Strawboard Co. v. Haldeman Paper Co.*, 83 Fed. 619, 625, 27 C. C. A. 634; *Kettle River Railroad Co. v. Eastern Railway Co. of Minnesota*, 41 Minn. 461, 471, 43 N. W. 469, 6 L. R. A. 111; *Rogers v. Hosegood*, 2 Ch. D. 388, 395; *Keppel v. Bailey*, 2 Myl. & Keen, 517, 537; *Reid v. McCrum*, 91 N. Y. 412, 417, 418; *Wells v. Benton*, 108 Ind. 585, 8 N. E. 444, 9 N. E. 601; *Glenn v. Canby*, 24 Md. 127, 130, 131; *Clement v. Willett*, 105 Minn. 267, 270, 117 N. W. 491, 17 L. R. A. (N. S.) 1094, 127 Am. St. Rep. 562, 15 Ann. Cas. 1053; *Scholten v. Barber*, 217 Ill. 148, 75 N. E. 460; *Dolph v. White*, 12 N. Y. 296, 301, 302; *Dickey v. Kansas City, etc., Railway Co.*, 122 Mo. 223, 231, 26 S. W. 685.

We think the true view of this covenant is that it does not touch or concern the land, but does concern a personal business. Mr. Sims, in his book on Real Covenants, at page 109 et seq., refers to this topic, and collects the decisions. But even should it be found that this covenant does in fact touch and concern the land, there would still remain the question whether in any event the burden of the covenant can run so as to charge the assigns of the covenantor.

The real contention of the complainant in this case appears to be, not that the covenant runs with the land, but that the covenant of the bankrupt runs with the business of the appellant.

It seems to be well settled in England that a covenant of the character of that now before us does not run with the land, and is not enforceable at law or in equity in such a way as to require a successor in title to the covenantor, who has entered into no covenant, to expend sums of money in accordance with what the original covenantor bound himself to do. In the following cases are valuable statements of the effect of the English cases upon these topics: *Hayward v. Brunswick Building Society*, 8 Q. B. D. 403; *Austerberry v. Oldham*, 29 Ch. D. 750. The latter case is cited on the appellee's brief to the effect that it is now settled in England that the burden of covenants will not run where there is no tenure; that is, where there is no reversion. The case, however, seems to have a much broader bearing.

Mr. Sims, in "Sims on Real Covenants," p. 148, says that the weight of American decisions seems to follow the contrary view. It should be noticed, however, that Mr. Sims, in his definition of a covenant which runs with the land, observes that the principle is the linking of properties together, so as to make one piece more useful by the obligation of the owner of the other. *Sims on Real Covenants*, 17, 19. In a note.

page 17, he states that the definition may cover incorporeal as well as corporeal hereditaments, and the appellee here argues that it has an incorporeal hereditament. We are, however, unable to accept the contention that the right to these conditional payments out of the profits of operation is an incorporeal hereditament.

In view of our opinion that the covenant does not run because it does not meet the primary requirement that such a covenant shall touch and concern the land, we need not further consider the question of the running of the burden of a covenant with a fee estate. We may observe, however, that no case has been cited to show that under the law of Arizona, where the land is situated, the burden of a covenant can run with a fee estate.

[2] In the District Court the question whether the covenant ran with the land was not decided, but the case was determined for the complainant on the ground that an equitable charge existed even if the covenant did not run with the land.

We are unable to see any ground upon which a court of equity can charge the appellant unless there was a legal covenant which ran with the land, or an agreement expressly charging the land. Equity cannot intervene on the ground of a vendor's lien for an unpaid purchase price.

By the law of Arizona (where the land is situated), as stated in *Baker v. Fleming*, 6 Ariz. 418, 59 Pac. 101, 2 Ann. Cas. 370, there is no implied lien for unpaid purchase money. In other words, the creature of equity, known as a vendor's equitable lien, which is based upon the fact that the purchaser has not paid for what he has received, does not exist in Arizona and is regarded as contrary to the policy of that state. This is conceded by the appellee, who contends that this decision is inapplicable, because in the present case we have an express lien; but, as no lien exists merely because there is an unpaid purchase price, or unpaid consideration, it necessarily follows that no lien arises either at law or in equity from the mere fact that there is a document in writing evidencing the agreement to pay a further price or consideration. To create such a lien there must be something more than a declaration that the purchase money to a certain amount remains unpaid; the amount must be expressly charged upon the land. *Hiester v. Green*, 48 Pa. 96, 86 Am. Dec. 569; *Jones on Liens*, vol. 2, § 110.

[3] We must give due effect to the decision in *Baker v. Fleming*, and this precludes us from raising upon equitable principles a charge for which the parties have not contracted.

The case of *Walker v. Brown*, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865, emphasizes the requirement of an agreement showing an intention to create a lien, charge or security.

The parties contracted not for security, for there was no fixed obligation to secure, but for a share in a fund that never was created, and for whose creation the contract itself can no longer avail.

It would establish a most dangerous rule of property were land to be charged with liens or in effect mortgaged by an instrument containing not a single definite expression of such intent.

But even were we to adopt the complainant's contention that it was intended that the land itself should be a security for the performance of the contract, we should still have to inquire whether in view of the bankruptcy and of the rights of the bankrupt under the contract that security was of any actual value. In other words whether the value of the land as a security was not exhausted by rights of the bankrupt to which the trustee in bankruptcy succeeded.

December 4, 1907, a petition was filed upon which, on April 27, 1908, there was an adjudication of bankruptcy. Its effect was to defeat the mining operations of the bankrupt and to destroy its ability to carry out the contract. If it be true that there was a contract for security, then the grantor could look only to the land itself, as it then stood, for such security; but the contract by its terms clearly created no present debt, and nothing was then due from the bankrupt. Therefore it was then impossible to prove any definite pecuniary charge against the land. Had the land been sold by the bankruptcy court, free from liens, with liens transferred to proceeds, complainant would have been unable to prove a definite pecuniary value, if any, of its right to a share of the profits.

The complainant could not derive from the bankrupt what was essential in addition to the mines to carry out the terms of the contract, and obviously could not expect a stranger to do so without consideration.

The personal assets of the bankrupt became immediately available for the payment of its creditors. If, as the complainant suggests, a trust was imposed which went with all successors in title to the land, it was an active trust that could not have been executed by sale of the land, but required the operation of the mines, in order to create the funds in which complainant was to share, and a trust that after the bankruptcy necessarily must have been carried out with funds supplied by the complainant, or raised upon the land itself. If by any possibility a receiver or trustee could have been appointed to carry out the supposed trust with funds so raised, then, after paying interest on the new funds supplied for development and a suitable compensation for the services of a receiver or trustee, if a profit resulted it would be first wholly applicable to the reimbursement of the bankrupt or its estate for all the charges for development and operation of the property, including transportation, sampling, treatment, and smelting, plant superintendence, etc., which were apparently some three-quarters of a million dollars. After such payment the complainant might have one-quarter of the profits, three-quarters going to the bankrupt's estate, until the complainant had received \$900,000, after which the entire property would be reconveyed to the bankrupt's estate.

As we understand the effect of the decree appealed from, it is that the purchaser of the mines at the bankruptcy sale is in equity bound to assume all of the obligations of the bankrupt under the contract, and, irrespective of the value of the land which it purchased, to furnish its capital and services as a voluntary successor to this obligation of the bankrupt as a condition of doing business.

Under the direction of the bankruptcy court, the mining property was put up at public auction, and, without notice of any claim that there was a charge upon the land or upon the profits of operation, it was sold, with other property, for the amount of the highest bid, \$200,000—presumably a fair price. In any event, after making all due allowances, this is a strong indication that the value of the security subject to the prior charges for reimbursement was of no substantial amount.

Subsequent to its sale at public auction, and before paying over to the trustee in bankruptcy the amount of the bid, the purchaser had notice which, for present purposes only, we may assume to be sufficient notice of the agreements of September 15 and November 15, 1906. After such notice counsel for the purchaser made an examination of the law of Arizona, and especially of the case of *Baker v. Fleming*, 6 Ariz. 418, 59 Pac. 101, 2 Ann. Cas. 370, which holds that the equitable doctrine of a vendor's lien for unpaid purchase money has no application in that state.

The purchase price as fixed, before notice, at the sale by the trustee in bankruptcy was paid over despite the notice. The purchaser and the appellant, however, have from the first consistently refused to recognize or be bound by the contract of the bankrupt. So far as the title to the real estate is concerned, they may be so affected by notice as to make irrelevant the fact that the instrument had not been recorded. We may assume that they took the bankrupt's actual title as distinguished from the record title. To hold, however, that their acts and conduct have been such as to amount to a voluntary adoption of a contract which they have always consistently contended did not bind the land, and was of no legal effect against them, would be a grave injustice and a perversion of the rule that one who is not an original party to a contract may become such by voluntary adoption, and that such voluntary adoption may appear from acts and conduct as well as from express verbal agreement.

The case of *Wiggins Ferry Co. v. Ohio & Mississippi Railway Co.*, 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055, cited in the opinion of the District Court, though not cited upon appellee's brief and apparently not now relied upon, turns upon the voluntary adoption of a contract by conduct which was found only consistent with its adoption. The conduct of the appellants and their predecessor in title is consistent only with their repudiation of the contract.

By taking the land it is very clear that they assumed no legal, equitable, or moral obligation to advance new money and make new efforts for the benefit of the grantor; and a court of equity cannot justly appropriate values derived from the development of the mines through business activities and capital not derived from the bankrupt.

[4] It is true that the trustee in bankruptcy took the property with all the equities impressed upon it by the bankrupt, but it is likewise true that we must consider the equities from both sides, and not from the side of the complainant alone. The trustee takes with the equities in the bankrupt's favor as well as with the equities against him.

After its very large expenditure we think that the bankrupt itself

might have elected to cease its investment of capital and its business efforts without breach of any express or implied covenant. Regarded as a personal covenant, it was practically discharged by full performance by the bankrupt of all duties implied in it. No new personal obligation of a purchaser could exceed the original obligation of the bankrupt.

According to the complainant's view there has been attached to this land for an indefinite period (perhaps in perpetuity) an obligation which attaches as a condition of doing business to all persons succeeding the bankrupt in title and to the proceeds of their new capital and business activities. But this disregards the rights of the bankrupt under the contract. If, following the complainant's argument, we ignore the personal character of the covenant and say that it relates to the proceeds of land, and therefore to the land, then it follows, as both covenantor and covenantee are to have rights in the proceeds, that the land represents not only the grantor's share of profits, but the bankrupt's right to reimbursement. The right of the covenantor to all the proceeds of the land until repaid the amount expended in development and working is primary, and should it exhaust the value of the land as a security at the time of the bankruptcy the complainant stands merely in the plight of a second mortgagee when a first mortgage is foreclosed and brings less than the amount of the debt.

We fail to see the application to this case of the doctrine of *Legard v. Hodges*, 3 Bro. C. C. 531, 4 Bro. C. C. 421, in which the covenantor, having bound himself to pay a certain sum, covenanted to set apart and appropriate one-third part of the clear yearly rents arising from several estates until such sum was paid. This created a debt with a contract to appropriate the rents to pay it, and was held to impose a trust upon the land which bound purchasers with notice—a trust which could be administered through a receiver.

The difficulty in the complainant's case is that the grantor took in addition to a satisfactory purchase price merely a chance in a mining venture, and took no security that this venture should last longer than the ability or interest of the coadventurer, the bankrupt.

As was said by the Circuit Court of Appeals for the Ninth Circuit, in *Synnott v. Tombstone Consolidated Mines Company*, 208 Fed. 251, 125 C. C. A. 451:

"Manifestly there could be no lien to secure something for which no liability existed. The case showing that there never were any surplus earnings of the company, and that as a consequence, the funds out of which the instruments" were alone "payable were never created," etc.

The case of *Portland Chemical & Phosphate Co. v. Blodgett*, 152 Fed. 929, 82 C. C. A. 77, is said by the appellee to be on all fours with the present case. That case, however, is in very substantial particulars different from the present case. There was an express agreement for the purchase price of \$100,000; there was an agreement that the balance of the purchase money should be paid by a royalty per ton; there was an agreement binding the purchaser to operation, and especially an agreement in terms prohibiting the conveyance or in-

cumbrance of the land until the full amount should be paid. The effect of this was expressly to charge the land with a fixed and agreed purchase price. The case is of no value as an authority in the present case, except as it well illustrates by contrast the deficiencies of the complainant's contracts.

There are in the case many other important questions, some affecting the complainant's rights under the assignment by the Blue Bell Company of proportional shares of the prospective profits and their reassignment to the present complainant.

The question of estoppel by failure to record the instruments while the bankrupt corporation was borrowing large sums from bankers, and was employing such sums for an enterprise in whose profit the Blue Bell Company and the bankrupt were both interested, is a very serious question, as is also the question of the equitable status of this complainant as against creditors who advanced their money for the development of the mines, and succeeded to the bankrupt corporation's right of reimbursement, and who are now, through reorganization proceedings, interested as stockholders in the Maine corporation, the defendant.

Without determining these questions, we prefer to rest our conclusion upon the ground that the contracts referred to create no legal or equitable charge upon the land or upon the defendant corporation, the appellant.

The decree of the District Court is reversed, and the case is remanded to that court, with directions to enter a decree dismissing the bill with costs; and the appellant recovers its costs of appeal.

ALDRICH, District Judge (dissenting). It seems to me that this case discloses a plain equity in the appellee.

The majority opinion proceeds upon the idea that the agreements do not disclose any definite purchase price; that there was no actual agreement or liability beyond the payment of the \$10,000 and the \$90,000; and that the transaction does not disclose an intention to bind an interest in the land, or to touch 25 per cent. of the net profits as security for the remaining \$900,000.

If the provision, in the agreement of September 15, 1906, which declares that "this agreement shall be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns," which was reiterated in the final agreement of November 15th, was not intended as security through touching 25 per cent. of the product of the mine after deducting expenses of mining, etc., to what possible end could it have been used? It did not express the idea that profits in a business are a technical royalty, or that royalty is rent. It did, however, plainly and unmistakably express the idea that the grantor should hold to himself 25 per cent. of the ore product, less operating and other contemplated incidental expenses, until the aggregate sum of \$1,000,000 is received, and that the agreement is binding upon successors and assigns. If, as said by Mr. Justice Holmes, in *Barnes v. Alexander*, 232 U. S. 117, 34 Sup. Ct. 276, 58 L. Ed. —, decided January 12, 1914, we are to start "with the principle that an informal

business transaction should be construed as adopting whatever form, consistent with the facts, is most fitted to reach the result seemingly desired," there is no difficulty whatever in reaching the conclusion that the parties intended security. It is obvious that there could be no security unless the agreement touched the mine itself. It is quite true that the profits and the security were contingent upon operations and contingent upon success; but these contingencies were obviously contemplated, as was the contingency of success in the contingent fee case with which the Supreme Court was dealing in the opinion just quoted.

It is perfectly true, and there is no contention against the idea, that the agreement of September 15th, and that of November 15th as well, contemplated business operations, and that the business of mining and preparing the product under the terms of the agreement was left altogether to the grantee and its successors, the situation to be subject, of course, to such considerations of good faith as the relations established by the agreement might require.

It is impossible for me to see that the case of *Stratton's Independence, Limited, v. Howbert*, 231 U. S. 399, 34 Sup. Ct. 136, 58 L. Ed. —, decided December 1, 1913, which related to the question whether the gains of a mining operation were the income of a business within the meaning of the act of 1909, has any application whatever to the questions or the principles involved in the case at hand, while the reasoning in the case of *Barnes v. Alexander*, which related to a contingent fee, with eyes toward the future and to the division of fruits if and when they should be received, is very close to the question which we are now considering.

The case at bar was decided by the District Court for the District of Maine in August, 1912, and the decision and the reasons for it were stated in an elaborate and well-considered opinion, which is reported in 198 Fed. 907. The opinion of Judge Hale contains a careful and comprehensive history of the titles in question, the issues raised by the pleadings, and the questions of law and fact involved; and there is no occasion for restating them here.

The properties to which the rights in question relate consisted of copper mines and mining rights situated in Arizona, and known as the Blue Bell Mines. The mines were sold for \$1,000,000, and were conveyed by deed executed in connection with certain agreements as to the purchase price.

There were two agreements in connection with the transaction, one on September 15, 1906, which stated the terms of the bargain or agreement of sale between the Arizona Blue Bell Company and one John L. Elliot and the terms of the contemplated conveyance. Upon the execution of this agreement \$10,000 of the purchase price was paid. This agreement and the rights under it were subsequently assigned to the New Jersey Consolidated Arizona Smelting Company.

On November 15, 1906, in conformity with and in furtherance of the agreement of September 15th, the Arizona Blue Bell Company conveyed to the New Jersey Consolidated Arizona Smelting Company. At the time the deed was delivered, the \$90,000 which was stipulated

for by the agreement of September 15th was paid by the grantee. On the same day—that is to say, November 15th—and as a part of the transaction involved in the execution and delivery of the deed, the grantee executed a written agreement to the grantor which, in conformity with and in furtherance of the agreement of September 15th, provided for the payment of the remaining \$900,000 out of the net earnings of the properties. The agreement was not recited in the deed, nor was it referred to, but in express terms it was made binding upon the respective parties, their successors and assigns, and its benefits under express terms were to inure accordingly.

The fair import of the agreement is that the sale was for \$1,000,000. The \$10,000 and the \$90,000 were definitely described as advance payments. The agreement of September 15th recites that the Blue Bell Company agrees to sell and Mr. Elliot agrees to purchase, etc., the price to be paid by Mr. Elliot for the properties to be the sum of \$100,000, \$10,000 of which was to be paid when the agreement was signed, and the remaining \$90,000 upon delivery of the deeds; and there is a further covenant and agreement to pay, or cause to be paid, to the Blue Bell Company, until it shall have received the aggregate sum of \$1,000,000, 25 per cent. of the net profits. The agreement of November 15th recites that the consideration is \$100,000 in cash and the payment to the Blue Bell Company of 25 per cent. of the net profits resulting from the operation of the mining properties until the Blue Bell Company shall have received the aggregate sum of \$1,000,000. Again, it is provided that, in consideration of the execution and delivery of the deed, the Consolidated Company agrees to pay, or cause to be paid, 25 per cent. of the net profits resulting from operations until the Blue Bell Company shall have received the aggregate sum of \$1,000,000, and that such payments shall be made quarterly. It is, of course, true that the right of the grantor, or its successors, to receive the \$900,000 was contingent upon success of operations to be carried on under the relations which were created by the agreements. This was something contemplated by the parties at the time they made the trade and created the security.

The questions are:

First, whether the agreement for the payment of the purchase price from the net earnings of the mining properties constitutes a covenant at law which runs with the land, with or without regard to the question of notice; and,

Second, if not technically that, whether it becomes a charge upon the land which will be enforced in equity against parties holding with notice.

It must be borne in mind as a leading and quite controlling consideration that the values involved were not in any substantial measure based upon the land in the sense in which land values are popularly and generally accepted, but upon an inherent product of the land whose value and availability were dependent upon working and mining operations. Indeed, the agreement of November 15th recites that the quarterly payments are to be made from the net profits of the

preceding quarter, and that the profits shall be calculated upon the net proceeds of the operations of the mining properties. It is difficult to conceive of a situation which would more clearly warrant a conclusion that the right sought to be established by the agreement touched and concerned the land, because the right had reference to an imbedded and hidden resource whose value depends upon operating development, every phase of the right being thus incident to and consequent upon the right of possession and control. An agreement of this character touches and concerns the land, because it is primarily founded upon and attaches to the product which is the sole or principal element of value therein. A question of this kind is largely controlled by the nature and character of the property and the intention of the parties.

The nature of the interest covered by the agreement in this case is apparently such as to bring the covenants unquestionably within that class of cases which hold the most restricted view as to covenants which touch the land. From the very nature of the interest and the character of the right sought to be established, the covenants, if they were to be at all potential, necessarily attached to an undeveloped product which must, if anything did so, produce the profit out of which the purchase payments were to be made, and whether profits were to be realized was necessarily dependent upon possession and development. It touched an interest which, as expressed in *Camp v. Boyd*, 229 U. S. 530, 558, 33 Sup. Ct. 785, 57 L. Ed. 1317, in speaking of "ground rents," represented a part of "the substantial fruits," and "the entire fruits, of ownership."

The interest and the right in question necessarily inhered in and attached to the land, or, to be more exact in a situation like this, it attached to the inherent fruit which was the chief element of the land value. It is palpable that the parties intended that the agreement should touch the land and its imbedded product, because by express terms, it was stipulated that "such net profits shall be the net proceeds from the operation of the said mining properties, after deducting the cost of mining, necessary development work," etc., and because, by the express terms of the agreement, the rights thereunder were to inure to the benefit of successors and assigns, and its burdens were to rest upon successors and assigns.

While the appellant contends that the terms of this agreement do not touch and concern the land, it is apparent that its chief contention is based upon the idea that, if the terms of the agreement do touch, they do not run with the land, because there is no reversionary right in the grantor. Upon this question whether an interest which so essentially inheres as this does in the sole element of undeveloped land resource is dependent upon a reversionary interest in the grantor, and upon the question whether privity of estate means tenure, or easement, or succession to title, the briefs and the arguments present an interesting and valuable discussion of the English and American cases, with the result of apparent demonstration that, if the question whether the covenant runs is contingent upon the existence of a reversionary right, the contingency is not founded upon reason, and,

if applied to a situation like this, that the denial of a meritorious right would be based upon grounds of fiction, rather than upon grounds of reason.

If persuaded, however, that the potentiality of covenants, which cut so deeply into an inherent land resource as these do, should not be made contingent upon a technical reversionary interest, still there might well be hesitancy in placing the decision upon that ground, because it is with reluctance that courts seize upon difficult questions—questions confronted with confused conditions under the authorities and with divergent reasonings of varying weight; and it is only when a determination of such controverted questions is necessary for the decision of the case that they are inclined to assume the responsibility of attempting a proper solution. Such a necessity does not exist here, because the second position of the appellee, which is, that even if the covenant does not run technically at law it creates a charge or a burden upon the land which should be enforced in equity against a purchaser with notice, presents an adequate ground for establishing and enforcing the rights of the covenantee.

This case is one of equitable cognizance, because it is for an accounting and an injunction, and under a familiar rule that when equity assumes jurisdiction for any purpose with respect to a given subject relief will be granted with respect to all questions between the parties relating to the same situation, the complainant has an adequate and complete remedy in equity. Thus, it follows that this case is not at all embarrassed by the rule which exists in some jurisdictions, subject to many exceptions, that courts of equity will not deal with questions of covenant where they run at law. Therefore the establishment of this right, upon the ground that the covenant operates as an equitable charge upon the land, is not at all dependent upon the question whether the covenant does or does not technically run at law, and, even if the question whether the covenant technically runs at law is to remain undetermined, still the views already expressed in respect to the nature of the property covered by the agreement, and the sense in which the agreement attaches itself to the inherent property value, are pertinent upon the question involved in the proposition that the agreement becomes an equitable charge enforceable against parties having notice.

The opinion of the District Court deals with the agreement in respect to future payments, as though it involved a royalty. This is perhaps not strictly true; but, as the payments are necessarily involved in the operation of development and use, and as they are based upon a certain percentage of the benefits, the obligations are in a very considerable sense like those with respect to royalties. Indeed, the covenants relate to an interest so inherent in the land resource as to bring them nearly if not quite within the requirements of the more exacting rules which obtain under the principles governing the subject of ground rents.

The propositions that the nature of the property is such as to make the undertakings and obligations nearly if not quite like those in respect to expressed royalties; and such as to bring the right nearly if

not quite within the principles which govern that class of rights involved in "ground rents"; that the agreement relates to a property interest so inherent in the land as to make the undertakings and obligations correspond with the undertakings and obligations which obtain in respect to covenants which run at law with land, unless defeated by a possible technical or fictional rule in respect to reversion—involve considerations which bear upon the question whether the agreement at issue should be accepted as one which constitutes a charge or burden upon the land which equity will enforce as against a successor in title with notice.

The exigencies of this case do not require an analysis and reconciliation of the decisions in this country and England since *Legard v. Hodges*, 3 Brown's Chancery, 531, and *Tulk v. Moxhay*, 2 Phillips, 774, upon the subject of covenants which do or do not run at law; in respect to equitable relief and its scope; under what circumstances enforceable; and why in some jurisdictions it is afforded only in respect to restrictive covenants or agreements.

While there has been diversity of reasoning and of authorities upon the general question as to what constitutes an equitable charge upon land, and as to the application of the equitable doctrine to particular cases, it may now, at least, be accepted as settled and established by the weight of judicial authority that where an agreement covers interests which inhere in the land, and particularly in situations where the interest covered by the agreement depends upon something to be produced from the land, where the agreement is executed for the purpose of securing the purchase price, and where it is clear that the intention was to bind successors and assigns, that the land itself will be affected by an equitable burden or charge enforceable in equity upon proceedings for an accounting against purchasers with notice.

It is not understood that the wide American discussion, and the very considerable diversity of judicial opinion in respect to the subject of implied equitable liens and implied equitable charges, nor the case of *Baker v. Fleming*, 6 Ariz. 418, 59 Pac. 101, 2 Ann. Cas. 370, which deals only with the question of implied equitable liens, has any application whatever to a situation in which the charge or security is sought to be established under a distinct express agreement in respect to an unpaid purchase price, and upon notice to the parties against whom remedy is sought.

It would seem that, without much regard for particular words or particular form, express agreements which relate to values inherent in land, and which are executed for the purpose of securing the payment of the purchase price, where the intention of the parties is plain, have generally been accepted in situations where covenants do not technically run at law as creating an equitable charge. This proposition is sustained by text-writers and by numerous authorities, which it is not necessary to review. Upon the question as to the existence and effectiveness of such a rule in a proper situation, it is deemed sufficient to refer to the case of *Walker v. Brown*, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865, and the authorities cited in support of the following paragraphs as to notice.

Now, as to notice to the appellant, the Consolidated Arizona Smelting Company of Maine (not the Arizona Smelting Company of New Jersey), which holds its title as a purchaser at a bankrupt sale.

The question in respect to notice is doubtless one of law and fact, and the court below held and found that the purchaser's connection with the title and its actual notice of the agreement before confirmation of the bankruptcy sale, a time at which, upon the ground of surprise, it could have receded from its attitude as purchaser, amounted to notice, or was sufficient at least to put it upon inquiry as to the state of the title and of the grantor's agreement for security. I see no reason for disturbing that conclusion. *Coal Company v. Doran*, 142 U. S. 417, 427-442, 12 Sup. Ct. 239, 35 L. Ed. 1063; *Luke v. Smith*, 13 Ariz. 155, 108 Pac. 494; *Luke v. Smith*, 227 U. S. 379, 33 Sup. Ct. 356, 57 L. Ed. 558.

I pass by discussion in respect to the operativeness of agreements not in deeds and not recorded, as well as the point of the appellant's that the agreement securing the purchase price was purposely and wrongfully withheld from the record, as immaterial, because my position is grounded upon the idea that the purchaser is chargeable with notice of the security and of the burden on the land.

The purchaser at the bankrupt sale took the title of the trustee in bankruptcy, which was that of the bankrupt, and no more. *Company v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; *Murphey v. Brown*, 12 Ariz. 268, 100 Pac. 801; *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986.

I do not perceive any equitable considerations which, against the obvious purposes of the parties, can operate, not only to defeat the plain terms of their agreement, but to cause the grantor to lose the price of his land. Paying to the grantor, under an agreement, not 25 per cent. as an arbitrary and fixed rate, but 25 per cent. from the net profit of operations upon land for which the grantor has not been paid, is neither an oppression nor an inequitable burden upon successors or purchasers with notice.

HATTIESBURG LUMBER CO. v. HERRICK.

(Circuit Court of Appeals, Fifth Circuit. February 10, 1914. On Application for Rehearing, March 24, 1914.)

No. 2342.

1. ACCOUNT (§ 6*)—GROUNDS OF JURISDICTION—ACCOUNTING.

A federal court of equity has jurisdiction of a suit which involves an accounting of complicated transactions between the parties extending over several years, with charges and countercharges, although relief of a legal nature is also sought by the bill.

[Ed. Note.—For other cases, see *Account*, Cent. Dig. §§ 17, 18; Dec. Dig. § 6.*]

2. APPEAL AND ERROR (§ 185*)—JURISDICTION—WAIVER OF OBJECTIONS.

Where there was ground for contention as to whether a bill presented a case of equitable cognizance, and the defendant answered, consented

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to a reference to a master, excepted to his report, and took a cross-appeal, he cannot, for the first time, raise the question of equitable jurisdiction in the appellate court by a motion to dismiss the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1166-1176, 1375; Dec. Dig. § 185.*]

3. EQUITY (§§ 409, 410*)—REPORT OF MASTER—FINDINGS UNDER CONSENT ORDER.

Where by consent of the parties an order was entered appointing a special master with power to hear and consider all testimony whether taken by himself or by deposition, to view all physical evidence offered, to inspect the premises involved in the suit, and to report all testimony with exhibits, together with his findings of fact and conclusions of law, his findings of fact were conclusive upon the court, unless unsupported by any legal evidence, or contrary to all the evidence, and his conclusions of law, based upon the facts so found, only were reviewable on exceptions.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 904-923; Dec. Dig. §§ 409, 410.*]

4. EQUITY (§ 410*)—REPORT OF MASTER—EXCEPTIONS.

Exceptions to the report of a master which present questions of law only are not a waiver of the conclusive effect of his findings of fact.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 905-919; Dec. Dig. § 410.*]

5. LOGS AND LOGGING (§ 8*)—CONTRACTS—CONSTRUCTIONS—CUTTING AND SAWING TIMBER.

A contract by which complainant agreed to cut and saw timber owned by defendant, and then to either load the lumber on cars or stack it on the yard, depending on whether saw bills and shipping directions had been received from defendant, for which complainant was to receive a stipulated sum per thousand feet, was one for the performance of services, and if the title to the timber at any time passed to complainant, it was vested in defendant after it had been sawn into lumber and stacked on the yard, and complainant was not liable for its loss by fire after it was so stacked.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 15-17; Dec. Dig. § 8.*]

6. LOGS AND LOGGING (§ 8*)—CONTRACT—CONSTRUCTION—CUTTING AND SAWING TIMBER.

Under a provision of such contract that complainant should be paid monthly for the quantity sawed on a scale of the logs made by persons, selected by each party, but that final settlement should be made on the record of shipments of lumber kept by defendant, complainant could not be deprived of payment for lumber sawed by the action of defendant in cutting and trimming it before shipment, so as to increase its grade, but diminish its quantity.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 15-17; Dec. Dig. § 8.*]

7. DAMAGES (§ 40*)—BREACH OF CONTRACT—LOSS OF PROFITS.

The fact that a party has ceased performance of a contract because of its breach by the other party which justified the discontinuance of such performance does not deprive him of the right to recover as actual damages for the breach the profits he would have made by full performance, where the same can be shown with reasonable certainty, or, if not, his loss because of the outlay by him in preparing for performance.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 72-88; Dec. Dig. § 40.*]

Shelby, Circuit Judge, dissenting.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal and Cross-Appeal from the Circuit Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Suit in equity by the Hattiesburg Lumber Company against Fred Herrick. From the decree, both parties appeal. Reversed on complainant's appeal, and affirmed on defendant's appeal.

This was a suit in equity filed by the appellant and cross-appellee against the appellee and cross-appellant in the chancery court of Harrison county, Miss., and removed therefrom by defendant to the Circuit Court of the United States for the proper division and district. The bill prayed for an attachment on certain lands of the defendant, who was a nonresident of Mississippi, pursuant to a state statute, and for a sale of said lands to answer the decree of the court for whatever amount, upon an accounting between plaintiff and defendant, was found to be due the plaintiff upon a contract between the parties, and also for damages for the alleged breach of the contract. The defendant answered the bill of complaint, and at the same time filed a cross-bill against the plaintiff, which was served upon it, and by which he claimed a decree for two certain items under the contract, aggregating \$8,000, and for damages for the alleged breach of the contract sued upon by the plaintiff, to which the plaintiff interposed an answer. The case was then, by consent of the parties and by order of court, referred to a special master to take the testimony and report the same to the court at its next regular term, together with his conclusions and findings, both upon the evidence and the law of the cause. Pursuant to the order, the master thereupon proceeded to take the evidence, and, having completed the taking of it, to report it, together with his conclusions and findings both of law and of fact, to the court. Both parties thereupon filed exceptions to the findings of the master. After hearing the exceptions, the court entered a decree, in part sustaining and in part overruling the exceptions of the defendant, and overruling the exceptions of the plaintiff, and it is from this decree that each of the parties has appealed to this court. There is submitted, along with the submission on the merits, a motion filed by the appellee to dismiss the appeal, because the action being, as contended by it, one at law, the only remedy available to plaintiff to review the decree was by writ of error.

Baskin & Wilbourn, of Meridian, Miss., Bowers & Griffith, of Gulfport, Miss., and Callaway & Huie, of Arkadelphia, Ark., for appellant and cross-appellee.

J. I. Ford, of Pascagoula, Miss., W. A. White, of Gulfport, Miss., and Edwin T. Merrick, of New Orleans, La., for appellee and cross-appellant.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge (after stating the facts as above). The jurisdiction of a court of equity over the action is sought to be sustained upon two grounds:

(1) That the Mississippi statute (section 536 of the Code of Mississippi) confers on the chancery court of the state—

"jurisdiction of attachment suits based upon demands founded upon any indebtedness, whether the same be legal or equitable, or for the recovery of damages for the breach of any contract, express or implied, or arising ex delicto, against any nonresident, absent or absconding debtor, who has lands or tenements in this state."

The suit was brought in the state chancery court by attachment against the lands of the defendant under this statute, and removed by him to the Circuit Court of the United States. The contention of

the defendant is that the state statute could not confer on the Circuit Court of the United States jurisdiction in equity of a cause of action, in its nature legal, as distinguished from equitable. We find it unnecessary to decide this question, as the jurisdiction of the court over the appeal may be sustained upon the other ground upon which it is contended the case is one of equitable cognizance.

[1] (2) That an accounting is sought by the bill between the parties to it of mutual transactions covering a period of two years, involving numerous items of claim and counterclaim, the accounting being complicated in its nature, and one which it was impractical to arrive at fairly and adequately by the ordinary common-law proceedings. We are of the opinion that the following authorities tend to support the jurisdiction of the Circuit Court to entertain the cause upon its equity side, upon the ground of the necessity for an accounting: *Fechteler v. Palm Bros. & Co.*, 133 Fed. 462-465, 66 C. C. A. 336; *Fenno v. Primrose*, 119 Fed. 801, 56 C. C. A. 313; *Kirby v. R. R. Co.*, 120 U. S. 130, 7 Sup. Ct. 430, 30 L. Ed. 569; *Beggs v. Edison Electric Co.*, 96 Ala. 295, 11 South. 381, 38 Am. St. Rep. 94; 1 Cyc. 420-424; 4 Pomeroy Eq. Jur. (3d Ed.) § 1420.

[2] If there is doubt as to whether the bill contains equity, for an accounting, if it had been assailed upon that ground in the court below, we are clearly of the opinion that it is sufficient in that respect, as against an attack first made upon it, upon that ground, in this court. The record shows that the defendant answered the original bill without objecting to the equitable jurisdiction of the court, also filed a cross-bill and consented to an order appointing a master, excepted to the master's report upon other grounds, and brought the record to this court by a cross-appeal, and first objected to the jurisdiction of the Circuit Court, as a court of equity, over the cause, after the cause had reached this court by appeal, and by a motion filed by him, in this court, to dismiss the appeal upon the ground that the cause was one of legal cognizance, and the final judgment in it would not sustain an appeal.

There was, at least, some ground for equitable jurisdiction, as for an accounting. It was not a case where the cause of action was indisputably a legal one. It was open for contention between the parties as to whether a sufficient case for an equitable accounting was presented. The defendant in the lower court made no contention against the equity of the bill, but consented to proceed with the cause upon the equity side of the court, and first objected to the exercise of the equity jurisdiction of the court below after appeal had been perfected from the decree of the lower court, and by a motion to dismiss the appeal, made in the appellate court. Having been tried as an equity case in the court below, and without objection by the appellee, and the cause of action being one embraced with one of the general heads of equity jurisdiction, the issue as to whether the pleadings and facts brought the case sufficiently within the jurisdiction of a court of equity will not be permitted to be made by the appellee, for the first time, in this court, but it will be treated in this court, as it was tried in the lower court, as an equity cause and properly

reviewable by the remedy of appeal. *Highland Boy Gold Mining Co. v. Strickley*, 116 Fed. 852, 54 C. C. A. 186-188; *Hollins v. Brierfield Coal Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1115; *Reynes v. Dumont*, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934; *Tyler v. Savage*, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 89; *Burbank v. Bigelow*, 154 U. S. 558, append., 14 Sup. Ct. 1163, 19 L. Ed. 51; *Guaranty Co. v. Mechanics Co.*, 80 Fed. 772, 26 C. C. A. 146; *Perego v. Dodge*, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. Ed. 113; *Toledo Computing Scale Co. v. Computing Scale Co.*, 142 Fed. 919, 74 C. C. A. 92; 18 *Encyc. Pl. & Practice*, p. 119; *Simpkins' Federal Equity Suit* (2d Ed.) p. 25; 1 *Cyc.* p. 428.

The motion to dismiss the appeal is therefore dismissed. This renders it unnecessary for us to consider appellee's motion to dismiss a writ of error, which was subsequently sued out by appellant; the contention being that it was sued out after the expiration of the six months within which a writ of error lies to this court.

Coming to the merits, the purpose of the bill was to recover amounts alleged to be due under a contract entered into between the plaintiff and defendant, for an accounting to determine the amounts so due, and for the recovery for damages for its alleged breach. The cross-bill sought to recover certain items alleged to be due appellee under the contract, and for the recovery of damages for the alleged breach of the contract by appellant. At the time the contract was entered into, the plaintiff was the owner of about 12,000,000 feet of timber and a sawmill, which it was operating, cutting the timber which it owned. The defendant was the owner of about 80,000,000 feet of timber, adjoining plaintiff's, but had no mill. The then price of lumber was such as to make the manufacture of lumber attractive to both parties. In this situation the parties opened negotiations. The defendant was anxious to arrange for the cutting and sawing of his timber at the plaintiff's mill. This was agreeable to the plaintiff, provided the cutting and sawing of the defendant's timber was deferred until the plaintiff's timber had been first cut and sawed and marketed. Each party was desirous of getting the benefit of the present market prices for lumber, and naturally wished its or his lumber to be first disposed of. This obstacle to agreement was surmounted by the defendant's purchasing the plaintiff's timber on a stumpage basis, and the plaintiff agreeing to cut and saw the timber so purchased, as well as that originally owned by defendant, for a consideration to be paid it by defendant. On this basis the contract of March 26, 1906, that which is alleged to have been broken, was entered into. It provided for the logging, sawing, grading and placing on railroad cars of all merchantable pine timber, 10 inches and larger at the stump, that was then standing on lands owned by defendant in Harrison county, and which was indicated on a plat attached to the contract. The defendant agreed to pay the plaintiff \$9 a thousand feet for the services to be rendered by it, to be paid between the 10th and 15th of each month for all lumber sawed the month previous, the amounts to be arrived at by the measurements of two tallymen, one furnished by each party, the final tally of all lumber sawed, and upon which final settlement

was to be made, was to be arrived at by the record of sales and shipments of the lumber sawed. The plaintiff was to receive \$1 a thousand for all lumber so stacked as to require handling, the amount stacked never to exceed 500,000 feet. The plaintiff was to receive \$9.50, instead of \$9, a thousand for sawing if and when a circular saw was replaced by a band saw. All merchantable timber was to be cut from each tree. Defendant was to furnish saw bills and shipping instructions to keep plaintiff's mill and loading crews fully employed, but defendant was to have option of having the mill run or closed at nights. Plaintiff was to have the use of certain railroad material belonging to defendant, and to return the same at the end of the contract, or its value. Plaintiff was to keep the mill insured for not less than \$20,000. If 25,000,000 feet or more remained uncut, at time of a fire, plaintiff was required to rebuild; if less than that amount, it had an option to do so. The defendant also agreed to buy from plaintiff the standing timber owned by plaintiff in Harrison county, as shown by a plat attached to the contract, and according to an estimate thereof by one M. Hemphill, a copy of which estimate it was recited was attached to the agreement, and to pay therefor at the rate of \$4.50 per thousand feet, the payments to be made as follows, \$10,000 when the plaintiff began operations, the balance as fast as the timber was cut, payments to be made on the 15th for all timber cut the previous month, but no further payments to be made until \$10,000 worth of said timber was delivered at the contract rate per thousand. The plaintiff also agreed to change the dry kilns and install a machine shop, towards the cost of which the defendant was to contribute \$5,000 if necessary for plaintiff's reimbursement. The plaintiff agreed to commence on the contract March 27, 1906, and to continue in a diligent manner until its completion. The plaintiff agreed to furnish the defendant with statement of the daily shipments. These are the provisions of the contract, so far as they have a material bearing upon the issues of the case.

The plaintiff duly entered upon the performance of the contract, commencing with timber, theretofore owned by it, and which was nearer to the mill, and the parties continued operations for some months before any dispute arose between them. The defendant paid the \$10,000 in cash to plaintiff for the advance stumpage, and settlements were made, during the first few months, on account of saw bill and stumpage. The mill was changed by plaintiff from a circular to a band sawmill. The dry kilns were changed to steam and a machine shop was built, according to the terms of the contract. In May, 1907, the greater portion of the timber which had belonged to plaintiff was cut and sawed, and before the plaintiff ceased operations, the defendant's original timber was being cut and sawed. On February 22, 1908, a fire occurred which destroyed plaintiff's dry kiln, dry shed, and a large amount of lumber on its yard. In April, 1908, the plaintiff had rebuilt its mill and resumed operations, which continued until May 11, 1908, when the plaintiff shut the mill down and finally ceased operations under the contract.

Commencing with the fall of 1906, friction had arisen between the

plaintiff and defendant as to the proper construction of the contract, as to the amounts due plaintiff on monthly settlements both for saw bill and for stumpage, and after the fire in February, 1908, as to who should bear the loss for the lumber burned by it. These differences became acute, and other matters of difference arose also after the fire. It was contended by defendant that no estimate had been made by Hemphill of plaintiff's standing timber; that the contract provision that the plaintiff's timber should be paid for according to Hemphill's estimate had been abandoned, and payment for actual amount cut substituted by the parties therefor. The plaintiff contended that Hemphill had made the estimate, and that, though it was not attached to the contract, it should control. Defendant claimed that final settlement for amounts due on account of saw bill should be determined by record of shipments of lumber kept by defendant. The plaintiff claimed that the amount due on account of saw bill should be determined according to the course of business under the contract by "log scale" measurements at head of mill. The provision as to placing tallymen for each party at tail of mill was never carried out. There was a large discrepancy between the amount of lumber sawn as ascertained by log scale and by record of shipments. The defendant attributed this discrepancy to inaccuracy of log scale measurements. The plaintiff attributed it to defendant's acts in wasting the lumber after it had passed through the mill by cutting and trimming it in what the plaintiff claimed was an unauthorized way, to increase the grade, while diminishing the quantity. The defendant disclaimed responsibility for the lumber destroyed by fire. The plaintiff claimed that title passed to the lumber after it passed through the mill and was stacked, since it was then subject to defendant's orders as to removal and shipment, and that the loss should be borne by defendant. A dispute as to the amount of reimbursement plaintiff was entitled to on account of construction of machine shop and change in dry kiln also arose. Numerous fruitless endeavors to adjust differences occurred. At one time a settlement was supposed to have been accomplished, but it was differently construed by the parties, and unavailable. After the fire, the plaintiff again unsuccessfully attempted to get a mutual understanding as to the proper construction of the contract and an adjustment of differences, before reconstructing and resuming operations. After the mill had started up in April, 1908, differences again arose, and a final meeting was arranged between plaintiff's representatives and the defendant and his representatives, at Gulfport, but, like the others, it failed of reconciling the differences; the defendant denied that plaintiff had any valid contract, denied the Hemphill estimate, and was willing to proceed with the contract only upon his own construction of it, and to make future payments only upon the basis he had done in the past. The plaintiff thereupon in May, 1908, abandoned further operations under the contract, and brought this suit upon it. The differences mentioned are the material ones that the suit was intended to determine.

[3] Before the cause was at issue the parties agreed upon the appointment of a master by the court, and upon an order making the appointment, which was in this language:

"Order Approving Special Master.

"In the Circuit Court of the United States, Southern Division, Southern District of Mississippi.

"Hattiesburg Lumber Company v. Fred Herrick.

"No. 83.

"In the above cause it is ordered by consent of the parties made known in open court that the defendant have 30 days from this date in which to file his answer and cross-bill, and that complainant have 60 days thereafter in which to file answer to said cross-bill, each as of this term, and it is further ordered and decreed, by consent of the parties as aforesaid, that C. G. Mayson, Esq., be and he is hereby appointed a special master or commissioner of this court in said cause, and that said commissioner be and he is hereby vested with the power and authority to hear all testimony in said cause, to fix a place or places for said hearing and to adjourn same from time to time, and to suitable places to be determined by him, to require the attendance before him of all witnesses with books, papers, and documents in their possession or under their control, and to administer all oaths, to issue commissions for depositions of nonresident witnesses, and *to receive and consider all depositions taken by either party*, and to examine all said witnesses and exhibits of documents, papers, and writings to the full extent that he, said commissioner, shall deem lawful and proper, *and that he view all physical evidence offered by either side, including a personal inspection of the premises involved in said suit, if, in his discretion, same may be of benefit in determining any question in said cause*, and that all the testimony of the witnesses be reduced to writing, and that said commissioner report all same to this court at its next regular term with all exhibits and all depositions of nonresidents offered, *together with his conclusions and findings, both upon the evidence and the law of said cause*.

"Ordered, adjudged, and decreed this the 17th day of February, A. D. 1909.

"H. C. Niles, Judge.

"Filed February 17, 1909."

The master, after hearings, which consumed 11 weeks, made his report to the court, stating his findings of facts and his conclusions of law thereon. After his report was filed, each party filed exceptions to it, which are set out in the record. The court, after hearing the exceptions, entered a decree, in which he partly sustained and partly overruled the findings of the master, both upon questions of fact and questions of law. This is the decree from which both parties appeal.

The first question presented for our consideration is the weight that is to be given the report of the master, as to his findings of fact, and under the terms of the order, by which he was appointed. The appointment of the master was by consent, and not alone by the action of the trial court. So, by consent of the parties, his authority was not restricted to the mere taking of the testimony and the submission of it, when taken, to the court. He was given, by consent of the parties, the power not only to take evidence, but to hear all evidence, taken in the case, by himself or by others, in the shape of depositions, to examine any physical evidence submitted by either party, and to inspect the premises involved in the controversy, if he found it of advantage to do so; and to report his findings of fact and conclusions of law to the court. It is clear that the authority so conferred made of the master more than a mere commissioner to take testimony. He was authorized to hear testimony taken by other com-

missioners, in the form of depositions, to examine physical evidence, and inspect the premises, evidence of a character that he could not transmit in his report to the court, and that the court could not benefit from. These powers would of themselves impliedly show that the parties submitted the cause to the master for his decision rather in the capacity of an arbitrator than that of a commissioner. However, the order expressly and by its terms requires him to report to the court, not only the testimony taken by him, but his findings of fact based thereon and his conclusions of law. Such powers could be conferred on the master only by consent of the parties, but they were so conferred. By consent of parties, it was competent for the court to abdicate partly its functions in favor of the master, as the order made by it shows it did, in this case. Under such an order, the findings of fact of the master, unless unsupported by any legal evidence or contrary to all the evidence before him, are conclusive and not open to contestation before the court. The master's conclusions of law, based on his findings of fact, are, when excepted to, reviewable before the court which appointed him. That this is the effect to be given the master's findings of fact, when appointed with such authority, is sustained by the authorities.

In the case of *Kimberly v. Arms*, 129 U. S. 512, 524, 525, 9 Sup. Ct. 355, 359, 360 (32 L. Ed. 764), the Supreme Court, distinguishing the authority of a master appointed in the ordinary way and one to whom, by consent of parties and an order of the court, the issues in a cause were referred, said:

"It is not within the general province of a master to pass upon all the issues in an equity case, nor is it competent for the court to refer the entire decision of a case to him without the consent of the parties. It cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers. But when the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, and report his findings, both of fact and of law, and such reference is entered as a rule of the court, the master is clothed with very different powers from those which he exercises upon ordinary references, without such consent; and his determinations are not subject to be set aside and disregarded at the mere discretion of the court. A reference, by consent of parties, of an entire case for the determination of all its issues, though not strictly a submission of the controversy to arbitration—a proceeding which is governed by special rules—is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law. Its findings, like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise.

"The reference of a whole case to a master, as here, has become in late years a matter of more common occurrence than formerly, though it has always been within the power of a court of chancery, with the consent of parties, to order such a reference. * * * The power is incident to all courts of superior jurisdiction. * * *

"By statute in nearly every state, provision has been made for such references of controversies at law. And there is nothing in the nature of the proceeding, or in the organization of a court of equity, which should preclude a resort to it in controversies involving equitable considerations.

"By the consent in the case at bar it was intended that the master should

exercise power beyond that of a reporter of the testimony. If there had been such a limitation of his authority, there would have been no purpose in adding to his power 'to hear the evidence' the power 'to decide all the issues between the parties and make his report to the court, separately stating his findings of law and of fact,' together with the evidence. To disregard the findings and treat the report as a mere presentation of the testimony is to defeat, as we conceive, the purpose of the reference and disregard the express stipulation of the parties."

In the case of *Davis v. Schwartz*, 155 U. S. 637, 15 Sup. Ct. 239, 39 L. Ed. 289, the Supreme Court, reaffirming the case of *Kimberly v. Arms*, supra, said:

"The question of the conclusiveness of findings by a master in chancery under a similar order was directly passed upon in *Kimberly v. Arms*, 129 U. S. 512 [9 Sup. Ct. 355, 32 L. Ed. 764], in which a distinction is drawn between the findings of a master under the usual order to take and report testimony and his findings when the case is referred to him by consent of parties, as in this case. While it was held that the court could not, of its motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers, yet where the parties select and agree upon a special tribunal for the settlement of their controversy, there is no reason why the decision of such tribunal, with respect to the facts, should be treated as of less weight than that of the court itself, where the parties expressly waive a jury, or the law declares that the appellate court shall act upon the finding of a subordinate court."

After restating the rule laid down in *Kimberly v. Arms*, the court proceeded:

"As the reference in this case was by consent to find the facts, we think the rule in *Kimberly v. Arms* applies; and, as there is nothing to show that the findings of fact were unsupported by the evidence, we think they must be treated as conclusive."

In the case of *Farrar v. Bernheim*, 75 Fed. 136, 139, 21 C. C. A. 264, 266, this court said:

"It is, moreover, true, as insisted by the appellee, that, under a certain consent to refer all questions of law and fact to the determination of the particular standing master, the finding of that officer is usually conclusive. Such a consent, entered as an order of court is a submission of the controversy to a special tribunal selected by the parties, to be governed by the ordinary rules applicable to the administration of justice in tribunals established by law; and its determinations are not subject to be set aside and disregarded at the mere discretion of the court."

In the case of *U. S. Trust Co. v. Mercantile Trust Co. et al.*, 88 Fed. 140, 31 C. C. A. 427, the Circuit Court of Appeals for the Ninth Circuit, referring to the effect of the findings of such a master, said:

"Before entering into a consideration of these propositions, there is a preliminary question to be disposed of, and that is as to the effect to be given to the findings of fact of the special master. It is contended, at the outset, by the counsel for appellant, that this court and the court below are bound by the findings of fact made by the special master. It will be observed that the reference, by the court below, to the special master * * * was not that of an ordinary reference to take and report testimony, but it was stipulated and agreed between counsel representing all the parties that the special master should 'take the proofs of the respective parties, and report the same to the court, with his findings of fact and conclusions of law thereon.' The effect of this stipulation was undoubtedly to constitute, to a certain extent, the special master as judge of the facts presented to him. * * * So far, there-

fore, as the findings of fact by the special master, under the stipulations referred to, are based upon conflicting evidence, or upon the veracity of witnesses, or so far as there is evidence consistent with the finding they are conclusive and binding upon the court."

The authorities quoted from establish the principle that the findings of fact of a master, vested with the authority of the master in this case, are subject to review only when it is shown that they are not supported by any legal evidence, or are contrary to all the evidence submitted to him, in which cases the questions presented for review are questions of law and not questions of fact.

[4] In the instant case, each party excepted to the findings of the master, and it is contended that by so doing the whole matter was opened for review by the court. We find it unnecessary to decide whether in any case the filing of exceptions by a party might not reopen fully the master's report, as to him, for review by the court. Whether the filing of exceptions has such effect must depend upon the nature of the exceptions and the points intended to be presented by them. If they present for review the correctness of the master's report in matters of law only, the exceptor cannot be held to waive the conclusive effect of the master's findings of fact. The rule leaves open for review the master's conclusions of law, and exceptions intended to question such conclusions are consistent with rule, and so cannot constitute a waiver of it. Among the reviewable conclusions of law are included findings of fact based on no evidence, or contrary to all the evidence. Such findings are also open to exceptions upon that ground, and the filing of such exceptions would not be a waiver of the rule. The exceptions filed by plaintiff to the original report are two in number. The first excepts to the allowance of \$143.50 to defendant for \$41,000 feet of timber left in the woods in stumps over 14 inches high. Plaintiff asserts that there was no evidence submitted to the master to justify this finding. The exception, therefore, presents a question of law. The second exception relates to the disallowance by the master of plaintiff's claim for prospective profits, unrealized because of defendant's alleged breach of the contract. This also presents for review a question of law, since the master found that the contract had been breached, and disallowed prospective profits as damages only because of his holding that the breach was due to a misconstruction of the contract by defendant. The plaintiff's original exceptions would not estop him from invoking the rule, since their grounds were not inconsistent with it.

The plaintiff filed further exceptions to the original report and to the master's answers to certain interrogatories propounded by defendant, which involved matters of fact. These exceptions, however, were conditioned expressly by plaintiff upon a holding by the court that the findings of fact of the master could be reviewed. The plaintiff by failing to file exceptions in time would lose its right to have the master's findings reviewed, though the court held them to be subject to review. The defendant, having filed exceptions as to matters of fact, we do not think the plaintiff lost its right to insist upon the proper effect of the findings of fact, by taking the necessary steps to preserve its right to review them in the event the court differently construed the effect of

the order of appointment, when the exceptions were expressed to be effective only in the event the court so ruled.

This conclusion would require the findings of the master, which related to matters of fact, as distinguished from questions of law, to be sustained by the court unless there was an entire absence of evidence in support of them. The findings excepted to by the defendant, except those to which his tenth and sixteenth exceptions relate, relate to matters of fact, and, in our opinion, have the support of legal evidence, and the findings should have been sustained by the court below. (1) The master's finding upon which the defendant's tenth exception was based is to the effect that the title to the timber, under the contract, passed to the defendant when it was sawn into lumber and stacked upon the yard. (2) The master's finding upon which the defendant's sixteenth exception was based is to the effect that the plaintiff had the right to cease operations under the contract at the time it did, and that the cross-bill of the defendant should be dismissed.

[5] 1. The contract provided that the plaintiff should log, saw, and place, f. o. b. cars at Millview, Miss., in a good and workmanlike manner, certain merchantable timber owned or thereafter to be acquired by defendant, for which defendant was to pay plaintiff \$9 a thousand feet, payments to be made monthly, according to the check of two tallymen, and final settlement to be made from records of sales and shipments. The plaintiff was to receive \$1 per thousand additional for all lumber stacked upon the yard which required rehandling, the amount stacked at no time to exceed 500,000 feet. Defendant was to furnish saw bills and shipping instructions so as to keep plaintiff's mill and loading crew fully employed. Plaintiff was to cut timber in dimensions applicable to bills and schedules to be furnished it by defendant, and to fill all orders as quickly as possible. The contract was one for the performance of services, and not one for the sale of a commodity. The timber which was to be sawed into lumber was already the property of the defendant before it passed through the mill. The contract did not change the ownership of the timber, but only stipulated for certain services to be rendered with reference to it. The plaintiff was first to log and saw it, and then either to load it on the cars or stack it on the yard. The disposition of the lumber after it passed through the mill was to be determined by the defendant exclusively. If he furnished saw bills and shipping instructions, it was to be immediately loaded on cars by plaintiff. If no shipping instructions were furnished, it was to be stacked on the yard by the plaintiff, to await future disposition according to the orders of defendant.

[6] It seems clear, as the ownership of the timber remained always in the defendant, and the plaintiff's relation to it was confined to manufacturing it into lumber at defendant's instance for a reward, and either stacking or shipping the lumber, that the title, if it ever passed from defendant to plaintiff at any time, was certainly vested in the defendant after it had passed through the mill, and was either stacked on the yard or loaded on cars, as directed by defendant. After that its disposition and control was that of the defendant, and plaintiff, having completed the service required of it, should not be held responsible for its loss. This would be as true of the period the lumber re-

mained stacked on the yard awaiting defendant's directions to ship as it would be of the period subsequent to its being loaded on the cars for shipment. The contract provided that final settlement should be made by records of sales and shipments. This, however, did not have the effect of postponing the passage of title. Its purpose was merely to provide a method of correcting the temporary tally at the mill, a matter of convenience in accounting, which should not operate to change the time of the passing of title. Its effect to determine final amounts due was not such as to deprive the plaintiff of payment for sawing timber which the defendant thereafter wrongfully diminished in quantity by scaling and trimming, with the purpose of increasing its grade. We think the finding of the master in this respect was correct.

2. We are also of the opinion that the master correctly decided that the plaintiff was justified in ceasing operations under the contract in May, 1908, and that the defendant was entitled to no damages because thereof.

This results in a reversal of the cause upon the direct appeal, with directions to the court below to enter a decree confirming the report of the master, with the remittitur, and as amended by him, so far as its findings are affected by the exceptions of the defendant, and granting plaintiff the appropriate relief to which it is entitled under the master's report, and the affirmance of the decree so far as it is affected by the cross-appeal.

[7] There remain for decision the two questions raised by plaintiff's (appellant's) exceptions to the master's report originally filed. The plaintiff's subsequent exceptions were conditional upon the power of the court to review the master's report on questions of fact, and the denial by us of that power disposes of them adversely to plaintiff. Of the two original exceptions, the one which relates to the finding of an amount due from plaintiff to defendant of \$143.50 for stumpage on 41,000 feet of defendant's timber left in the woods by plaintiff is not insisted on by plaintiff in this court, and is not passed upon by us for that reason. The other relates to the finding of the master that:

"As the differences between the parties in this case arose over the construction of the contract, and as each party manifested a willingness to carry it out according to his own interpretation, I do not find that either party has a right to claim of the other prospective profits."

This finding was excepted to by the plaintiff, and the court below overruled the exception, to which action the plaintiff assigns error in this court, which is insisted upon.

The ground upon which the court below overruled the plaintiff's exception to this finding of the master is thus expressed in the opinion of the district judge:

"The principle of law controlling the proposition under discussion as to complainant's right to recover for outlay and loss of profits is clearly stated in the case of *United States v. Behan*, 110 U. S. 338 [4 Sup. Ct. 81, 28 L. Ed. 168]: 'If a party injured by the stoppage of a contract elects to rescind the contract, he cannot either recover for outlay or loss of profits, but only for the value of services actually performed, as upon a quantum meruit.' It is a well-settled principle of the law that to justify one party to a contract in abandoning it, and at the same time entitle him to recover damages and the

future profits which he may have realized had he completely executed it, the opposite party must have been guilty of such a breach as to prevent or absolutely put an end to further operations under the contract by the party complainant."

We think neither the reason given by the master in his report, nor the different reason given by the District Judge in his opinion, are sufficient to justify the denial of damages to plaintiff, either for its outlay or for loss of future profits, if it has shown itself to be otherwise entitled to them.

Dealing, first, with the reason assigned by the master for his finding. The settled measure for recovery for a breach of contract is an amount which fully compensates a plaintiff for the loss sustained by the breach of contract, which includes the benefits and gain he would have realized from its performance, or, in the event they are too uncertain for assessment, then reimbursement for the expense of the outlay the plaintiff incurred in preparation for its performance. This is as much a part of the plaintiff's actual damages as is an amount due for a part of the contract performed before breach, and can no more be denied the plaintiff. Its recovery by plaintiff is a matter of right, and not of discretion with the court.

In the case of *Robertson v. Cloud*, 47 Miss. 208, the court said:

"The rule is that if complete performance of a contract is prevented by one party thereto, the other, who had complied, or was able and willing to comply, shall be compensated in damages to the extent of making him whole"

—which the court held to include "compensation for partial performance, according to the terms of the contract, and such damages as would legitimately result from the refusal of the plaintiff to permit a full performance."

In *Trigg v. Clay*, 88 Va. 335, 13 S. E. 435, 29 Am. St. Rep. 723, the court said:

"It has been held that, when the defendant refused to allow the contracts to be executed, the jury should allow the plaintiffs as much as the contract would have benefited them—profits or advantages which are the direct and immediate fruits of the contract, entered into between the parties, and part and parcel of the contract itself, entering into and constituting a portion of its very elements, something stipulated for, and the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. * * * An examination of the cases will show that the courts have been endeavoring to establish rules by the application of which a party will be compensated for the loss sustained by the breach of contract; in other words, for the benefits and gain he would have realized from its performance, and nothing more."

In *Howard v. Stillwell Mfg. Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147, the Supreme Court said:

"But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where from the express or implied terms of the contract itself, or the specific circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into"

The motive of the defendant in breaching the contract is not material upon the issue of the assessment of the plaintiff's actual damages. The plaintiff is entitled to his full actual damages for the breach, regardless of the motive that induced its breach. In the assessment of exemplary damages, in a case for such damages, the court or jury might properly look to the defendant's motives, as a matter of aggravation or mitigation. Punitive damages were not involved in this case. The master erred in denying the plaintiff any part of its actual damages, either by way of prospective profits or reimbursement for outlay in preparation, for the reason given by him, and which was that the defendant broke the contract because he misconstrued its proper meaning and was willing to perform according to his erroneous construction.

The reason given by the District Judge for denying the plaintiff damages by way of prospective profits or reimbursement for outlay was that the plaintiff had elected to rescind the contract after a breach by the defendant, which did not amount to a total abandonment of the contract on his part, and did not absolutely put an end to further operations under the contract by the plaintiff. The rule, as settled by the authorities, would seem to be that the prior breach upon defendant's part must have an effect that would render the plaintiff's subsequent performance of the contract difficult, and such as would greatly decrease the profits which the plaintiff would otherwise have made.

In the case of *Anvil Mining Co. v. Humble*, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814, the Supreme Court said:

"It is insisted, and authorities are cited in support thereof, that a party cannot rescind a contract and at the same time recover damages for its nonperformance. But no such proposition is contained in that instruction. It only lays down the rule, and it lays that down correctly, which obtains when there is a breach of a contract. Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken, and desist from any further effort on his part to perform; in other words, he may abandon it and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about. Generally speaking, it is true that when a contract is not performed the party who is guilty of the first breach is the one upon whom rests all the liability for the nonperformance. A party who engages to do work has a right to proceed free from any let or hindrance of the other party, and if such other party interferes, hinders, and prevents the doing of the work to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop and sue for the damages which it has sustained by reason of the nonperformance which the other has caused."

In the case of *Horst v. Roehm* (C. C.) 84 Fed. 570, the court said:

"On behalf of the defendant it has been contended that, 'assuming that the action can be maintained, the measure of damages must be restricted to the loss, if any, upon the deliveries which should have been made prior to the bringing of the suit.' I cannot yield assent to this proposition. It conflicts with the principle that the measure of damages in every case must be such as, when applied, will result in ascertainment of the sum necessary to make good the entire loss sustained by reason of the act or default which constitutes the cause of action. The plaintiffs were, by the act of the defendant, prevented from making the deliveries called for by the contracts. It is this an-

ticipatory denial and obstruction of the right to deliver, not a tender and refusal, which is the ground of the suit, and the measure which might otherwise have been applicable is therefore wholly inappropriate. The law of damages is not comprised in a set of arbitrary rules. Where a contract has been broken or a wrong has been committed, compensation must be made. This is the underlying principle, and any standard of measure which does not accord with it cannot be applied, but some other, which is fairly compensatory to the one party, and not unjust to the other, must be resorted to. *Carroll-Porter Boiler & Tank Co. v. Columbus Mach. Co.*, 5 C. C. A. 190, 55 Fed. 451. In this case the plaintiffs have shown that they could have made subcontracts for the delivery of the hops, according to their contracts with the defendant; and, whatever might be the rule in a case in which this could not be shown, I am of the opinion that where, as in this instance, that fact appears, the difference between the price at which such subcontracts could have been obtained and the price named in the contracts between the parties is manifestly the amount of the loss actually suffered, and therefore must be the correct measure of the damages recoverable. *Hinckley v. Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875 [30 L. Ed. 967]; *Mining Co. v. Humble*, 153 U. S. 540, 14 Sup. Ct. 876 [38 L. Ed. 814]."

The case of *Roehm v. Horst* reached the Supreme Court of the United States, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, and was affirmed, and that court said, on page 20 of 178 U. S., page 780 of 20 Sup. Ct., on page 961 of 44 L. Ed., as follows:

"As to the question of damages, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself. If a vendor is to manufacture goods, and during the process of manufacture the contract is repudiated, he is not bound to complete the manufacture, and estimate his damages by the difference between the market price and the contract price * * * and the cost of performance. *Hinckley v. Pittsburgh Bessemer Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967. Even if in such cases the manufacturer actually obtains his profits before the time fixed for performance, and recovers on a basis of cost which might have been increased or diminished by subsequent events, the party who broke the contract before the time for complete performance cannot complain, for he took the risk involved in such anticipation. If the vendor has to buy instead of to manufacture, the same principle prevails, and he may show what was the value of the contract by showing for what price he could have made subcontracts, just as the cost of manufacture in the case of a manufacturer may be shown. Although he may receive his money earlier in this way, and may gain, or lose, by the estimation of his damages in advance of the time for performance, still, as we have seen, he has the right to accept the situation tendered him, and the other party cannot complain.

"In this case the plaintiff showed at what prices they could have made subcontracts for forward deliveries according to the contracts in suit, and the difference between the prices fixed by the contracts sued on and those was correctly allowed."

The authorities cited show that it is sufficient to show that the plaintiff was so interfered with by defendant, or that defendant so far repudiated the contract or breached its conditions, as that future performance by plaintiff would have been substantially more difficult and more expensive, so that its anticipated profits would have been materially lessened thereby.

The case of *United States v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168, is not in conflict with this rule and does not control this

case. In that case the plaintiff was permitted to recover the amount of his outlay in preparing to perform the contract, but was not permitted to recover anticipated profits, and only because he had not proved them with sufficient certainty. The court distinguished the rule applicable to cases in which the plaintiff had elected to rescind the contract and to those in which he elected to go for damages for the breach of the defendant, as follows:

"When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he cannot recover any damages for a breach of the contract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a quantum meruit. * * * But when he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services. If he chooses to go further, and claims for the loss of anticipated profits, he may do so subject to the rules of law as to the character of profits which may be thus claimed."

In the instant case, as in the Behan Case, the plaintiff did not elect to rescind the contract, but was compelled to abandon its further performance by the conduct and breaches of the defendant, and is not thereby precluded from recovering anticipated profits, if they are ascertainable with reasonable certainty, or, if they are not, then at least the amount of the necessary outlay to enable it to perform the contract.

The master and the District Judge each found that the defendant first breached the contract, in a manner that entitled the plaintiff to refuse to proceed further with it, and yet recover all amounts due plaintiff up to the time of its refusal to proceed. We think the record shows that the breaches on defendant's part were such as to constitute legal prevention of performance by the plaintiff. The defendant, prior to cessation of operations by plaintiff, had repeatedly failed to pay monthly for all the lumber sawed the previous month; had failed to furnish saw bills and shipping instructions for the lumber sawed for a long period, so as to keep the plaintiff's loading crew unemployed; had permitted the lumber to accumulate on the yard largely in excess of the maximum stipulated in the contract; had refused to pay either stumpage or saw bill on lumber burned, though its presence on the yard was due to his negligent failure to give proper disposition; he wrongfully charged back to plaintiff a substantial part of the amount plaintiff had expended in changing the dry kilns and erecting a machine shop; he denied liability for unpaid stumpage, upon the ground that Hemphill had made no estimate of it, and had scaled down the lumber sawn by plaintiff for the purpose of increasing its grade, thereby wrongfully diminishing the amount due plaintiff on account of saw bill; he asserted that plaintiff had no valid contract of any kind with him, and in response to plaintiff's inquiry as to his future course, had notified plaintiff that he would proceed with the contract only upon the construction given it by him in the past, and which the master and the court below correctly determined to be an improper one. Under defendant's construction, the plaintiff could have proceeded to carry out the contract only with greatly diminished returns.

The plaintiff, just a month prior to the final cessation of operations, had reconstructed its mill, which had been partially burned. It had gone to great expense in preparation for the performance of the contract, and incurred an outlay which was of no substantial advantage to it for any other purpose. Its own timber had been very largely cut and sawn. It had a profit in sawing the defendant's timber, a reconstructed plant with which to do it, and which it could use for no other purpose. Its situation was such as to make it inconceivable that it should desire a termination of the contract.

On the other hand, the market price of lumber had fallen, and it was to defendant's interest that the mill should be shut down. He had made request of the plaintiff that it be shut down because of the condition of the market, had thrown obstacles in the way of plaintiff's operations, and evinced his reluctance to take the output of the mill.

In the final negotiations the plaintiff's representatives showed a disposition to adjust their differences with defendant, and to make concessions not required by the contract of it, and implored him to make concessions such as would make the continued operation of the mill possible. The defendant had the advantage of position in the trading, since the plaintiff, if the contract were abandoned, had an expensive mill on its hands with its own timber substantially cut and sawn, and no timber other than defendant's adjoining it. The defendant's attitude was unreasonable and uncompromising, and can be reconciled only with the idea that he was anxious to compel the plaintiff to shut down the mill. The interest of the plaintiff to continue operations, and that of the defendant to have operations cease, bear out this view of the final negotiations.

Our opinion is that the plaintiff was prevented from performance by the conduct of the defendant, and was entitled to discontinue operations, without waiving its right to insist on compensation, not only for amounts then due under the contract, but as well for loss of future profits, if it could establish their amount with reasonable certainty, or, if not, then reimbursement for the amounts, if any, expended by it to perform the contract, and which were of no advantage to it for any other purpose.

The remaining question is whether the plaintiff should be allowed to recover anticipated profits under the facts of this case. The profit for manufacture, as it existed at the time of the shutting down of the mill, was determinable with reasonable certainty. The contract price was \$9.50 a thousand feet, and the then cost to plaintiff of manufacture left it a substantial margin of profit. There remained uncut, at the time of the shutdown, about 80,000,000 feet of timber. About 16,000,000 had been cut by plaintiff from March 27, 1906, until May 11, 1908. Excluding the period during which the mill was not operated after the fire, from February, 1908, until April, 1908, and the total operations would cover a period of approximately two years, and the rate of the cutting approximately 8,000,000 feet annually. At this rate, 10 years would be required to cut all the timber covered by the contract. If the plaintiff's cost of cutting and sawing remained constant during that time, as was the case with the contract price of \$9.50, the

profits could be assessed with reasonable certainty for the remaining period of the contract. It is not probable, however, that the cost of labor, fuel, feed, and supplies would continue constant over a period of 10 years, and this improbability introduces such an element of uncertainty into the assessment on the basis of future profits as to make it an unsafe measure of recovery.

We turn to the alternative method of assessment, that of reimbursement to plaintiff for its necessary outlay for preparation. The record clearly shows that it did certain things, in response to the stipulations of the contract itself, that were expensive to it, that it would not otherwise have done, and that were of no, or of but partial, advantage to it, apart from the fulfillment of the contract. We instance the change of the mill from circular to band saw construction, the change of the dry kilns, and construction of the machine shop, so far as there was an excess over the \$5,000 agreed to be paid plaintiff by defendant for that construction, and the construction of railroad or logging tracks to reach the timber on defendant's property. It is a reasonable inference that the small amount of timber owned by plaintiff would not have justified it in expending the amounts, aside from its expectations from the performance of the contract. With the contract set aside, the plaintiff had on its hands a costly mill and equipment, with no available timber tributary to it. The tracks constructed on defendant's property were useless to plaintiff, except for the purpose of bringing defendant's timber to plaintiff's mill under the provisions of the contract.

It is clear that the plaintiff was put to a large expense for an outlay that had little value to it, in the absence of a performance of its contract with the defendant. The evidence shows that the amount of this outlay was in the neighborhood of \$90,000. From that amount there should be deducted an amount which would represent the value of the use of the outlay during the time the contract was being performed by plaintiff, and the added value to plaintiff's mill and property, if any, due to the expenditure, and upon the hypothesis that it had no contract with the defendant. The present record probably furnishes data from which the correct result might be arrived at. In the court below no damages were allowed by the master or the court, either for future profits or reimbursement for outlay. In view of this determination of the court below, neither the parties, the master, nor the court probably had their attention sufficiently directed to the proper amount to be allowed on this account. We, therefore, think that it would be better not to attempt to fix the amount upon this record, but permit the parties to present their data again, after the proper legal measure of the recovery, on this account, has been fixed by this court.

The cause is remanded to the District Court, with directions to confirm the master's report upon the exceptions of both parties, except as to his finding that the plaintiff was entitled to no damages for loss of profits or expense of outlay, and to re-refer the cause to the master to permit the parties to present before him evidence only upon the question as to the amount of plaintiff's loss by reason of the preparation and outlay for the performance of that part of the contract which

it was disappointed of fulfilling by reason of the defendant's wrongful breaches, and, upon the coming in of the master's report, to award the plaintiff such relief as it may be shown thereby to be entitled to, in conformity with this opinion. The costs of appeal to be taxed against appellee.

SHELBY, Circuit Judge, dissents.

On Application for Rehearing.

GRUBB, District Judge. This cause came on to be heard upon the application of both the appellant and the appellee for a rehearing, and was submitted on briefs by counsel; and, it appearing to the court that the evidence in the record tended to show that the appellant had collected the sum of \$3,500 on account of fire insurance for the lumber destroyed by fire, and that the bill of complaint offered to credit said sum against any amount that might be found due to complainant from defendant, and it not appearing with certainty from the record whether the appellee was entitled to said credit or whether it had in fact been allowed said credit, on consideration of said applications, it is now here ordered and adjudged and decreed by this court that the decree of reversal heretofore rendered in this cause be and it is hereby modified, so as to direct that the case be re-referred to the master for the purpose, in addition to that named in the original decree, of ascertaining whether the appellee is entitled to a credit against the amount found due from him to the appellant for the said amount of insurance, and whether or not the said amount was in fact credited in the report of the master, and with said modification said decree of reversal is confirmed, and the applications for a rehearing of the said original decree are hereby denied.

UNITED STATES v. ERIE R. CO.

(Circuit Court of Appeals, Third Circuit. April 2, 1914.)

No. 1763.

1. RAILROADS (§ 254*)—EQUIPMENT OF TRAINS—PENALTIES—EVIDENCE.

The testimony of a witness that each of three groups of classification tracks at a railroad terminal constituted a yard threw no light on the question whether the whole triangle formed by such three yards constituted unitedly a single terminal classification yard, so that the movement of trains between them was not subject to Act March 2, 1893, c. 196, § 1, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), relative to the running of trains without a sufficient number of cars so equipped with power or train brakes that the engineer could control its speed without the brakemen using hand brakes.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 764-772; Dec. Dig. § 254.*]

Duty of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

2. TRIAL (§ 139*)—DIRECTION OF VERDICT—WHEN JUSTIFIED.

When the evidence, with all the inferences that the jury could justifiably draw therefrom, is insufficient to support a verdict for plaintiff and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

such a verdict would be set aside, the court should direct a verdict for defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

3. RAILROADS (§ 229*)—EQUIPMENT OF TRAINS—STATUTORY PROVISIONS.

Where three railroad yards at a terminal, though at some distance from each other, because of natural barriers and the tracks of another railroad, were interdependent on each other, each supplementing and necessary to complete the partial switching done in the others, and all forming a combination switching system topographically indispensable to the handling of incoming and outgoing trains, the movement of trains from one to the other was a switching operation, and not subject to Act March 2, 1893, c. 196, § 1, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), relative to running trains without a sufficient number of cars equipped with power or train brakes.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. § 229.*]

4. RAILROADS (§ 229*)—EQUIPMENT OF TRAINS—STATUTORY PROVISIONS.

Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), and Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1911, p. 1314), relative to air brakes on cars used in interstate commerce, have two distinct objects in view, namely, to compel railroads to have their cars equipped with such brakes under all circumstances, and to compel the use of air brake equipped cars under certain circumstances; and these duties are separate and distinct.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. § 229.*]

5. RAILROADS (§ 229*)—EQUIPMENT OF TRAINS—STATUTORY PROVISIONS.

Act March 2, 1893, c. 196, § 1, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), making it unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive not equipped with a power driving wheel brake and appliances for operating the train-brake system, or to run any train without a sufficient number of cars so equipped with power or train brakes that the engineer can control its speed without the use of hand brakes, does not compel the coupling of air brakes in switching operations, in view of the use of terms usually applied to road, as contrasted with switching operations, and the impracticability or impossibility of carrying on switching operations if it applied thereto.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. § 229.*]

In Error to the District Court of the United States for the District of New Jersey.

Action for penalties by the United States against the Erie Railroad Company. Judgment for defendant, and the United States brings error. Affirmed.

See, also, 197 Fed. 287.

J. Warren Davis, U. S. Atty., of Trenton, N. J., and Philip J. Doherty, Special Asst. U. S. Atty., of Washington, D. C.

Collins & Corbin and George S. Hobart, all of Jersey City, N. J., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BUFFINGTON, Circuit Judge. In the court below the United States, by 18 counts, charged the Erie Railroad Company with a violation of Act Cong. March 2, 1893, c. 196, § 1, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), which provides:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose."

It will be observed that these counts do not charge the railroad with violation of that absolute duty referred to in *Delk v. St. Louis*, 220 U. S. 586, 31 Sup. Ct. 617, 55 L. Ed. 590, of properly equipping its cars initially with statutory safety devices. What they do charge is that the railroad subsequently unlawfully used such initially properly equipped cars in that it operated trains in interstate traffic wherein 75 per cent. of the cars had not their air brakes connected with the engine. The case has been tried twice in the court below, and twice brought to this court for review. It involves the movement of freight cars in the great tidal yard terminal system of the Erie Railroad Company contiguous to New York Harbor. The present writ is an effort on the part of the government to have this court review and reverse its former decision, or in the event of our adhering to such view, to put the case in such shape that an application to review it may be made to the Supreme Court. On the first trial the lower court declined to admit testimony tending to show that the operations complained of were switching yard movements. It further instructed the jury that the movements complained of violated the statute. On error to the entry of judgment thereon, this court, in an opinion reported at 197 Fed. 287, 116 C. C. A. 649, which opinion we by reference make part hereof, remanded the case "with permission to the court below to grant a new trial, if so moved by the government." On the case as then presented in this court two questions arose: First, did the act in question require, in switching operations, the coupling of air brakes? If not, a second question arose, namely, Were the car operations therein involved switching movements? The first question, which was one of statutory construction, we decided in the negative, saying:

"Giving then to the act the construction that it was not meant to cover bona fide switching operations, we next inquire whether the car movements here in question were really switching operations of the railroad."

After discussing the proofs we then said:

"To us it seems clear that there was evidence tending to show that the whole triangle formed by the Bergen, Jersey City, and Weehawken yards constitutes unitedly a single terminal classification yard. While the distance between two of these points is over three miles, it is evident from the narrow strip of land that is left along the river from the Palisades that this wide spread of space is topographically required to permit the complicated car transfer and classification of a great railroad's terminal traffic. It is in such yards that the great contest against inextricable confusion and freight congestion must be waged."

Indeed, the case had been tried and the evidence adduced on the theory that it turned on the definition of the word "train," and it was contended that if the cars coupled together in this intersubyard transfer could be called a train, the statute was violated, whether such transfer was really switching or not. Setting aside this contention, and pointing out what was the real question involved, we said:

"It is urged that considerable numbers of cars, initially classified at the three respective points, are moved on the main freight tracks to and through the tunnel, and that they constitute trains, and such movement therefore falls within the wording of the statute. Of course, 35 cars coupled together and drawn by a locomotive make a train, for such connected cars are drawn and follow in the engine's train; but this mere word definition does not settle the question before us. It is not a wrangle over mere names, but rather whether the railroad is here doing a bona fide switching work which the law confessedly was not meant to cover. * * * We have here a question of a great terminal located in a most congested freight center. * * * Indeed, the testimony of the government's inspector * * * shows that practically the same terminal situation as that at Jersey City exists at Buffalo and other terminal points. We are pointed to no conditions incident to this short run which makes the use of the air brakes essential to the safety of the shifting crew. The run is a brief one. There are neither grades to encounter, stops to be made, nor protracted exposure."

In the absence of testimony pertinent to the real issue involved, this court might have also said, as was done by the Circuit Court of Appeals of the Eighth Circuit in *C., B. & Q. R. R. v. United States*, 211 Fed. 12:

"This case was tried mainly by the dictionary. We have much reasoning of counsel upon general principles. What we would have preferred would be: An accurate description of the development of the terminal yards at Kansas City; the present structure of those yards; the methods of handling trains therein; the speed at which transfer trains are moved between the yards; the control over such trains afforded by the coupling up of the air upon a part of the cars only; whether in actual practice, with the air coupled up on 6 to 10 cars, the engineer can control the speed of these transfer trains from the locomotive, 'without requiring brakemen to use the common hand brakes for that purpose'; what, if any, accidents have resulted from the failure to couple up 75 per cent. of the air; the time that would be consumed in coupling up 75 per cent. of the air on such trains; the number of trains that are moved in the yard; the effect upon the movement of cars in such terminal yards if 75 per cent. of the air had to be coupled up on all these strings of cars. In other words, the evidence should do all that could be done to place the court in the same position as an experienced railroad man in judging of these transportation questions."

[1] Feeling, however, that the government might have such testimony to offer, we, as seen by our order, and to afford an opportunity to produce the same, gave the government leave, if it saw fit, to move for a new trial. On the second trial, however, the government has given no testimony whatever on the question which we pointed out as the vital one in the case, namely, "whether the railroad is here doing a bona fide switching work." The only testimony bearing on the foregoing question is that of one witness, an inspector for the Interstate Commerce Commission as follows:

"Q. Now are you familiar with the local situation of Jersey City? A. Yes, sir. Q. What would you call the collection of tracks at Jersey City on which the cars are shifted? A. Classification tracks for the making up of trains.

Q. What would you call the whole group of classification tracks there, *limiting* your answer to those classification tracks at Jersey City? A. A yard. Q. Is there a similar group of classification tracks at Bergen? A. There are. Q. What, among railroad men, is such a classification group of classification tracks at Bergen called? A. A yard. Q. Are you familiar with a similar group of classification tracks at Weehawken? A. Yes, sir. Q. Will the same answer apply to the designation of the group of classification tracks at Weehawken that is applied to the others? A. It does. Q. In each case it is a yard? A. Yes, sir."

[2] It scarcely need be said that this testimony, as to the mere existence of three individual yards, threw no light whatever on the real issue whether "the whole triangle formed by the Bergen, Jersey City, and Weehawken yards constitutes unitedly a single terminal classification yard." Indeed the express limitation of the question asked, "*limiting* your answer to those classification tracks at Jersey City," precluded the witness from giving any answer on the real issue. It would therefore seem that when the government omitted to furnish any evidence on that issue, and expressly precluded its only witness from giving any testimony upon it, it cannot now justly complain that such issue was not submitted to the jury; for, as it seems to us, the situation, in view of the trial procedure, narrows itself to this: If the case had been submitted to the jury and it had found for the government, would the court below have been bound to set the verdict aside? The recognized test in that regard is that:

"When the evidence given at the trial with all the inferences the jury could justifiably draw from it is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant."

In that regard the trial judge, in directing a verdict for the defendant, said:

"It has been held by the courts that these requirements of the safety appliance act are not obligatory in shifting movements in a yard. If they were, the mere movement of a car without the required appliances in a yard would be a violation of the act; and the mere movement of the train, in shifting, without the coupling of the cars, together with the air-brake appliance, so that the required number of cars were so coupled, would be a violation of the act. But, as I have said, the act does not require these appliances in a terminal yard where shifting is done.

"The evidence in this case appears to me to be undisputed that the railroad company receives cars at Jersey City, receives cars at Weehawken, and receives cars at Bergen. The evidence discloses the fact that cars—many of them—are received at Jersey City from lighters, and also at Weehawken, and that those cars must be removed quickly to make room for others that may be coming. There is an abundance of evidence that is uncontradicted, as to the great number of cars that are received and handled at these two points. The evidence is uncontradicted that at Jersey City the defendant railroad company is hemmed in by the Pennsylvania Railroad and by other conditions, so that it has there but a limited number of tracks—60, I think, 50 or 60—and the evidence shows that at Weehawken, also, the defendant is hemmed in, able to have but some 80 tracks there. * * * The evidence shows that the movement of these trains extends from what they call the terminals at Jersey City and Weehawken, through the tunnel out to Bergen, where there are something like 115 tracks, where cars can be classified, where they can be inspected and repaired, and where the air hose may be coupled up and the air brakes thoroughly tested, taking all the time that is necessary, before they start for their various destinations. As I say, the facts are not

disputed. This is one yard, under the evidence in the case, although separated by a mountain and connected by a tunnel, which, by the way, the evidence shows, does not contain the main traveled tracks of the railroad. Being one yard, therefore, under the evidence in the case, it is my duty to instruct you, gentlemen, that the railroad company is not guilty of a violation of the act in its train movements, as charged, and that your verdict must be for the defendant."

[3] In view of the absence of evidence on the part of the government, and of the undisputed facts proved by the defendant, the question whether these three yards are or are not a switching unity is not debatable. Unquestionably they are. That the cars in question were being subjected to switching classification in successive yards of this system is undeniable. Courts no more than individuals can close their eyes to the fact that they were being moved in switching, not road, service, and that this service was continuously and uninterruptedly a switching service none the less because barriers of nature—the Hudson river and Palisades at front and rear, and the laws of man in a prior use by common carriers, north and south—necessitated part of such switching being done on one side and part on the other of the tunneled Palisades. Of the physical fact that this was a switching operation there can be no doubt. Of the legal results that flow from that physical fact there is of course a question, but as to the facts themselves there is no question.

Our decision has commended itself to the Circuit Court of Appeals of the Eighth Circuit in *C., B. & Q. R. R. Co. v. United States*, supra, wherein it was said:

"The identical question which is here presented was before the Circuit Court for the Third Circuit in *Erie Railroad Company v. United States*, 197 Fed. 287 [116 C. C. A. 649], and, we think, was there properly decided, notwithstanding its criticism in *United States v. Pere Marquette R. R. Co.* [211 Fed. 220] in the District Court of the United States for the Western District of Michigan, decided September 5, 1913."

We have carefully considered the case of *United States v. Pere Marquette R. R. Co.*, referred to, but as the facts of that case are stated, the legal question involved in our case, namely, whether the act of 1903 covers switching operations, was really not involved in that case. There the Wyoming yard was the switching outpost on the main line of the railroad terminating at Grand Rapids. It was two miles from the city, and while it was within the yard limits of that city, all the classification and switching incident to the distribution of incoming, and the making up of outgoing, trains was done in the Wyoming yard. As stated in the opinion:

"Wyoming yard and freighthouse yard are both within the general yard limits of the city of Grand Rapids, but they are about two miles apart and *each has its own system of switching tracks*. Trains passing from one yard to the other must run for the entire distance upon defendant's main line, over which its regular passenger and freight trains, as well as switching and transfer trains, are operated. This part of the main line has some minor grades and curves, and crosses at grade five city streets and a street car line. All of defendant's freight trains entering Grand Rapids are taken directly to Wyoming yard, and *are there broken up and the cars switched and classified*; some being put into outgoing trains and forwarded to their destination, while others, containing local merchandise, are switched or transferred to the

freighthouse yard, or to some city side track, to be unloaded and to have their cargoes rearranged. All outgoing freight trains are made up at and started from Wyoming yard."

It is therefore clear that the entire switching of incoming cars intended for other lines took place in the Wyoming yard, and such cars never went to the city freightyard. As to the incoming local freight, it also was classified and switched in the Wyoming yard and from there sent in over the main road to the city freightyard for unloading. The Wyoming yard was in fact the sole terminal switching yard. There and there alone classifications and interchange were made. Under these terminal conditions it could no more be contended that the subsequent transfer to the city freightyard of these already switched trains for two miles, over the main passenger and freight line of cross streets at grade and intersecting trolley tracks, was a switching operation than would be the case if the Wyoming yard were 22 instead of 2 miles distant from the city freightyard. In other words, the switching was initially and finally finished at the Wyoming yard and the switching there, so far as the make-up of trains was concerned, was in no way affected by, dependent upon, or correlated to anything thereafter or theretofore done in the city freightyard. The track between Wyoming yard and the city freightyard was not a nexus that served to correlate two dependent yards, but was a hiatus or break between two independent yards. To us it is clear that the Wyoming terminal is wholly different from the Erie, because in the Erie we have three switching yards interdependent of each other, each supplementing and each necessary to complete the partial switching done in the other, and all forming a unitary combination switching system topographically indispensable to the handling of incoming and outgoing trains.

[4, 5] It is, however, contended that our former decision overlooked and disregarded the effect of the act of 1903 (32 Stat. 943), and that it is in conflict with the decisions of the Supreme Court referred to below. It will be observed, however, that federal air-brake legislation had in view two distinct objects, namely: First, to compel railroads to have their cars equipped with such brakes, *inter alia*, under all circumstances; and, second, to compel the use of air-brake equipped cars under certain circumstances. These duties of air-brake equipment and air-brake use are separate and distinct. As noted at the outset of this opinion, it is this duty to equip that is referred to in *Delk v. St. Louis*, 220 U. S. 586, 31 Sup. Ct. 620, 55 L. Ed. 590 as "an absolute duty to provide and keep proper couplers at all times and under all circumstances." The duty to equip was the subject-matter involved in *St. Louis v. Taylor*, 210 U. S. 282, 28 Sup. Ct. 616, 52 L. Ed. 1061; in the reaffirming case of *Chicago v. United States*, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582; in *Southern Ry. Co. v. United States*, 222 U. S. 24, 32 Sup. Ct. 2, 56 L. Ed. 72; and in *Wabash v. United States*, 168 Fed. 1, 93 C. C. A. 393. It will be noted, also, that the act of 1893, as construed by the Supreme Court in *Johnson v. Southern Pacific Co.*, 196 U. S. 21, 25 Sup. Ct. 158, 49 L. Ed. 363, was neither changed nor enlarged by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1911, p. 1314). That act was passed to meet the decision in *Southern Ry. Co. v. Johnson*, 117 Fed. 462, 54 C. C. A.

508, but needlessly so, for, as said by the Supreme Court in reversing the latter case:

"The latter act is affirmative, * * * and, in effect, only construed and applied the former act."

It would seem, therefore, that none of these cases involved the question here involved, namely, the compulsory use of air-brake equipment in switching operations. On that question, which is one of statute construction, we hold the act does not compel the air coupling of cars in switching movements. We so hold, amongst others, for these reasons: First, because had Congress meant to compel air-coupled switching, it would have said so; second, by providing automatic coupling Congress had already provided as far as it could against the avoidable dangers incident to switching; third, if the law includes switching, it covers all switching without limitation or exception, an impracticable and impossible thing; fourth, if the act covered switching, and Congress meant to except any switching therefrom, it neither did nor by language made it possible to now decide what switching was excepted. Indeed, a careful study of this act shows the use in the statute of terms and words which in common use are applied to road, as contrasted with switching, operations. The act deals first with the locomotive alone as distinguished from the train. It makes it unlawful for the railroad "to use on its line"—and line, main line, is a word which, in the common speech of railroad work, distinguishes the line of the road from switches and terminal yards. But the act proceeds, "to use on its line any locomotive engine in moving interstate traffic." Surely the words, "in moving interstate traffic," in connection with the use of a locomotive on its line, is aptly applied to draft of trains in their transit between states. But the act proceeds, the locomotive "on its line" which is "moving interstate traffic" must be equipped with "appliances for operating the train-brake system." Surely these words, "operating the train-brake system," mean that the system, the train-brake system, operated by the locomotive "on its line" and in "moving interstate traffic," refers to a running, rather than a switching, movement. And the further words of the statute, which make it unlawful for the road "to run any such train in such traffic * * * that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose," are words that aptly describe train movement. The operation of "the locomotive drawing such train" is in marked contrast with the push and pull of a switching engine, and "control its speed" refers to a train that is speeding, for the appliances must be such that "the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose." All these terms and words of railroad parlance are applicable to line travel and fitly descriptive thereof. In railroading, "line" is contracted with "switch," "yard," and "terminal"; main line, branch line, with switches. A "locomotive drawing such train" is in contrast with the push and pull of a yard switching engine. And not only is this the common and practical meaning of the

words, but when the practical operative consequence of giving these words the meaning here contended for are considered, the unwisdom of such construction is apparent. As well said by Judge Amidon in the Eighth Circuit case quoted above:

"The attempt is made to deduce the decision of the case from the definition of the word 'train' by a process of abstract reasoning. One fundamental trouble with such reasoning is that it proves too much. The word 'train' of course covers any string of cars hauled by an engine. But if the statute is to be applied to all trains falling within this definition, then it would cover all movements of cars by means of a locomotive in switching operations, and it would make no difference whether that movement was on a main track or a siding. Such a result reduces the reasoning to an absurdity, because its application to railroads would operate as an embargo upon commerce."

That it would be an unworkable embargo on terminal operations is a conclusion justified by the proofs in this record. These proofs show that the air coupling of trains, such as covered by the present indictments, to make the switch movement through the tunnel and between the Bergen, Jersey City, and Weehawken subyards, would require a delay of 1 hour and 25 minutes in the movement of each train. In this connection we pass by as untenable the contention of the government that part of the delay might be avoided by dispensing with testing; that the government officers would be satisfied with coupling. We cannot accede to this, and we think on mature reflection it would not be pressed. It suffices to say that if Congress meant that cars were to be air coupled while being switched, it did not intend to relieve the railroad from a thorough inspection of such couplings before they were used. It would not only be negligence for the company to fail to so inspect, but the manifest injustice of leading men to place reliance on the efficiency of untested appliances borders so near on positive and misleading wrong that we dismiss such contention without further discussion. We hold that air coupling in switching was not included in the statute. If we are wrong in that, if air-coupled switching is the statutory duty, then there must go with it such preliminary tests of such appliances as will insure their fitness to fulfill the statutory purposes in view, namely, that the engineer on the locomotive drawing such train be able to control its speed without requiring brakemen to use the common hand brake for that purpose. To forego inspection and the time needed therefor is not to be countenanced. The mere fact that the cars in these terminals come from other systems, whose standards of maintenance differ, would of itself require a more careful and thorough test and inspection before the cars were subjected to the exactions of an air-coupled service.

As to the remaining eight counts, we need only say, as we did in our former opinion, that as therein indicated our disposition of the main case disposes of these matters.

Adhering, therefore, to our former decision, we affirm the judgment below.

HASLER et al. v. WEST INDIA S. S. CO.

(Circuit Court of Appeals, Second Circuit. January 14, 1914. On Motion for Rehearing, February 21, 1914.)

No. 119.

1. SHIPPING (§ 58*)—CHARTER—ACTION FOR BREACH.

Libelant chartered a steamship to respondent for the carriage of a cargo of sugar to be loaded at one or more ports on the northern side of Cuba; the charter giving respondent the right to cancel, if the vessel was not at the loading port by July 12th. On July 6th she reached Havana with a cargo, and the master told respondent's agent that he would unload both night and day so as to be ready on time, but was told it would be unnecessary, as the cargo was ready and a delay of a day or two would be immaterial. Discharge was finished July 11th, and respondent then ordered the vessel to Neuvas for loading, which could not be reached in less than two days, and another agent for respondent told the master that it was intended to cancel the charter, if the vessel was not there on time. Libelant refused to send the vessel and brought suit for damages for breach of the charter. *Held* that, while the action of respondent might amount to an equitable estoppel to insist on the time limit of the charter, it was not a breach of the contract, the strict performance of which respondent was insisting on, but that the contract was broken by libelant by refusing to send the vessel to the designated loading port.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 233-244, 314, 327; Dec. Dig. § 58.*]

On Motion for Rehearing.

2. CONTRACTS (§ 237*)—PERFORMANCE—WAIVER OF CONDITIONS.

In the absence of conduct creating an estoppel, a waiver of a provision of a contract must be supported by an agreement based on a valuable consideration, and the waiver must have been intended by one party and so understood by the other.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1119-1122; Dec. Dig. § 237.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by Frederick E. Hasler and others against the West India Steamship Company. Decree for libelants, and respondent appeals. Reversed.

On June 17, 1910, Hasler, Leitch & Co., chartered owners of the steamship M. C. Holm, entered into a charter party with the West India Steamship Company; the agreement being concluded in New York City. Under this agreement the West India Company agreed to furnish Hasler, Leitch & Co. "a full cargo, under deck, of sugar in bags." Hasler, Leitch & Co. agreed on chartering and freighting the vessel to the West India Steamship Company "for a voyage from one and/or a second safe port on the north side of Cuba to New York, Philadelphia or Boston as ordered on signing bills of lading, one port only to be used for discharging." It was also agreed that: "Lay days, if required, not to commence before July 5, 10—Charterers have privilege of canceling charter should steamer not be at loading port ready for cargo by July 12, 10."

The Holm arrived at Havana on July 6th and completed its discharge on July 11th, about 2 p. m., when it was tendered to the agents of the West India Steamship Company in Havana. The order was then given by the charterers

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the vessel should proceed to Nuevitas a port two days' sail from Havana. Hasler, Leitch & Co. refused to send the vessel to Nuevitas for reasons appearing in the opinion and for the purpose of minimizing damages ordered the vessel to Turks Island to take a cargo of salt there available.

Hasler, Leitch & Co. claimed that the action of the West India Steamship Company amounted to a breach of contract. The steamship company denied any breach of contract on its part and asserted that Hasler, Leitch & Co. committed the breach by failing to send the steamer to Nuevitas. A decree was entered in the court below in favor of Hasler, Leitch & Co. for damages and costs amounting to \$2,716.73.

Ralph James M. Bullowa, of New York City (Norman B. Beecher, and Ralph J. M. Bullowa, of New York City, of counsel), for appellant.

Haight, Sandford & Smith, of New York City (Charles S. Haight, of New York City, Advocate), for appellees.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1] The question for this court to decide is whether the respondent committed a breach of the charter party and is liable in damages therefore as decreed by the court below. In determining this question it is necessary to apply the ordinary principles of contract law. For a charter party is regarded, after all, as simply an ordinary contract and as such is subject to the same rules that govern ordinary contracts.

Under the terms of the contract in the case at bar the respondent or charterer had the right to load the libellant's vessel with sugar at some one or two of the ports on the north side of Cuba for a voyage to New York, or Philadelphia, or Boston as ordered. The vessel by the express terms of the contract was to be at the loading port ready for cargo by July 12, 1910. It was the duty of the respondent, the charterer, when the vessel was tendered at Havana on July 11th to inform the libellant to which port or ports on the north side of Cuba she should proceed as her loading port. The order was issued that the boat should proceed to Nuevitas. This she did not do, basing her refusal to go upon the conduct of respondent, which, it is claimed, released her from the obligation to proceed to the designated port. It is also alleged that respondent's conduct amounted to a breach of the charter party.

It is our understanding that under a charter party if the ship is not at the loading port its duty is to proceed there with reasonable diligence, and if she fails to arrive by the designated time the charterer may refuse to load her and may also have his action for damages—unless the delay was occasioned by excepted perils. But in the case under consideration the action for damages is not brought by the charterer although the ship made no attempt to reach the designated port. Here the action is brought by the shipowners, and as they did not comply with the terms of their contract and do not claim that they did the circumstances must be somewhat unusual if they can maintain the suit.

It appears that the steamer reached Havana on July 6, 1910, with 3,200 tons of coal and 200 tons of coke on board, and the work of

unloading began at 6 o'clock the next morning. That same day the libelant informed the respondent that they would work nights and would go to any expense necessary to discharge the cargo so as to be ready to load on time as fixed by the charter. The reply was that the respondent did not intend to cancel; that it was not necessary to work overtime and would be a waste of money; and that, as the respondent had a cargo ready, it would not make any difference if the boat was two or three days late. It also appears that, if the libelants had not been misled by the respondent, the vessel could and would have been ready according to the contract. About 500 tons—a ten-hour day—was actually discharged each day, and, when night work was done, fresh gangs of men being used, about the same amount of coal was discharged each night. Because of the representations and assurances of the respondent that there was no intention to cancel and that there was no reason why the libelant should work nights, no night work at unloading was done the first two nights. But later, suspicions having been aroused that the intentions of the respondent were not according to its professions, night shifts were put on and worked all Saturday night and Sunday night, and it was agreed that if night shifts had also worked on the nights of Thursday and Friday the vessel might have cleared on Saturday and conformed in all respects to her contract.

On July 11th, the steamer being unloaded, one of the agents of the respondent, well aware of the representations previously made, came to see the libelant stating that he had "a dirty business to perform," or words to that effect; adding that the respondent had no cargo for the boat, and that if orders were wanted they would be given in writing to proceed to Nuevitas the farthest port to which she could be sent from Havana, and that when she got there "we are going to cancel her." The testimony also showed that the order to go to Nuevitas was given simply because it was known that the vessel finishing her discharge on July 11th could not reach Nuevitas on the 12th.

The libelants claim that, in view of all that took place, the respondent was in fact guilty of a breach of contract and that was the view taken in the court below. The libelants also claim that there was a waiver of the requirement that the libelants tender the steamer at the loading port on or before July 12th.

In all this we do not discover anything which amounts to a breach of contract on the part of the respondent. That there was a breach of the charter party is evident. But it occurred when and because the libelant failed to send the ship to Nuevitas and was committed by the libelant and not by respondent. There was nothing in the conduct of the respondent, bad and reprehensible as that conduct was, which discharged the libelant from its obligation to perform its agreement. The fact that the libelant was intentionally misled so to delay its unloading that it could not reach the port on the north side of Cuba within the time fixed in the charter party, did not, in itself, constitute any breach of contract by the respondent. But we are far from saying that it was without effect upon the rights of the parties under the contract.

There is no reason we are aware of why fraud or misrepresentation or misconduct in the dealings had between the parties to a charter agreement should have any different effect than would follow similar conduct as between parties who had entered into any other kind of contract. And we must admit that the testimony we find in the record has not made a favorable impression upon us, or served to convince us that the characterization given to the business by the respondent's own representative, already quoted, was not deserved. But while this representation was made by the respondent, and was acted upon by the libelants to their prejudice, it is proper to add that it was made by one of respondent's subordinate officials, and that the chief officers of the respondent company denied that they had ever authorized it or that they had any knowledge of it until after the harm had been accomplished.

A court of admiralty exercises, within certain limits, equitable as well as legal jurisdiction and is entirely competent to afford certain equitable relief. In *Andrews v. Essex Fire & Marine Ins. Co.*, 3 Mason, 6, 16, Fed. Cas. No. 374, Mr. Justice Story in 1822 said that:

"In the exercise of their general jurisdiction, courts of admiralty may be properly said to be courts of equity; that is, courts proceeding *ex æquo et bono*, and not confined to the narrow notions of the common law."

And in *Benedict's Admiralty* (2d Ed.) § 329, it is said that the court of admiralty is bound, by its nature and constitution, to determine the cases submitted to its cognizance upon equitable principles, and according to the rules of natural justice. It cannot in a technical sense be called a court of equity. It is rather a court of justice.

But there is no legal or equitable principle under which this court can hold that this culpable conduct of the respondent put an end to this contract, or relieved the libellant from its obligation to send the vessel to such port as the respondent directed. The most effect the courts could give to the respondent's conduct would be to recognize it as giving rise to an equitable estoppel.

In *Bispham's Equity*, § 181, it is said to be—

"the first principle upon which all courts of equity proceed that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own acts, or with their own consent, enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to do so where it would be inequitable, having regard to the course of dealing between the parties."

In the *American & English Encyc. of Law* (2d Ed.) vol. 29, p. 1104, it is said:

"Where time of performance is of the essence of the contract, a party who does any act inconsistent with the supposition that he continues to hold the other party to his part of the agreement will be taken to have waived it altogether."

In 16 Cyc. 805, the law is stated as follows:

"While waiver is not in the proper sense of the term a species of estoppel, yet where a party to a transaction induces another to act upon the reasonable

belief that he has waived or will waive certain rights, remedies, or objections which he is entitled to assert, he will be estopped to insist upon such rights, remedies, or objections to the prejudice of the one misled."

The cases clearly establish the proposition above laid down. *Lydig v. Braman*, 177 Mass. 212, 58 N. E. 696; *Union, etc., Bank v. Jefferson*, 101 Wis. 452, 77 N. W. 889; *Watkins v. Green*, 101 Mich. 493, 60 N. W. 44; *Hedgepeth v. Rose*, 95 N. C. 41; *Higgins v. Haberstraw*, 76 Miss. 627, 25 South. 168; *Hyde Park v. Borden*, 94 Ill. 26; *Youngblood v. Cunningham*, 38 Ark. 571.

The effect of this misconduct, this misleading of the libelant into a belief that a few days of delay would be immaterial, was simply to estop the respondent from afterwards canceling the charter if the vessel as a result should fail to reach Nuevitas on the date fixed in the charter July 12th. It amounted simply to a waiver of the time limit. There can be no authority for saying that it put an end to the contract as a whole. It was still the duty of the steamer to go to Nuevitas even though it knew it could not arrive until after July 12th. And if it had proceeded to that port with all due dispatch and the respondent had then asserted its right to cancel the contract under the cancellation clause the courts would have denied its right to do so on the ground of estoppel.

The libelants did not perform the contract; the ship not having been sent to Nuevitas.

A plaintiff in an action upon a contract cannot succeed ordinarily, if he has himself failed to perform at the proper time; but the principle does not apply if the failure to perform is excused because of the conduct of the defendant. A plaintiff's failure to perform is unnecessary if there has been a prior serious breach of the contract by the defendant. And in like manner a plaintiff's failure to perform is excused if the defendant has repudiated the contract and given the plaintiff to understand that he will not perform the contract when it becomes due. In the one case the plaintiff's excuse for his own non-performance is the defendant's actual breach of the contract and in the other his excuse is the prospective breach. Neither the actual breach nor the prospective breach terminates the contract in and of itself. The contract still exists, but the party not at fault has a defense and an excuse for nonperformance. See *Wald's Pollock on Contracts* (3d Ed. by Williston) p. 351. At the time the ship was ordered to Nuevitas, the defendant had not failed to perform and had committed no breach. It is also clear that there was no renunciation of the contract by the defendant. On the contrary, the defendant made it very clear that instead of repudiating the contract it was insisting upon a strict adherence to the contract and was proposing to adhere strictly thereto. In stating that it would cancel if the ship did not arrive at Nuevitas on July 12th it was only exercising a right which it claimed under the contract.

The testimony of the respondent was that the order to go to Nuevitas was given in order that it might not be in default. The fact that it was given in order that the boat would miss her canceling date, is not important. Neither is it, as we view it, important that at the

time the order was given the intention was to cancel on July 12th, "unless," as respondent testified "something developed," by which it was meant that it was intended to cancel unless a cargo of sugar was secured by the time the boat arrived.

As there was no actual breach of the contract on the part of the respondent, there can be no recovery of damages in this suit for the failure to furnish the libelants with a cargo of sugar under the agreement.

This conclusion makes it unnecessary for us to consider the question as to the measure of damages, and whether or not error was committed in the court below in that respect.

The decree of the District Court is reversed.

On Motion for Rehearing.

PER CURIAM. The libelants ask for a rehearing and claim that the respondent waived its right to insist that the vessel be sent to a port on the north side of Cuba. It becomes necessary, therefore, to inquire whether there was any such waiver.

[2] The burden of proof is upon a party claiming a waiver to prove it by such evidence as does not leave the matter doubtful or uncertain. In the absence of conduct creating an estoppel, a waiver must be supported by an agreement founded upon a valuable consideration. There can be no waiver unless so intended by one party and so understood by the other, or one party has so acted as to mislead the other who is estopped thereby. 40 Cyc. 261.

In the case at bar the claim of a waiver is based upon a conversation which one of the libelants testified took place in the afternoon of July 11th (that being the afternoon on which the order to go to Nuevitas was issued) in which conversation it is now asserted that the respondent waived its right to have the ship go to that port. But the testimony does not satisfy us upon that point. That such a conversation occurred on that afternoon was denied by the vice president of the respondent company as well as by its chartering clerk. When the vice president was asked whether any such conversation occurred on that afternoon in which it was agreed that the libelants might send the boat to Turks Island for a cargo of salt and not to Nuevitas, his answer was, "It did not." In this he was substantiated by the chartering clerk, who was alleged to have been present when the conversation occurred. The vice president of the company, however, admitted that he had sent one of his agents with a message to one of the libelants, the purport of which, as he stated it, was that:

"We had no cargo, and if the boat goes to Nuevitas she will probably be late, and if we do not get cargo we will cancel, and as the chances are not strong of our getting cargo we won't order her there."

But that message was sent prior to the issuance of the order to go to Nuevitas and was revoked by the designation of Nuevitas as the sailing port which was made on the same afternoon and within the time the respondent had under the law and the charter to designate the port. The original statement that the respondent would not order the boat to Nuevitas was not supported by any consideration, and gave

rise to no estoppel as it was at once withdrawn before it had been acted upon by the issuance of the order to go to Nuevitas. That it was not regarded at the time as a waiver by the libelants appears from the letter of July 22, 1910, which they sent to the respondent and in which they state the basis of their claim but make no mention of any waiver. In that letter the libelants say they sent the ship to Turks Island because they had been told that there was no cargo at Nuevitas. If the respondent had actually agreed that the libelants need not send the ship to Nuevitas and might send it to Turks Island, it seems probable that the agreement would have been mentioned in the letter to which reference has been made. Again no mention is made of any such agreement in the libelants' letter of August 3, 1910. In that letter the idea of a waiver is for the first time advanced, but upon entirely different grounds, and grounds which seem to us to be untenable. The libelants wrote:

"While you had a right to name the loading port, we had a right to demand that the port be named a reasonable time in advance of the canceling date, and in our judgment your failure to name a loading port in spite of our repeated requests, coupled with your statement that a day or two made no difference to you, amounted to a complete waiver of the technical rights which you might have had," etc.

The respondent was not bound to designate the port until the ship was unloaded and the requests to have the port named prior thereto did not make it incumbent on the respondent to do so. The port was designated on the very afternoon the unloading was completed and the ship tendered, and in doing so the respondent fulfilled its duty in that regard. The effect of the misleading of the libelants by the respondent's statement that two or three days delay would make no difference has already been discussed and its effect stated. Our conclusion on this part of the case is that there was no waiver of the right to order the ship to Nuevitas.

The motion for a rehearing is denied.

CARPENTER v. M. J. & M. & M., CONSOLIDATED, et al.†

(Circuit Court of Appeals, Ninth Circuit. February 16, 1914.)

No. 2277.

1. JUDGMENT (§ 522*)—CONCLUSIVENESS—COLLATERAL ATTACK.

The purchaser of a section of school land from the state of California received a certificate of purchase which he assigned to one G., but the assignment was not filed with the Register of the State Land Office as required by law. Three years later, no interest having been paid on the deferred installment of purchase money, a foreclosure suit was brought by the state, and the certificate was adjudged null and void and canceled. The original purchaser was the only party defendant in the action, but Pol. Code Cal. § 3552, provides that the judgment in such case shall bind an assignee, unless notice of his assignment has been filed with the register before commencement of the action. Certified copies of the judgment were filed with the register and county recorder, and the land was sold to another, to whom a second certificate was issued. Six years after the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

†Rehearing denied May 25, 1914.

judgment G., who had made no payments on his certificate, assigned interests therein to two others, who, under an agreement with him, filed a motion to set aside the judgment as void for want of jurisdiction. An order denying the motion was affirmed by the Supreme Court of the state. Subsequent litigation between G. and his assignees and the second purchaser resulted in favor of the latter; the Supreme Court holding that the question of the validity of the judgment canceling the first certificate was *res judicata* and the judgment conclusive against collateral attack. A patent was then issued to the second purchaser. G. having died, complainant, as assignee of certain of his heirs, commenced the present suit in equity against the patentee and her grantees, praying for a decree that defendants held the title to an undivided part of the land in trust for him, and alleging the invalidity of the judgment for cancellation. *Held*: (1) That the state judgment of foreclosure and cancellation effectively barred a suit by any one claiming under the defendant therein, so long as it remained in force; and (2) that the present suit, which did not ask its vacation, was not a direct but a collateral attack upon such judgment and could not be maintained.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 965; Dec. Dig. § 522.*]

Conclusiveness of judgments as between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank of Memphis v. City of Memphis*, 49 C. C. A. 468; *Converse v. Stewart*, 118 C. C. A. 215.]

2. TRUSTS (§ 365*)—LACHES—DELAY IN BRINGING SUIT.

The suit not having been brought until 19 years after the judgment attacked was rendered, and no valid reason for the delay being shown, complainant was barred by laches from the right to any relief in equity.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568–573; Dec. Dig. § 365.*]

Appeal from the District Court of the United States for the Northern Division of the Southern District of California; Wm. C. Van Fleet, Judge.

Suit in equity by Judd E. Carpenter against M. J. & M. & M., Consolidated, Ethel D. Company, Maricopa 36 Oil Company, Wellman Oil Company, Cliff Oil Company, M. & T. Oil Company, Associated Transportation Company, Standard Oil Company, Associated Oil Company, all corporations, and Emily E. Graham, as executrix of the estate of F. M. Graham, deceased, R. E. Graham, George E. Whitaker, William F. Phillips, Mary A. Bonyng, W. A. Bonyng, W. C. Price, John Doe, Richard Roe, and others. Decree for defendants, and complainant appeals. Affirmed.

Suit in equity by the plaintiff that the defendants be decreed to hold the title to an undivided one-sixth of certain described lands in Kern county, Cal., in trust for the use and benefit of the plaintiff; that defendants be directed to execute a deed of said land to plaintiff; that defendants account to the plaintiff for all the petroleum and natural gas extracted and removed by the defendants from said premises; and that, pending litigation, a receiver be appointed to take and receive all the rents, issues, and profits of said lands, and for an injunction, pending litigation, restraining the defendants from taking or extracting oil from said land, or from selling any oil now on said land.

On August 1, 1888, one S. Davis, a citizen and resident of the city of Sacramento, Cal., filed in the office of the Surveyor General of that state an application to purchase from the state certain school lands belonging to the state, described as section 36, township 12 north, range 24 west, San Bernar-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dino base and meridian, containing 640 acres, situate in the county of Kern, in said state of California. The price of the land was \$1.25 per acre, making a total of \$800. The application to purchase was approved by the Surveyor General of the state on February 1, 1889, and a certificate of said approval was on that date issued and delivered to Davis. On February 15, 1889, Davis paid to the treasurer of Kern county, on account of said purchase price, the sum of 25 cents per acre, amounting to \$160, together with interest in advance at the rate of 7 per cent. per annum on the unpaid balance of \$640 from the date of the approval of the purchase to the 1st day of the following January. The interest amounted to \$41.07, making a total payment of \$201.07, leaving unpaid the principal sum of \$640. On March 20, 1889, the Register of the Land Office of the state of California issued to said Davis a certificate of purchase for said section of land. On April 1, 1890, Davis sold and assigned all of his right, title and interest in and to said certificate of purchase, and all of his right, title, and interest in and to the land described in said certificate, to one Charles H. Gilman. No notice of this assignment appears to have been filed with the county recorder of Kern county or the register of the Land Office, as required by law.

The annual installment of interest on the Davis certificate of purchase, due and payable in advance on the 1st day of January in each year, being unpaid and delinquent for the years 1890, 1891, and 1892, the district attorney of the county of Kern, state of California, on August 25, 1892, brought suit in the superior court of that county to foreclose the interest of said Davis in and to the certificate of purchase issued to him by the Register of said Land Office on March 20, 1889, and in and to the land described therein, on account of the delinquency and nonpayment of the balance of the purchase price of said land, and the unpaid interest thereon, amounting in the aggregate to \$774.40. On the day the complaint was filed, a summons was issued which was placed in the hands of the sheriff of Kern county on August 27, 1892, and the latter, on August 30, 1892, made return that "after due search and diligent inquiry" he had been "unable to find the within named defendant, S. Davis, in Kern county." On September 6, 1892, an affidavit for an order of publication was filed, and an order for the service of summons by publication was made and entered therein by the court. On December 19, 1892, an affidavit of publication of the summons was filed, showing that the summons had been published "in the Kern county Echo," a newspaper published in said Kern county, for ten consecutive weeks, as required by law. On December 27, 1892, the default of the defendant Davis was entered by the court, and thereupon a decree was entered in said action wherein the court found that the defendant had been regularly served with process as required by law and had failed to appear and answer the complaint therein, that the legal time for answering had expired, and the default of the defendant had been duly entered according to law; and thereupon the court adjudged and decreed that all the interest of the said defendant Davis in and to the certificate of purchase theretofore issued to him by the state of California, and all his right, title, and interest in and to the land therein described, be foreclosed and forever canceled, and thenceforth rendered null, void, and of no force, validity, or effect whatsoever, and that all persons claiming under said defendant subsequent to the execution of said certificate of purchase, either as purchaser, incumbrancer, or otherwise, having liens upon said land, be forever barred and foreclosed of all right, claim, or equity of redemption in and to said certificate of purchase of said land, and every part thereof.

On January 4, 1893, a certified copy of this judgment was filed in the office of the Register of the State Land Office, and on January 16, 1893, a certified copy of said judgment was filed in the office of the county recorder of Kern county, Cal.

On January 22, 1899, Mary A. Bonyng, one of the appellees in this case, made application to the State Land Office to purchase from the state the land described in the Davis certificate and in the foreclosure judgment. This application was approved by the Surveyor General of the state, and on January 23, 1900, a certificate of purchase for said land was issued to her. On July 25, 1900, Thomas L. Moran, who had made application to purchase the south

half of said section 36, commenced an action in the superior court of Kern county against Mary A. Bonynge, claiming the right to have the respective rights of the parties to purchase said land determined by the court. On December 7, 1900, Charles H. Gilman (to whom Davis on April 1, 1890, had assigned the certificate of purchase to the land in controversy) assigned to one Fred W. Lake an undivided one-half interest and to one H. H. Snow an undivided one-fourth interest in and to the Davis certificate of purchase. Lake on October 1, 1900, had acquired knowledge of the judgment of foreclosure entered in the superior court of Kern county, with respect to the land described in the Davis certificate, and this knowledge he had communicated to Davis and Gilman at that time. On December 14, 1900, the latter appeared in the superior court of Kern county and moved the court to set aside and vacate and annul the judgment entered on December 27, 1892, and quash the service of summons in said case, on the ground that the judgment was void and was entered without authority of law, for the reason that the court never acquired jurisdiction over the person of the defendant and had acquired no jurisdiction to render any judgment against him in the case; that no service of summons issued in said case, either actual or constructive, was ever made upon said defendant; that the affidavit and order of publication of summons made and filed therein did not comply with the laws of the state; that all the proceedings had and done against the defendant were null and void and of no legal force or effect whatever. On December 31, 1900, the motion was granted, and the court made its order purporting to annul, vacate, and set aside its judgment entered on December 27, 1892. On the day this order was made by the court in the case of *People v. Davis* (143 Cal. 673, 77 Pac. 651), the court made an order in the case of *Moran v. Bonynge* (157 Cal. 295, 107 Pac. 312), granting Gilman, Snow, and Lake leave to file a complaint in intervention in that case, and such complaint in intervention was thereupon filed. On October 21, 1901, the district attorney of Kern county gave notice that he would move the court to set aside the order made in *People v. Davis* on December 31, 1900, purporting to vacate and annul the judgment of December 27, 1892, which motion was granted on December 11, 1901. From this order an appeal was taken by Lake, as the successor in interest of Davis, to the Supreme Court of the state of California, where the order of the superior court was affirmed, the Supreme Court holding that a judgment which was not void upon its face could not be vacated upon motion after the lapse of one year, as provided in section 473 of the Code of Civil Procedure of the state of California; that the question whether a judgment was or was not void upon its face was to be determined from an inspection of the judgment roll under the statute in force at the time of the entry of the judgment; that by such inspection the court found that the judgment was not void upon its face, since under the statute, as it then stood, the affidavit and order of publication of the summons were not part of the judgment roll; and that their sufficiency would be conclusively presumed in favor of the validity of the judgment. *People v. Davis*, 143 Cal. 673, 77 Pac. 651.

On December 28, 1907, Gilman, Lake, and Snow filed an amended complaint in intervention in *Moran v. Bonynge*, to which the defendants demurred, and the demurrers were sustained without leave to further amend. On May 19, 1908, a judgment was entered in said action awarding the right to purchase the land in controversy to Mary A. Bonynge. From this judgment Gilman, Lake, and Snow appealed to the Supreme Court of the state of California, and that court affirmed the judgment of the lower court on February 7, 1910, holding that the complaint in intervention did not state facts sufficient to entitle the plaintiffs to a judgment in their favor. *Moran v. Bonynge*, 157 Cal. 295, 107 Pac. 312.

On January 25, 1909, the state of California issued a patent for said section 36 to Mary A. Bonynge. Under this patent the defendants derive their title to the land in controversy. On March 1, 1909, Lake and Snow commenced an action in the superior court of Kern county against Mary A. Bonynge and John Doe to obtain a judgment declaring that the defendants held the naked legal title to the lands conveyed by the state to Mary A. Bonynge, in trust for the plaintiffs. In the complaint it was alleged that on

December 7, 1900, Gilman sold and transferred to the plaintiff Snow an undivided one-fourth interest in and to the Davis certificate, and had sold and transferred to the plaintiff Lake, on the same date, an undivided one-half interest in and to said certificate. The plaintiffs asked, in addition to a decree in their favor, that the court should make such decree to protect the heirs, devisees, and collateral kindred of Charles H. Gilman (who it was alleged had died intestate in San Francisco, Cal., on January 17, 1909), as might be consistent with equity. To this complaint Mary A. Bonyngé and W. A. Bonyngé filed their answer, and on June 1, 1909, judgment was entered in said action in favor of the defendants. The plaintiffs Lake and Snow appealed to the Supreme Court of the state from the last-mentioned judgment, and that court affirmed the judgment of the superior court, holding, in an elaborate opinion, that the judgment rendered by the Supreme Court on the appeal in *People v. Davis*, 143 Cal. 673, 77 Pac. 651, was *res judicata* on the subject of the validity of the original judgment and conclusive against collateral attack. *Lake v. Bonyngé*, 161 Cal. 120, 118 Pac. 535. In the brief for appellant we are informed that a writ of error has been granted in this case by the Supreme Court of the United States, and that the case is now pending in the latter court.

Charles H. Gilman died intestate on January 17, 1909, in the city and county of San Francisco, leaving him surviving as his heirs at law six children, to wit, Eunice May Gilman, Ruby Hagerdon, Mabel Corey, Pearl Alisky, James Monroe Gilman, and Cordelia Thompson. At the time of his death said Charles H. Gilman claimed to be the owner and holder of an undivided one-fourth interest in and to the certificate of purchase issued to Davis by the state of California. Thereafter four of said children, to wit, James Monroe Gilman, Pearl Alisky, Eunice May Gilman, and Ruby Hagerdon, made, executed, and delivered a deed of conveyance of all their right, title, and interest in and to said certificate of purchase, and in and to the land covered thereby, as the heirs at law of said Charles H. Gilman, deceased, to one W. G. Deal, and by a decree of distribution entered in said estate an undivided one-sixth interest in and to the certificate of purchase, and in and to the land covered thereby, was distributed to said W. G. Deal. On August 9, 1910, said W. G. Deal sold, transferred, and assigned all his right, title, and interest in and to the certificate of purchase, and in and to the land covered thereby, to the plaintiff herein, Judd E. Carpenter.

The present suit in equity was commenced on December 30, 1911, by the plaintiff, Judd E. Carpenter, a citizen of the state of New York, claiming to hold a one-sixth interest in and to the certificate of purchase issued to Davis, and in and to the land covered thereby, against the defendants, all citizens of the state of California, as the assignees of Mary A. Bonyngé. The bill of complaint sets up the various proceedings and conveyances hereinabove recited, whereby the plaintiff claimed to have become the owner and holder of an undivided one-sixth interest in and to the certificate of purchase issued to Davis. The prayer of the complaint is that it be decreed that the said defendants hold the title to an undivided one-sixth of said section 36 in trust for the use, benefit, and enjoyment of the plaintiff; that the defendants, and each of them, be directed and commanded to execute a deed of conveyance sufficient in form to convey an undivided one-sixth of said land to the plaintiff; that the defendants account to said plaintiff for all oil, petroleum, and natural gas extracted and removed by the defendants from said premises; and that an injunction be issued restraining the defendants, and each of them, pending this action, from taking or extracting oil from said land, or from selling any oil now on said land which was taken from said land.

The defendants demurred to the complaint on the ground that the plaintiff was without equity, and that his claim of right was barred by laches and by the statute of limitations of the state of California, and that this action is barred by the proceedings in the various suits in which the title to the land in controversy has been litigated and determined, as above recited.

A decree was entered in the court below sustaining the joint and several demurrers of the defendants to the bill of complaint, and dismissing said suit, from which decree the plaintiff has appealed to this court.

James F. Peck, of Oakland, Cal., and Charles C. Boynton and Walter Shelton, both of San Francisco, Cal. (Walter D. Cole, of Oakland, Cal., of counsel), for appellant.

Hunsaker & Britt, J. W. McKinley, and Frank Karr, all of Los Angeles, Cal., George E. Whitaker, of Bakersfield, Cal., and David S. Ewing and Frank H. Short, both of Fresno, Cal., for appellees Cliff Oil Co. and others.

Edmund Tauszky, of San Francisco, Cal., for appellees Associated Oil Co. and others.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] The controversy in this case grows out of a certificate of purchase issued by the state of California on March 20, 1889, to one S. Davis, a resident of Sacramento, in the state of California, for a section of school land located in Kern county in that state. On April 1, 1890, Davis assigned this certificate to one Charles H. Gilman. Davis had paid 20 per cent. of the purchase price of the land, and interest in advance to the 1st day of January, 1890. On August 25, 1892, the annual installments of interest, which became due in advance on January 1st of 1890, 1891, and 1892, being unpaid and delinquent, the district attorney for Kern county commenced an action in the superior court of that county on behalf of the state to obtain a judgment foreclosing the interest of Davis in and to said certificate of purchase, and canceling and declaring the same null and void, and adjudging that all persons claiming under said Davis, subsequent to the execution of said certificate of purchase, either as purchasers, incumbrancers, or otherwise, be barred and foreclosed of all right, claim, or equity of redemption in and to such certificate of purchase.

It appears that at the time of the commencement of this action and the entry of the judgment therein on December 27, 1892, and subsequently, the certificate of purchase issued to Davis stood of record in his name; the notice of the assignment to Gilman not having been filed with the Register of the State Land Office. Gilman was therefore not made a party defendant in that action, and no judgment was entered against him by name. But it is provided in section 3552 of the Political Code of California that a judgment against a purchaser binds the assignee unless the notice of assignment has been filed with the Register before the commencement of the action. The judgment entered in the case followed the prayer of the complaint and adjudged and decreed that all the interest of said defendant in and to the certificate of purchase issued to Davis, and all the right, title, and interest in and to the land therein described, be foreclosed and forever canceled and thenceforth rendered null, void, and of no force, validity, or effect whatsoever, and that all persons claiming under the said defendant subsequent to the execution of said certificate of purchase, either as purchaser, incumbrancer, or otherwise, having liens upon said land, be forever barred and foreclosed of all right, claim, or equity of redemption in and to said certificate of purchase and every part thereof.

This judgment, as it stands of record and is continued in force, has foreclosed all the interest of Davis and his assignee Gilman in and to the certificate of purchase issued to Davis by the state, and has canceled the same and rendered it absolutely null and void, and has foreclosed the rights of all persons claiming under them or either of them, or under the certificate of purchase. It follows as a legal consequence that no rights can be predicated upon that certificate until that judgment is set aside and vacated. The plaintiff in the present case bases his right to have the defendants adjudged and decreed to hold the title to an undivided one-sixth of the land in controversy for his use and benefit upon the ground that to the extent of such interest he has become the successor in interest of Charles H. Gilman in and to the certificate of purchase issued to Davis and assigned to Gilman. He makes this claim notwithstanding a valid and subsisting judgment, rendered by a court of competent jurisdiction, has adjudged that the rights of all parties claiming under the purchaser or his assigns have been foreclosed, and the certificate declared null and void and of no effect; but the plaintiff claims that the present action was commenced to vacate and set aside the judgment standing in his way. We find nothing in the bill of complaint to support this claim. The bill contains no prayer that the judgment be set aside and vacated. The only relief prayed for, other than for an injunction and an accounting, is that it be adjudged and decreed that the defendants hold the title to the land in controversy for the plaintiff, and that they be required to convey the legal title to him. It is alleged in the bill of complaint that, in the action resulting in a judgment against Davis, the summons was not served upon the defendant Davis personally or otherwise; that Davis had no notice or knowledge of the proceeding in the superior court, or of said action, until about the 1st day of October, 1900; that said Gilman had no notice or knowledge of the proceedings in the superior court prior to the 1st day of October, 1900; that the court was without jurisdiction to render any judgment in said action against the defendant Davis; and that said judgment is null and void and of no effect whatever. But these allegations, without a prayer that the judgment be set aside and vacated, set up a collateral and not a direct attack upon the judgment. That the judgment is not open to collateral attack has been held by the Supreme Court of the state of California in the various litigations in which this controversy has reached the court. *People v. Davis*, 143 Cal. 673, 77 Pac. 651; *Moran v. Bonyng*, 157 Cal. 296, 107 Pac. 312; *Lake v. Bonyng*, 161 Cal. 120, 118 Pac. 535. In the latter case the Supreme Court refers to the judgment of foreclosure in the preceding case of *People v. Davis*, and, after quoting from the decision of the court on appeal in that case, says:

"The pivotal question upon which the validity of the order under review in the Davis appeal turned was whether the judgment roll showed that the trial court had acquired jurisdiction of the defendant. It was held that it had, and such decision is *res judicata*. Under this decision, the status of the judgment as a valid one was settled forever as against any collateral attack upon it by the parties to the appeal or their privies. Gilman had succeeded by the agreement of December 7, 1900, to the rights of Davis under his certificate of

purchase, and on the same day conveyed to Snow an undivided one-fourth and to Lake an undivided one-half interest in said certificate and the lands described in it. An agreement was entered into at the same time by Snow and Lake with Gilman which recited that 'as the Davis certificate had been foreclosed, and a decree annulling the same entered in a suit brought for that purpose, it is necessary, in order to maintain the claim of present title under said certificate of purchase, to take proceedings to set aside and annul the judgment and decree of foreclosure in said suit entered,' and that Snow and Lake agreed 'at their own expense and cost to take all necessary proceedings * * * to claim, assert, and maintain the title to said land as it originally accrued, * * * by reason of said certificate of purchase, and to recover and take the same as if no judgment of foreclosure had been entered,' and that the services to be performed by them towards that end was the true consideration for the conveyance from Gilman to them. Pursuant to that agreement, Lake moved the court to vacate the judgment, and took the appeal from the order annulling the previous order obtained by him vacating it. As successors of Davis through mesne conveyances, Lake, Gilman, and Snow, as their interests were injuriously affected by the judgment in *People v. Davis*, although not parties to the original action, had the right to make themselves parties to that action by moving to set aside the judgment, and on the denial of their motion had a right to appeal to have the proceedings of which they complained reviewed, not only for excess of jurisdiction, but for error. *Elliott v. Superior Court*, 144 Cal. 501, 77 Pac. 1109, 103 Am. St. Rep. 102. In making himself a party by moving thereunder and taking that appeal pursuant to the agreement made by him and Snow with Gilman, Lake was acting in behalf of Gilman, Snow, and himself in attacking the validity of the judgment in favor of the people of the state, plaintiff in that action, and under and through whom the respondent here, Mary A. Bonyne, acquired her title. While the parties of record on appeal were the people, Davis, and Lake, still the parties to the present action, in which the conclusiveness of the judgment on appeal is involved, are the same, or are parties who were in privity with them as parties to that appeal, and so are bound by the judgment therein. As said in *Koehler v. Holt Mfg. Co.*, 146 Cal. 335, 337, 80 Pac. 73: 'The case comes clearly within the principle that a judgment operates as an estoppel to preclude the "parties and privies from contending to the contrary of that point or matter of fact which, having been once distinctly put in issue by them, has been, on such issue joined, solemnly found against them."'

It was further contended in that case that the action then before the court was in equity, and that the trial court, in the exercise of its equity jurisdiction, upon the evidence before it, should have gone behind the judgment and declared it void for failure to obtain jurisdiction to render it, and that is precisely the contention of the plaintiff in this case. As it was decided adversely to the plaintiff in that case, it must be held in this case that the whole question is *res judicata* and cannot be again litigated in the present case. If it be said that Gilman was not a party to that case, the answer is that Gilman, as well as Lake and Snow, was a successor of Davis, and, as Gilman's interest was injuriously affected by the judgment in *People v. Davis*, he had the right to make himself a party to that action by moving to set aside the judgment, and, on the denial of that motion, he had the right to appeal to have the proceedings reviewed, not only for excess of jurisdiction, but for error. This much is decided in *Lake v. Bonyne*; and, by an application of the same rule in the present case, we must hold that, if Gilman was not technically a party in *Lake v. Bonyne*, he was in privity with Lake and Snow, who were, and is barred by the judgment in that case and by the judgment in *People v. Davis*.

[2] But the bill of complaint discloses a still further objection to the plaintiff's case. It is not shown that either the plaintiff or his predecessors in interest have shown such diligence in protecting their rights as entitles the plaintiff at this late day to invoke the power of a court of equity. Gilman became the assignee of Davis in the certificate of purchase on the 1st day of April, 1890. To protect his rights as assignee, he should have notified the Register of the Land Office of the assignment before the commencement of the foreclosure suit. This he did not do. But it appears that between October 1 and December 31, 1900, he discovered that he had lost the certificate of purchase, and he thereupon applied to the Register of the Land Office for a duplicate. In his application Gilman appears to have notified the Register of the Land Office for the first time that the certificate of purchase had been assigned to him. When Davis assigned the original certificate to Gilman on April 1, 1890, the interest for the year 1890 on the balance due on the certificate was unpaid and delinquent. Neither Davis nor Gilman paid this interest, nor did Gilman, after the assignment of the certificate to him, pay the interest in advance on January 1st for the years 1891 and 1892, which was delinquent when the judgment of foreclosure was entered. Nor did he pay the interest in advance for the years 1893, 1894, 1895, 1896, 1897, 1898, 1899, or 1900. It was not until December, 1900, as appears from the bill of complaint, that Gilman tendered to the county treasurer of Kern county these delinquent payments covering a period of 11 years. This failure of Gilman to promptly notify the Register of the Land Office of the assignment to him of the certificate of purchase, and his further failure to pay the annual interest in advance on the balance due on the certificate for the period of 11 years, was negligence far beyond the period of any statute of limitations applicable to any feature of this case, if the action were at law.

It is provided in section 338 of the Code of Civil Procedure of California that an action for relief on the ground of fraud on the part of the state must be brought within three years after the discovery by the aggrieved party of the facts constituting the fraud; and in section 343 of the same Code it is provided that all actions for relief, not elsewhere provided for in the Code, must be commenced within four years after the cause of action accrued (that is to say, after the discovery of the facts constituting the legal bar to the adjudication of the right). The plaintiff's predecessor in interest, Gilman, was advised of the judgment of foreclosure on October 1, 1900. This suit was commenced on December 31, 1911, a little more than 11 years after he was advised of that judgment, and 21 years after it was entered. It is not charged in the bill of complaint that Gilman was kept in ignorance of that judgment by any officer of the state, or by any one claiming or holding adversely to his interests; nor is it charged that Gilman was lulled into inaction by the promise, stipulation, or representation of any one, whether claiming or holding adversely or not. With respect to the delay in bringing the present suit, the excuse is that Gilman was pursuing other and fruitless remedies; but this excuse is not sufficient to constitute diligence in seeking re-

lief in a court of equity, assuming that the present suit is such a proceeding. What is required is diligence commensurate with the situation; and, while a court of equity is not bound by the statute of limitations in determining whether laches are chargeable to a plaintiff in a suit of this character, nevertheless it furnishes a reasonable standard for measuring conduct, where that question alone is involved; and, under the circumstances of this case, we must hold that neither the plaintiff nor his predecessors in interest have shown such reasonable diligence in protecting their rights as entitle the plaintiff at this late date to invoke the power of a court of equity. This view of plaintiff's conduct, and that of his predecessors in interest, is supported by an overwhelming weight of authorities.

The case of *Burgess v. Hillman*, 200 Fed. 929, 119 C. C. A. 225, was a suit in equity brought to avoid the forfeiture of certain lands by the state of Kansas and to have the defendants declared to hold the land in trust for the plaintiff. The facts of that case are very similar to those in the present case, except that the statutes of Kansas do not provide for a judicial foreclosure, as in California. The Kansas statutes authorize certain officers, upon the default of a purchaser of its lands, to publish certain notices and make certain entries in the public records, whereupon a forfeiture takes place, so that, instead of the court there having under consideration the question of the effect of a judgment of a court of the state, the forfeiture was one that had arisen under a statute without judicial action. The court, commenting upon the facts in that case, said:

"The case of *Burgess v. Hixon*, 75 Kan. 201, 88 Pac. 1076, was a case wherein this same appellant was seeking to eject Hixon from certain school lands which had been purchased from the state by one Walton in the same manner as the lands in controversy herein had been purchased by Adair. Burgess was the assignee of Walton. The language of the court in the case cited is very appropriate as characterizing the position of Burgess in the present case, and we repeat it here, as follows: 'Of course Walton knew from the instant of his first default that his rights were subject to forfeiture. He knew that, upon his failure to pay, it was the imperative duty of the county clerk to put into operation, and of the sheriff to carry out, forfeiture proceedings. He was bound to anticipate and to expect that the law would be followed, and the record which was in fact made was ample to give him information that the state had undertaken to terminate his rights, and that the officials, having authority in the matter, construed what was done to amount to a restoration of the land to the public domain.' It sufficiently appears from the record that the lands in question were of a speculative value, and appellant does not seem to have had sufficient interest in the same for three years to pay any of the installments of interest, or to ascertain, from the many sources of information open to him, the condition of the title. After having had actual notice of the forfeiture, he delayed more than a year before commencing his action in the state court, and then, after that action had been pending for two years, he dismissed it and commenced the present action. In the meantime appellees had gone into possession of the land and made lasting and valuable improvements. It is true appellant in his bill offers to allow appellees to receive credit by deducting the value of the improvements from the rents and profits claimed by appellant, but we do not think appellees in equity owe appellant any rents and profits."

The decree of the lower court, dismissing the bill on demurrer for want of equity, was accordingly affirmed by the appellate court.

The facts alleged by the bill of complaint in the present case, invoking the equitable powers of the court, are not nearly so strong as they were in the case cited. We conclude that in no aspect does the complaint state a case for the interposition of a court of equity.

The decree of the court below is affirmed.

In re NATIONAL PRESSED BRICK CO.

NEWTON v. MICHIGAN CHEMICAL CO. et al.

(Circuit Court of Appeals, Sixth Circuit. April 16, 1914.)

No. 2471.

1. BANKRUPTCY (§ 463*)—APPEAL—RETURN—FILING—TIME—EXTENSIONS—RULES.

Where the filing of a return was due February 8th, and an order of extension recited that it was "duly granted" on that day, but had been inadvertently omitted from that day's record and was not actually entered until February 10th, it would be conclusively presumed on appeal that the recital expressed the truth, and hence a motion to dismiss could not be granted on the ground that the extension was not made in time.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 926; Dec. Dig. § 463.*]

2. CORPORATIONS (§ 80*) — SUBSCRIPTION — FRAUDULENT REPRESENTATIONS — WAIVER OF FRAUD.

Where claimant was induced to purchase stock in a bankrupt corporation by fraudulent representations of a promoter, but with knowledge of the fraud claimant paid an installment on the stock and participated in the management of the corporation's affairs and only sought to rescind after he became convinced that it could not proceed with its activities at a commercial profit, the fraud was waived.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 244, 246-264, 1407, 1407½; Dec. Dig. § 80.*]

3. CORPORATIONS (§ 80*)—STOCK SUBSCRIPTION—RESCISSION—FRAUD.

Where claimant was induced to subscribe for stock in a corporation organized to manufacture binder-process sand brick, a representation by a promoter, who induced claimant to subscribe, that the brick could be made at \$8 a thousand and were salable at \$22, was a mere expression of opinion and could not be made the basis of fraud authorizing a rescission of the subscription.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 244, 246-264, 1407, 1407½; Dec. Dig. § 80.*]

4. BANKRUPTCY (§ 457*)—ALLOWANCE OF CLAIMS—CREDITOR'S RIGHT OF APPEAL.

A bankrupt's creditor under proper circumstances may be permitted to appeal from an order allowing claims against the bankrupt's estate when the trustee has refused to do so.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 917; Dec. Dig. § 457.*]

5. BANKRUPTCY (§ 457*)—ADMINISTRATION OF ESTATE—ALLOWANCE OF CLAIMS—APPEAL.

A creditor of a bankrupt is not entitled to appeal from an order allowing other claims against the bankrupt's estate, where the assets of the estate are amply sufficient to pay all scheduled claims.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 917; Dec. Dig. § 457.*]

6. BANKRUPTCY (§ 457*)—CLAIMS—ALLOWANCE—RIGHT OF APPEAL—STATUS OF APPELLANT.

Where claimant, who was a stockholder in a bankrupt corporation sought to rescind his subscription and recover the amount paid from the estate, and during the litigation constantly claimed to occupy the position of a creditor and disclaimed the status of a stockholder, he could not appeal from an order allowing other claims against the estate in the capacities both of stockholder and creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 917; Dec. Dig. § 457.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

In the matter of bankruptcy proceedings of the National Pressed Brick Company. From an order of the District Court confirming the findings of the referee, disallowing the claim of Thomas W. Newton, and allowing the claims of the Michigan Chemical Company and others, Newton appeals. Affirmed as to the disallowance of Newton's claim, and appeal dismissed as to the others.

The case is here on appeal from an order of the District Court confirming the findings of the referee in bankruptcy which disallowed appellant's claim, and allowed certain other claims, against the estate of the bankrupt.

In December, 1909, Haskin, Newell, and Nicol, organized, under the laws of Arizona, a corporation called the Michigan Chemical Company. This company was never authorized to do business in Michigan. It had as its principal asset a secret formula for making a binder for the manufacture of pressed sand brick. Later the three parties named, who had meanwhile interested several others procured the incorporation, also under the statutes of Arizona, of the present bankrupt corporation; and on April 12, 1910, the interested parties, who included appellant, held the first stockholders' meeting at Detroit, Mich. The organizers of the chemical company seem to have intended that that company should not manufacture brick, but should merely give rights to use the formula to brick-manufacturing companies such as the present bankrupt corporation, which it was intended should have the exclusive right to use the binder in question for manufacturing purposes in Wayne county, Mich.; the binder to be actually manufactured by the chemical company. Of its \$100,000 capital stock the brick company issued \$77,170 (par), of which amount \$31,670 (par) was sold for cash at prices ranging from 50 to 90 per cent. of par value, and aggregating \$18,236.01; \$41,000 (par) was used at an agreed price of 50 cents on the dollar in the purchase of brick-plant machinery, real estate, and buildings; the remaining \$4,500 seems to have been sold at par. At the time of the first meeting of stockholders, appellant verbally agreed to take \$5,000 (par) of stock at 80 cents. He paid, April 16, 1910, \$2,400, and on August 1st following \$1,000. The remainder of his subscription was never paid. The brick company purchased a manufacturing site near Detroit, erected a building thereon, purchased certain brick-making machinery, and attempted to manufacture brick. The enterprise was unsuccessful. In February, 1912, appellant filed his bill on the chancery side of the circuit court for Wayne county, Mich., for the rescission of his stock purchase, on the ground of fraudulent representations inducing the same. Immediately thereafter, and as the result thereof, the corporation went into voluntary bankruptcy. The chancery suit is still pending. Appellant filed against the bankrupt estate a claim for the \$3,400 paid for his stock, alleging that his purchase was in consequence of fraudulent representations made by Haskin, the principal fraud alleged being that Haskin showed appellant samples of brick alleged to have been made under the process in question; represented that the brick company had the exclusive right

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to the use of the secret process mentioned; that the chemical company would, under contract theretofore made, furnish to the brick company the binder for the use in brick manufacture at a price that would enable the brick company to manufacture at a maximum cost of \$8 per thousand brick equal to the sample shown by Haskin, and equal in appearance and quality to face brick sold in Detroit at \$22 per thousand and upwards; also, that the brick company had sufficient funds on hand with which to build a plant that would turn out 15,000 to 20,000 of such brick per day, at the maximum cost stated.

The referee found as a fact that before appellant paid for any of his stock, and before the organization of the brick company was completed, Haskin made to appellant the claimed representation as to the number of brick per day that the company could make, and their manufacturing cost and selling value respectively; also, that the company had machinery and sufficient capital to erect and equip a plant for making brick; and that this latter representation was untrue. He also found that brick-making machinery which the promoters of the chemical company had contracted to purchase at \$5,500 was sold to the brick company for that amount in cash, plus \$25,000 par value of the stock of the brick company (which was part of the \$41,000 stock before referred to, as used for purchase of real estate, machinery, and buildings), which was reckoned at 50 cents on the dollar, and that this machinery deal was unknown to appellant when he paid the first \$2,400 on his stock purchase, but that he had full knowledge of it before he made the second payment of \$1,000; also, that there was no testimony showing that Haskin did not believe the statements made by him to be true, and that they appeared to be the usual representations made with reference to many new lines of untried manufacturing enterprises; also, that the evidence did not sufficiently show that Haskin did not expect and believe that the machinery would do all that was represented. The referee further found that appellant was at the Detroit plant a portion of the time during the erection of the building and the installation of the machinery; that as early as August, 1910, and before the second payment of \$1,000 on the stock purchase was made, he learned fully of the details respecting the purchase of the machinery and its sale to the brick company, and partly because of such knowledge refused to take up and pay for the remaining \$750 (par) of stock; also, that during the last three months of the year 1910 appellant became fully informed of all the details of the organization and promotion of the bankrupt corporation; and in January or February, 1911, employed an attorney who, with appellant, examined all the records of the proceedings of the corporation, which disclosed to appellant substantially all the facts he claimed not to know when he purchased, or agreed to purchase, his stock; that after obtaining such full knowledge, and "after it had become probable, though perhaps not entirely certain, that the bankrupt corporation could not make brick with the machinery," appellant attended the annual stockholders' meeting in April, 1911, and took part as a stockholder in the election of directors; that appellant also attended stockholders' meetings in October and November, 1911, at one of which meetings he took part as a stockholder, in connection with resolutions providing for changing the plant so as to manufacture brick from shale instead of sand; that appellant attended a later stockholders' meeting in January, 1912, and took part in connection with questions relating to a sale of the plant and assets of the corporation.

The referee found as a fact that the corporation was solvent when the bankruptcy proceedings were begun, and that there were still funds at the time of the report in the hands of the trustee sufficient to pay in full all claims scheduled, plus the costs and expenses of administration, and leave some funds to be returned to the stockholders.

The referee was of opinion: (a) That Haskin was not authorized to represent the brick company in making the representations in question; and (b) that whatever right of rescission existed was lost by appellant's election to stand as a stockholder and not as a creditor; and, without expressing an opinion as to whether appellant had a right to rescind as against the corporation or the individuals alleged to have defrauded him, held that appellant had not a provable claim in bankruptcy.

The claim of the chemical company was allowed at \$1,240.31 (for unpaid price of brick machinery sold), on condition that it surrender the full \$25,000 of stock issued in connection with the machinery purchase. The claim of Mallow Bros., which was largely for material used in building the brick company plant, was allowed at \$1,681.55, being the amount remaining after allowing the agreed price of \$5,000 for \$10,000 par value of brick company stock received by the builders, which also was part of the \$41,000 stock item before referred to. The remaining claims allowed, which amounted to \$3,000, do not require specific mention.

The District Court confirmed the finding of the referee.

F. H. Aldrich, of Detroit, Mich., for appellant.

E. T. Berger and Allan Campbell, both of Detroit, Mich. (E. R. Milburn and Stanton Clarke, both of Detroit, Mich., of counsel), for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge (after stating the facts as above). [1] We are asked to dismiss the appeal from the disallowance of the Newton claim because return was not made by February 8th, which was the last day therefor in the absence of extension. Rule 18 of this court authorizes the judge who signed the citation to "enlarge the time for return at or before its expiration." The order of extension was not actually entered until February 10th, but the order expressly recites that it was "duly granted" on February 8th, and had "been inadvertently omitted from the record of that day." We must conclusively presume that this recital expresses the truth, and the order must thus be treated as if made and entered on February 8th. The motion to dismiss must accordingly be denied.

[2] Turning to the merits: The representations that the brick company had machinery and sufficient capital to operate were material; and we shall assume, for the purposes of this opinion, that the brick company was sufficiently organized to make Haskin's representations binding upon it with respect to a transaction of which the brick company has had the benefit. The referee and the court have found, however, that appellant had early knowledge of the falsity of the representations we are considering, and that with such knowledge he elected to maintain his status as a stockholder, participating as such until just before the bankruptcy, which seems to have been precipitated by the bill filed by appellant to rescind his purchase. These concurrent findings of the referee and judge must be accepted unless clearly wrong. *Haines v. Bank* (C. C. A. 6th Cir.) 203 Fed. at page 228, 121 C. C. A. 431; *Western Transit Co. v. Davidson Steamship Co.*, 212 Fed. 696. 129 C. C. A. 232, decided by this court March 13th last. The rule announced by these cases is especially applicable where, as is the case here, the entire testimony was taken before the referee. *Wabash Ry. Co. v. Compton* (C. C. A. 6th Cir.) 172 Fed. 17, 21, 96 C. C. A. 603. We find nothing seriously impugning the correctness of these concurrent findings, unless in respects not deemed controlling. True, we are cited to no testimony that appellant's employment of attorney was as early as February, 1911; and the record is perhaps more consistent

with the conclusion that he did not actually attend the stockholders' meeting at which the action was taken to change the process of manufacture from sand to shale; and, while he attended the meeting at which it was decided to close down the plant and sell out the assets, the record does not show how he voted, and he denies having done so. But these discrepancies, so far as they are such, are not controlling. Appellant knew in September, 1910, about the sales of stock below par and what each stock purchaser had paid; also, that the brick-making machinery was secondhand; that it had been bought for \$5,500, and was being resold to the brick company for that amount plus \$25,000 par of brick company stock; also, that the building was to be paid for largely in stock. He seems to have cared little for these matters, and if the company had proved able to make brick commercially and profitably he would have been satisfied. There was no representation that the samples of brick shown were made by this machinery. The reason he failed to take the remaining \$750 par of stock was that the company did not succeed in making brick; and he admits he knew he was foolish to pay the last thousand dollars, which was paid in August, 1910. It is fairly open to inference that, if appellant was not actually convinced, he had at least good reason to believe before January, 1911, that the company could not with commercial profit make sand brick by the process involved. He at least knew of the action had November 4, 1911, to change to the shale process; for as to meetings he did not personally attend he seems to have been kept advised by Dr. Cronin, his fellow townsman and family physician. The conclusion is irresistible that for a year after he had reason to believe the company was not likely to make good he participated, as stockholder, in the carrying on of the business. Meanwhile, it is fair to presume, the net assets of the company became of less distributive value than when bankruptcy intervened. To now permit rescission would be to allow appellant to obtain a larger share of the assets than other stockholders, some, at least, of whom appear to have been as deserving of indulgence as he. We think as to the representations now in question he must be held to have elected to maintain his status as stockholder. The rule is well settled that any decisive act of a party with knowledge of his rights and of the facts determines his election in case of inconsistent remedies; and that the exercise by a buyer of acts of ownership over property bought which are inconsistent with a right to rescind the contract constitutes a waiver of such right. See *Roseboom v. Corbitt*, 196 Fed. 627, 633-635, 116 C. C. A. 301, decided by this court, where a number of authorities are collected.

[3] The representation that by the binder process brick could be made at \$8 per thousand, salable at \$22, must be regarded as a mere expression of opinion. No criticism is made upon the merits of the brick actually shown by Haskin to appellant, and there is no doubt that the samples so shown had been actually made by Haskin, either alone or with his associates, under the formula, at a brick-machining plant. There was no representation that the manufacture of brick under this process had been commercially carried on; the accuracy of the representation as to cost, profit, and salability could only be determined

by a testing out through actual commercial manufacture, and appellant must, in the nature of things, have so known. We are not convinced that Haskin did not expect and believe that the manufacture would be commercially profitable.

The representation that the brick company had the exclusive right to use the secret process, although not strictly accurate, could not well have prejudiced appellant. It seems to have been understood that the chemical company was to manufacture the binder for the brick company for a price to be paid therefor. It does not seem to have been represented or expected that the brick company was to have control of such binder manufacture, or that its officers and stockholders were necessarily to know the formula. True, it turns out that there had been no written contract between the chemical company and the brick company respecting the use of the binder, and the price for its manufacture had not been fixed; but no controversy seems to have arisen over this subject, and it is not claimed, as we understand the record, that the disappointment regarding, and subsequent abandonment of, the binder process was caused, or in any way contributed to, by any lack of actual ownership of the formula as between the chemical company and the brick company, or by reason of the terms on which the chemical company manufactured or was willing to manufacture the binder for the brick company. Indeed, representatives of the chemical company assert (without contradiction so far as we can find) that an exclusive right to the benefit of the formula in Wayne county, or at least Detroit, was intended to be passed to the brick company; and the binder, so far as used by the brick company, seems to have been furnished by the chemical company at no more than cost. The abandonment of that method of manufacture was due only to the failure of the process to work commercially; in other words, to make brick that would hold together. Appellant, apparently, expressed the situation, when he said:

"I don't know, only this much, if you will allow me to say it, that I think the doctor [Haskin] fell down on his proposition. I don't think he could make the brick. He might make a few in a kind of a laboratory test, but to make it by the wholesale, I don't think he could make them."

The investment was naturally a serious disappointment to appellant, as it doubtless was to several other investors. But upon the case presented, we think appellant's claimed right of recovery of the price paid for his stock was properly denied.

[4] Motion is made to dismiss the appeal from the allowance of the other claims because not taken by the trustee, and for lack of evidence that that officer had refused a request to appeal. A creditor may, under proper circumstances, be permitted to take an appeal when the trustee has refused to do so. *Ohio Valley Bank Co. v. Mack* (C. C. A. 6th Cir.) 163 Fed. 155, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184. See, also, *In re Roadarmour* (C. C. A. 6th Cir.) 177 Fed. 379, 380, 100 C. C. A. 611. While the record returned to this court contains, we think, no competent and sufficient evidence of a demand upon, and refusal by, the trustee to appeal, or that the referee refused to direct appeal by the trustee, yet we should hesitate to ignore the undisputed affidavits

filed in opposition to the motion to dismiss, which show such express demand upon and refusal by the trustee, and a refusal by the referee, following the appeal, to direct the trustee to enter his appearance and proceed with the appeal.

[5] The referee has found, however, as a fact that the assets of the bankrupt estate are amply sufficient (net) to pay all claims scheduled; and, if this is so, appellant had no right or occasion, as a creditor merely, to appeal from the allowance of the other claims; for in the capacity of creditor he had no legal interest in such claims. The final determination that he is not a creditor effectually deprives him of such interest, and renders immaterial the criticisms urged against the correctness of the referee's finding of solvency. The appeal from the allowance of such other claims should therefore be dismissed, unless appellant is properly here as a stockholder also.

[6] But assuming that a mere stockholder in a bankrupt corporation has a right to appeal from an order allowing creditors' claims, otherwise than through the trustee or in his name by the sanction of the court (a question we have no occasion to pass upon), it is enough to say that appellant has, in the bankruptcy proceeding, continuously disclaimed the status of stockholder; and, as we interpret the record, has, as a creditor only, claimed and been granted an appeal from the allowance of claims other than his own, which claims he was specially interested in defeating if the bankrupt was insolvent; as their allowance would, in such case, reduce the amount of his recovery as a creditor. Appellant's claimed status of creditor is absolutely inconsistent with a stockholding relation. He could not at the same time have maintained appeals in both capacities.

The appeal from the allowance of the claims of others than appellant will therefore be dismissed. The order disallowing appellant's claim is affirmed, with costs, but without prejudice to such right of action, if any, as appellant may have against any of the individual parties on account of such stock purchase, or to such proceedings, if any, as the trustee may be advised to take on account of sales of corporate stock at less than par. We must not be understood as intimating an opinion whether or not such rights of action exist.

WINTER et al. v. BOSTWICK et al.

(Circuit Court of Appeals, Seventh Circuit. December 8, 1913.)

No. 1830.

1. APPEAL AND ERROR (§ 242*) — NECESSITY OF RULING AND OBJECTIONS IN TRIAL COURT.

Where complainants moved to amend their bill, but the record did not show that any ruling was made on the motion that complainants asked for a ruling or assigned error on the ground that the court did not rule, nor because the amendment was not allowed, their right to amend could not be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1417-1425; Dec. Dig. § 242.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. APPEAL AND ERROR (§ 1012*)—FINDINGS—REVIEW.

A finding on an issue of fact will not be disturbed on appeal unless it is clearly against the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3990-3992; Dec. Dig. § 1012.*]

3. CANCELLATION OF INSTRUMENTS (§ 43*)—CONTRACT TO PURCHASE—RESCISSION—NOTICE—BILL.

Where a notice of intent to rescind a contract for the purchase of mining property alleged as a ground for rescission the vendor's fraudulent representations as to the title, and the bill to enforce such rescission expressly followed the notice and in terms limited the claim for relief to the charge of fraud, complainants could not successfully enforce a right to rescind because of failure of the vendor's title.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 96-99; Dec. Dig. § 43.*]

Appeal from the Circuit Court of the United States for the Western District of Wisconsin; A. L. Sanborn, Judge.

Action by Joseph H. Winter and another against Joseph L. Bostwick and another, as administrators of the estate of Joseph M. Bostwick, deceased, and others. From a decree in favor of defendants, complainants appeal. Affirmed.

William P. Belden and Young & Bell, all of Ishpeming, Mich., for appellants.

H. L. Butler, of Madison, Wis., George G. Sutherland, of Janesville, Wis., and John M. Olin, of Madison, Wis., for appellees.

Before SEAMAN and KOHLSAAT, Circuit Judges, and LANDIS, District Judge.

LANDIS, District Judge. This appeal is from a decree dismissing a bill for the rescission of a contract for the acquisition by the complainants of mining rights, for the recovery of purchase money paid therefor, and for moneys claimed to have been expended by complainants in the development and operation of the property.

In June, 1907, complainants, citizens of Michigan, entered into negotiations with the individual defendants, citizens of Wisconsin for the property in question, being a zinc mine in Lafayette county, Wis. The negotiations resulted in a contract in writing, of date July 3, 1907, which contract covenanted that the individual defendants were the owners of all the capital stock of the Baxter Mining Company; that that corporation was the owner of a lease, for mining purposes, of the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 29, township 2 N., R. 1 E., which lease was executed by James and Mary Baxter to William F. Palmer, October 14, 1904, and by him assigned to the Baxter Mining Company; that the Baxter Company was also the owner of a sublease, for mining purposes, of the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 29, township 2 N., R. 1 E., executed by the American Lead & Zinc Mining Company to the Baxter Company, and that the Baxter Company was also the owner of certain personal property described, being machinery, equipment, etc., having to do with mining operation.

The contract then provided that the defendants (for considerations

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

hereinafter to be mentioned) granted to complainants "the right to purchase, at their option, the entire capital stock of the Baxter Company at any time prior to April 1, 1908," to the end that said complainants "may thereby become the owners of all the property and rights" above mentioned. "As a consideration of such option," complainants agreed to pay defendants \$10,000 on the execution and delivery of the contract.

It was further provided that, in case the complainants "elect to purchase the capital stock of the Baxter Company under the option herein given," they shall pay defendants, as a consideration therefor, the \$10,000 mentioned above as the first payment, \$40,000 on or before January 1, 1908, and \$50,000 on or before April 1, 1908. It was also agreed that (in the event the complainants should elect to exercise their option to purchase) the defendants should further be entitled to receive \$300,000, and the complainants \$700,000, of the \$1,000,000 capital stock of a corporation to be organized by all the parties, and to which corporation was to be conveyed the property to be acquired by the complainants under the contract.

There are other provisions for the complainants' taking possession on the execution of the contract, for their operation and development of the property, for the safeguarding of the rights of all the parties by the deposit of moneys received from sales of ore, for the keeping of accounts, etc., and it was provided that complainants might cancel the contract at any time by giving ten days' written notice, in which event complainants were to forfeit all amounts paid by them either as purchase price or expended on the property, and all net earnings from operation. Provision was also made for the forfeiture by complainants of all their rights, including all payments made, in case they should fail to perform their obligations to the defendants and continue in default for five days after written notice thereof.

Another provision of the contract was as follows:

"19. The said first parties [defendants] undertake and agree that said Baxter Mining Company is and shall be free from indebtedness, and that the property to be transferred hereunder is unincumbered, and that the title of said Baxter Mining Company to said leases is clear and unimpaired."

Simultaneously with the execution of the contract, complainants made the first payment of \$10,000 and went into possession of the property. The work of operation and development continued therefrom until about ten days preceding January 1, 1908, the date fixed for the second payment. On December 31, 1907, complainants gave defendants written notice that:

They "had elected to and do hereby rescind the contract entered into with you on the third of July, 1907, relating to the Baxter mine property, and that we have filed our bill of complaint in the Circuit Court of the United States for the Western District of Wisconsin, in equity, to declare and establish such rescission and cancellation of said contract, by reason of your false and fraudulent representations which induced us to execute the same, all of which are fully set forth in said bill of complaint."

On the date of this notice the bill was filed. It alleged, in effect, that the complainants had been induced to execute the contract by defendants' false representations as to ore conditions and as to title;

averred that complainants had expended large sums in operating and developing the property, as by the contract they were required to do; set forth their discovery of the fraud, followed by negotiations between the parties, in November and December, for a new agreement to take the place of the one of July 3d; the breaking off of these negotiations; and the service of the notice. Rescission is prayed for.

The specific charge of fraud as to title was that the defendants had represented, in effect, that the Baxter Company's lessor, James Baxter, had a perfect title to the 80 acres covered by his lease to the company, whereas, as alleged, he had record title to but half of that parcel; and that in November, after the contract was executed, certain heirs of one Patrick Whaley, who was Baxter's grantor, had started suit, claiming a three-tenths ownership thereof.

[1] The answer denied all material averments of the bill, and there was a cross-bill, which, however, having been dismissed, need not be considered here. The trial judge found against the complainants on the issue of fraud, both as to the ore conditions and as to title. He also held that complainants were not entitled to a decree for breach of the contract in defendants' failure to furnish a marketable title, basing this ruling on the ground, among others, that the bill and notice of rescission made no claim for relief therefor. After his opinion was announced, and before the decree was entered, complainants filed a "motion to amend" the bill by adding a claim of "right to rescind the contract in reliance upon the rights given complainants by its terms, because of the failure of the title of defendants, who have not a marketable title to said Baxter lease." No ruling appears to have been made on this motion; nor does the court appear to have been asked for a ruling; nor is error assigned on the ground that the court did not rule; nor because the amendment was not allowed, in view of which, although considerable space in the briefs is devoted to an argument on this alleged error, the question is not before us for consideration.

Error is assigned on the holding that the defendants' breach in not furnishing a marketable title was not claimed in the bill and notice, and on the finding that there was no fraudulent representation as to title. Error is not assigned on the finding that there was no fraud in the representations as to ore deposits.

[2] The rule is that a finding of the trial court on an issue of fact will not be disturbed on review, unless the finding is clearly against the weight of the evidence. The record here discloses that, when the question of title was discussed by the parties during the preliminary negotiations and at the time the contract was executed, the defendants' assertions respecting the title were coupled with statements by them that they had been advised by their attorneys that the title was good. No fair reading of the evidence will justify the conclusion that what they said on this subject was, or purported to be, their own independent assertion of fact, as distinguished from a statement of what their attorneys had advised them. And in determining the effect on this question of fraud to be given to paragraph 19 quoted above (the meaning of which, standing alone, is not free from ambiguity), the trial court was not at liberty to disregard the evidence of defendants' state-

ments to complainants as to attorneys' opinions made during the negotiations and when the contract was signed. Moreover, on those occasions, the complainants were accompanied by their attorney, while the defendants had no attorney, and the contract, including paragraph 19, was drawn by the complainants' attorney after he, as well as the complainants, had heard the defendants' statements as to what they had been advised by their attorneys respecting the title.

[3] As to the error alleged on the ruling that the notice and bill did not demand rescission for failure of title, it will be observed the notice is expressly limited to the charge of fraud.

Now, while it may be possible that a complainant's rights will not necessarily be circumscribed within the strict letter of a notice of rescission (which we do not decide), and that his rights are to be ascertained from the bill filed in pursuance to such notice, still it must be apparent that to broaden those rights by this process, beyond the scope of the notice, as declared by its express language, it is at least incumbent on the complainant to tender a bill fairly open to the construction insisted upon. The complaint in this case sets out the representations as to title; avers that except therefor complainants would not have signed the contract without an examination of the title; alleges that complainants believed such representations to be true, and that their confidence in the truth thereof was strengthened by the action of the defendants in the insertion of covenants of warranty, and by the further fact that complainants were informed that defendants were men of integrity and good financial standing. The bill then proceeds:

"Your orators expressly allege, however, that they would not have signed said contract in reliance only upon said covenants of warranty, but that they signed the same because they believed the statements of said defendants heretofore set forth to be true, and that these statements constituted the inducements which led your orators to execute said contract at the time and under the circumstances in which it was executed, as hereinafter set forth."

It is also alleged that some time after the execution of the contract the complainants received the abstract, and that their attorney found that it did not show perfect title in the lessors; that the Whaley suit was begun; that then there were the negotiations for a new agreement, which negotiations came to nought, and further:

"Your orators allege that the execution of said contract [of July 3d] was induced by the false and fraudulent representations so made by the defendants and their agents, and that this fraud vitiates said contract, and that your orators are entitled, for these reasons, to have said contract canceled and rescinded, and that they ought, in equity, to be relieved from the harsh and unjust terms of said agreement. And your orators hereby elect to rescind and repudiate said contract and all liability thereunder, and ask the aid of equity to declare and establish such rescission and to protect the rights of your orators."

It thus appears that, instead of broadening the ground for rescission set out in the notice, the bill expressly follows the notice and in terms limits the claim for relief to the charge of fraud. Nowhere are there any words susceptible to the construction that the complainants had in mind the presentation of a case for failure of title.

We are of opinion, therefore, that error is not well assigned, and the decree of the District Court is affirmed.

D'ARCY v. JACKSON CUSHION SPRING CO.

(Circuit Court of Appeals, Sixth Circuit. January 6, 1914.)

No. 2373.

1. APPEAL AND ERROR (§ 1195*)—DECISION AS LAW OF CASE—PROCEEDINGS AFTER REMAND.

When a case has been once decided by an appellate court and remanded to the lower court, whatever was before the appellate court and disposed of by it is considered as finally settled. The lower court is bound by the decree as the law of the case, must carry it into execution according to the mandate, and cannot grant any further relief as to any matter decided on the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

2. APPEAL AND ERROR (§ 1195*)—DECISION AS LAW OF CASE—PROCEEDINGS AFTER REMAND.

Where the Circuit Court of Appeals, on an appeal in an infringement suit decided that complainant's patent was not infringed, that an injunction against defendant was erroneously granted, and reversed and remanded the case, and such decision necessarily involving the construction and scope of the patent, the lower court was without power, at least without prior permission from the appellate court, to reopen the case for further proof on that question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

3. APPEAL AND ERROR (§ 1195*)—LAW OF CASE.

Every question properly involved upon the appeal, which was determined by the appellate court and constituted a basis for its conclusion upon the ultimate question presented, becomes a part of such law of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

Appeal from the District Court of the United States for the Southern Division of the Eastern District of Michigan; Loyal E. Knappen, Judge.

Suit in equity by Frank P. D'Arcy against the Jackson Cushion Spring Company. Decree for defendant, and complainant appeals. Affirmed.

See, also, 181 Fed. 340, 104 C. C. A. 170.

Chappell & Earl, of Kalamazoo, Mich., for appellant.

L. V. Moulton, of Grand Rapids, Mich., for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and SANFORD, District Judge.

SANFORD, District Judge. This suit was brought by the appellant, Frank P. D'Arcy, against the appellee, the Jackson Cushion Spring Co., for the alleged infringement of letters patent No. 785,410, for improvements in springs, issued to D'Arcy, March 21, 1905, and relating to a wire fastening device for securing spring structures in upholstery construction. The defenses relied on were the invalidity of D'Arcy's patent for want of invention, and non-infringement. After a hearing on the pleadings and proof, an interlocutory decree was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

entered, adjudging that claim 2 of D'Arcy's patent was valid and was infringed by the defendant's fastening device known in the record as Style 3, but was not infringed by its device known as Style 1, ordering a reference to ascertain profits and damages; and enjoining further infringement. From this interlocutory decree the defendant was granted a broad appeal. On hearing the appeal, this court being of the opinion, after an extended consideration of the merits, that claim 2 of D'Arcy's patent was restricted to the form shown and described in his specifications and drawings, and that, although valid when thus restricted, it was not infringed by defendant's Style 3, the only device involved under the appeal, reversed so much of the interlocutory decree as awarded an injunction and remanded the case for further proceedings not inconsistent with the opinion of the court. *Jackson Co. v. D'Arcy* (6th Circ.) 181 Fed. 340, 344, 104 C. C. A. 170; and order modifying mandate.

After this mandate had been filed in the court below the defendant moved for a final decree. The complainant resisted this motion and moved for an order to reopen the case and for leave to take further testimony. On consideration of these motions the court below entered a final decree, denying the complainant's motion to reopen the case for further proof, adjudging that D'Arcy's patent was valid, but had not been infringed by the defendant, and dismissing the bill, with costs. From this decree D'Arcy has again appealed to this court.

1. A preliminary motion made by the appellee to dismiss the appeal was heard with the argument upon the merits. Several grounds of this motion obviously relate to the merits of the appeal. And as the only ground of the motion which was relied on in the argument, relating to the alleged incompleteness and insufficiency of the printed transcript, was met by the appellant by filing at the hearing, with the leave of the court, a complete supplemental transcript, this being done in accordance with a previous stipulation of counsel and without objection on the part of the appellee, the motion to dismiss must be dismissed, without consideration of its merits otherwise.

2. The chief contention of the appellant on the merits of the appeal, is that the court below was in error in denying his motion to reopen the case for further proof; it being, in effect, conceded both in his oral argument and brief, that if there was no error in this regard, the court below, in view of the restricted scope given to claim 2 of D'Arcy's patent in the opinion of this court on the former appeal, correctly held, on the record as it then stood, that there was no infringement by either of the defendant's devices.

In the former opinion of this court it was held that, in view of the prior state of the art, in which D'Arcy was not a pioneer in inventing a wire fastener to secure the parts of spring structures together, but merely devised a new form of accomplishing this result, and in view of the express language of his claim and the description in his specifications, his invention did not extend broadly, as urged, to the use of a wire fastener made in the form of a "double loop," without regard to the functions of its several parts, but was restricted to the form shown and described in his specifications and drawings, with the respective

functions of the arms and bases of the double loop, as therein shown, and limited to the structure therein disclosed. *Jackson Co. v. D'Arcy* (6th Circ.) *supra*, 181 Fed. at page 343, 104 C. C. A. 170.

The complainant, in support of his motion to reopen the case for further proof in the court below, offered certain affidavits in reference to the manner in which both the complainant and the defendant had applied their wire fasteners to the spring structures and testimony given by an agent of the defendant in subsequent litigation between the parties relating to another patent, which, it was urged, would more fully illustrate the true principle of D'Arcy's device, and show that it was of greater importance and entitled to a broader interpretation than it had been accorded in the opinion of this court, and would, under such broader construction, show that his claim was infringed by both of the defendant's devices, Style 1 and Style 3.

The court below was of opinion that, without the previous sanction of this court, it had no authority to reopen the case for further proof in reference to the question of the infringement by Style 3, which had been passed upon by this court; and that, even if it had authority to reopen the proof as to the question of infringement by Style 1, the complainant's application should be denied for the reason that the proffered testimony, when considered in connection with that already in the case, would not justify a different conclusion from that which it had formerly reached as to the construction of the D'Arcy patent, or have any substantial tendency to change its own conclusion that it was not infringed by the defendant's Style 1.

[1, 3] 3. When a case has been once decided by an appellate court and remanded to a lower court, whatever was before the appellate court and disposed of by it, is considered as finally settled. The lower court is bound by the decree as the law of the case, and must carry it into execution according to the mandate; and cannot vary it or examine it then for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. *Sibbald v. United States*, 12 Pet. 488, 492, 9 L. Ed. 1167; *Clark v. Keith*, 106 U. S. 464, 465, 1 Sup. Ct. 568, 27 L. Ed. 302; *In re Sanford Co.*, 160 U. S. 247, 255, 16 Sup. Ct. 291, 40 L. Ed. 414; *Illinois v. Railroad Co.*, 184 U. S. 77, 91, 22 Sup. Ct. 300, 46 L. Ed. 440. And see *Ruggles v. Buckley* (6th Circ.) 192 Fed. 907, 909, 113 C. C. A. 299, and *Kimberly v. Arms* (C. C.) 40 Fed. 548, 551. Thus where the Circuit Court of Appeals has decided, upon an appeal from an interlocutory decree granting an injunction, that the complainant's patent is valid, that the defendant has infringed, and that a perpetual injunction has been properly awarded, there is no power in the lower court, after the case has been remanded, to either dissolve, modify or suspend the injunction. *Bissell Co. v. Goshen Co.* (6th Circ.) 72 Fed. 545, 560, 19 C. C. A. 25. The opinion delivered by the appellate court at the time of rendering its decree, may be consulted to determine what was intended by its mandate. *In re Sanford Co.*, *supra*, 160 U. S. at page 256, 16 Sup. Ct. 291, 40 L. Ed. 414, and cases therein cited. And every question

properly involved upon the appeal, which is determined by the appellate court and constitutes, in part at least, the basis for its conclusion upon the ultimate question presented, becomes a part of the law of the case controlling the lower court in its subsequent proceedings. Thus in a suit upon a contract, while the precise question for review before this court was whether it was error to have taken the case from the jury, nevertheless, as the question whether the evidence tended to show any contract properly involved the question of the character and extent of the contract, and the finding of this court upon the latter question constituted, in part at least, the basis for its conclusion upon the former, such finding became part of the law of the case in the trial court in the new trial which was directed. *Chesapeake Co. v. McKell* (6th Circ.) 209 Fed. 514, 126 C. C. A. 336.

[2] In considering, on the former appeal in the present case, the question whether the defendant had been rightly enjoined from infringing claim 2 of the D'Arcy patent by its Style 3, the question of the construction and scope of this claim of the D'Arcy patent was directly and properly involved in determining whether or not it had been infringed by this style. Therefore, in the light of the principles above stated, we think it clear that the matters determined by this court as to the construction and scope of this claim and its non-infringement by Style 3, which, as shown by the opinion, constituted the basis for the conclusion reached in reference to the injunction, became a part of the law of the case for the guidance of the lower court in the further proceedings for which the case was remanded. And we therefore conclude that the trial court correctly held that it was without power, in the absence at least of prior permission from this court, to reopen the case for further proof as to the scope of the D'Arcy patent and its infringement by Style 3. Furthermore, we may add, the additional testimony proffered by the complainant had no substantial tendency, in connection with the other facts appearing in the record, to show that a wrong conclusion had been reached upon these questions in the former opinion of this court, or to lead to any different result. We accordingly find no error in the action of the court below in declining to reopen the case for further proof in the matter of infringement by defendant's Style 3.

4. A different question is, however, presented as to reopening the case for further proof in the matter of infringement by defendant's Style 1. As the interlocutory decree was in favor of the defendant upon this branch of the case, the question of the infringement of the D'Arcy patent by defendant's Style 1 was not brought before this court by the former appeal, and was not considered by it. This court did, however, upon the defendant's appeal, in reaching its conclusion as to non-infringement by Style 3, consider and determine, on the merits, the underlying question as to the scope of the complainant's patent which was necessarily involved in determining as to its infringement by either Style 1 or Style 3. We do not now decide, however, whether, in view of the authorities above cited, the determination of this question by this court, as shown by its former opinion, in reaching its conclusion in reference to enjoining infringement by Style 3, should

be held to have become the law of the case in so far as the trial court was concerned, in reference also to infringement by Style 1, so that, after the case had been remanded, it was without power, at least without prior leave from this court, to hear any further evidence bearing upon the scope of the D'Arcy patent as it had been determined by this court; it being unnecessary to now determine this question, since the appellant has, by its counsel, stated in argument that the matter of infringement by defendant's Style 1 is of such little practical importance that it does not desire to have the case remanded on the question of infringement by this style, unless it is also remanded for the taking of further proof as to infringement by Style 3.

Furthermore, we may add, we entirely agree with Judge Knappen's conclusion that the additional testimony proffered—little of which appears to have been newly discovered—had, in connection with that already in the case, no substantial tendency to show that a wrong conclusion had been reached by the trial court, on the interlocutory hearing upon the pleadings and proof, as to the non-infringement of the D'Arcy patent by defendant's Style 1, and would not have justified a different conclusion upon that question. So that even if it be assumed that, if newly discovered evidence of a material character had been proffered upon this question, the trial court would have been authorized, in its discretion, to reopen the interlocutory decree for further proof upon this point, we are clearly of opinion that there was, in view of the character of the testimony proffered, no abuse of discretion in the action of the court below, and that, on the contrary, it correctly refused, in the exercise of a sound discretion, to reopen the proof upon this branch of the case.

5. We find no error in the decree of the court below. It will accordingly be affirmed, with costs.

STANDARD PLUNGER ELEVATOR CO. v. STOKES et al.

(Circuit Court of Appeals, Second Circuit. February 10, 1914.)

No. 156.

1. MASTER AND SERVANT (§ 62*)—INVENTIONS OR DISCOVERIES—CONSTRUCTION OF CONTRACT.

A contract between parties who were about to acquire a corporation and a party who agreed to enter its employment when acquired in the business of manufacturing and selling elevators, elevator machinery, and kindred appliances, after providing for the assignment of the employé's interest in a valve and starting plug and the patent therefor, and that all inventions, ideas, and suggestions made by the employé during the period of employment with relation to such valve and appurtenances, and all inventions of elevator valves, plugs, methods of control, and valve appliances, and machinery for manufacturing them, should be the property of the corporation, provided that the employé thereby granted to the corporation the exclusive license to use all other future patents and inventions devised or acquired by him with relation to elevators and their appliances not otherwise provided for upon payment of a specified royalty; the term of the license to commence when the corporation commenced business.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Held that, as the contract evidently contemplated some interim of time between its execution and the acquisition of the corporation and consequent employment, this last provision should be construed to apply to inventions conceived during such interim, and should not be given the extremely harsh and possibly unconscionable construction that it covered all inventions indefinitely, though conceived long after the employment had ceased, especially as the term of a license for such an invention could not commence when the corporation commenced business.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 71; Dec. Dig. § 62.*]

Right to inventions as between employer and employé, see note to Pressed Steel Car Co. v. Hansen, 71 C. C. A. 221.]

2. MASTER AND SERVANT (§ 62*)—INVENTIONS OR DISCOVERIES—CONSTRUCTION OF CONTRACT.

A contract of employment, by which the employé assigned his rights in a plunger elevator valve and starting plug invented by him, which provided that all inventions and improvements made and patents obtained by him during the employment with relation to such valve and its appurtenances, including present starting plug or method of elevator control and all inventions of elevator valves, plugs, or methods of elevator control and value appliances and machinery for manufacturing such inventions, should be the property of the employer, was not restricted to inventions and improvements relating to the particular valve and starting plug already invented, but covered any invention or improvement relating to a method of plunger elevator control.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 71; Dec. Dig. § 62.*]

3. COSTS (§ 230*)—ON APPEAL—NEITHER PARTY SUCCESSFUL.

Where both parties appealed and neither wholly succeeded, no costs would be allowed.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 869-876; Dec. Dig. § 230.*]

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon cross-appeals from a decree of the District Court, Southern District of New York, in a suit for specific performance of contracts to transfer to complainant certain patents, applications, and inventions. The main contract, which is all that need be here discussed, is dated September 13, 1902. It is a contract of employment between Larson, party of the first part, and Hoyt, Woodin, Stokes, and Jones, parties of the second part. This contract was assigned to complainant. The defendants named in the bill are Stokes, Jones, Larson (the employé and inventor of all the patents except one which is covered by a similar contract with Jones), Wetherill, and the Greeley Square Hotel Company. No decree was made against the Hotel Company; Larson and Wetherill being nonresidents, the bill was dismissed as to them. The patents of Larson with which the bill is concerned were issued to Stokes, Jones, and Larson as assignees of patentee.

The contract was first considered and construed by Judge Ward in a suit on patent No. 899,224, upon motion for preliminary injunction (opinion not reported). Upon appeal from his decision this court (200 Fed. 766, 119 C. C. A. 246) disposed of that case without expressing any opinion as to the construction of the patent. In another suit the same contract was discussed by Judge Mayer (196 Fed. 47), who concurred with Judge Ward. In the suit now here on appeal Judge Holt followed Judges Ward and Mayer in their construction of the contract. The whole contract need not be recited, except for the passages which will be quoted in the opinion below; it is of the same general character as other contracts for the employment of persons in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

practice of an art, with the proviso that whatever patentable advances in such art may be worked out by them while in such employ shall belong to the employer.

L. W. Southgate, of New York City, for appellants.

C. V. Edwards and Alexander T. Mason, both of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. [1] We find nothing difficult or obscure in this contract. When it was executed the parties of the second part were "about to acquire" a certain corporation and the party of the first part agreed to enter the employment of the corporation when it was acquired. The contract is dated September 13, 1902; Larson testified that the corporation began business and he entered their employ about January 1, 1903; other witnesses say it was some time in September, 1902, but concededly it was subsequent to the execution of the contract and the language of the contract plainly contemplates the existence of some interim of time, long or short, between its execution and the acquisition of the corporation and consequent employment of Larson. The contract also contemplated another period of time, beginning necessarily subsequent to the first period, viz., the term of employment, extending from the day Larson should enter the employ of the acquired corporation for five years and any renewals thereof.

The business contemplated by the contract and in which Larson was to be employed was the "manufacturing and selling elevators of the plunger type, elevator machinery, and kindred appliances." The contract also recites the desire of the parties of the second part to acquire, from Larson, all his patents, patent rights, letters patent acquired and to be acquired, and inventions of a certain valve applicable to elevators of the "plunger" type and a certain starting plug or method of elevator control.

Provision was carefully and exhaustively made for turning over Larson's inventions, etc. The employé (Larson)—

"expressly agrees that he will not at any time while in such employ furnish any ideas, inventions, or suggestions with reference to said valve and its appurtenances to any person or persons or corporation except to the employers and the corporation to be organized by them as aforesaid, and that all such inventions or ideas during said period shall be the property of said corporation; that he will not leave such employ until its termination unless sooner discharged for good cause; and that all inventions, improvements, ideas, and suggestions made by him and patents obtained by him severally or jointly with any other person or persons during the entire period of his said employment, and any written renewal thereof made by him with said corporation, with relation to said valve and its appurtenances, including present starting plug, or method of elevator control, and all inventions of elevator valves, plugs, or methods of elevator control and valve appliances, and to machinery for manufacturing the same, are and shall be the sole property of said corporation, free from any legal or equitable title of the employé, and that all necessary documents for perfecting such title shall be executed by the employé and delivered to said corporation on demand."

Analyzing this part of the contract, we find it provides that:

(1) During his employment, Larson shall not furnish any ideas, in-

ventions, or suggestions in reference to a certain valve and appurtenances to any outsider.

(2) All inventions or ideas touching valve, etc., which may emanate from Larson during the period of employment, shall be the property of the corporation.

(3) All inventions, ideas, and suggestions made by him, during the period of employment, with relation to (a) said valve and appurtenances; (b) all elevator valves, plugs, methods of control, and valve appliances; (c) machinery for manufacturing the same—shall be the sole property of the corporation, and Larson will perfect its title by executing all necessary documents.

These clauses most carefully provided for everything in the way of invention and improvement, relating to the business Larson was to be employed in, which he might discover while he was thus employed. It appears, however, that before he signed the contract he had patents or applications for a valve and starting plug. These, not having been discovered during employment, were not covered by the clauses above quoted. Therefore the following additional paragraph was inserted:

"The employ  hereby assigns to the employers, in consideration of the premises, all of his right, title, and interest in and to said valve and starting plug, and the patent rights and letters patent to be issued therefor, provided that, as soon as said corporation commences business, the sum of \$5,100 be paid to the employ  by said corporation."

This money was paid and assignments duly executed.

After some other details, which need not be referred to, the contract provides as follows:

"The employ  also hereby grants to the said corporation the exclusive license to use all other future patents and inventions devised or acquired by him with relation to elevators and their appliances, or capable of use in connection therewith, and not above provided for upon payment to him of a royalty of \$1 for each several invention so made or acquired by him, provided, however, that the term of said license shall commence when said corporation commences business, and shall terminate if and when said Hoyt and Woodin cease to be directors of the said corporation."

Complainant contends that this clause should be given the broad construction of which its text is susceptible, and that under it all inventions of the kind referred to, the first conception of which came to Larson only after his employment had ceased practically, pass to complainant as exclusive licensee. As thus construed, the clause would be an extremely harsh one; it might even be found unconscionable, for it mortgages his inventive faculties to complainant for an indefinite period subsequent to employment, in relation not only to elevators of the "plunger" type, but to steam and electric elevators as well. So harsh a construction should not be given to the contract, unless its language precludes any more reasonable construction.

It seems to us that the contract is susceptible of a very simple and more reasonable interpretation.

By the other clauses the corporation got: (a) All Larson had invented down to the date of signing the contract. (b) All he might invent during the period that might elapse between the time his employment actually began and the time it terminated.

But, as already pointed out, it was contemplated that between the date of signing the contract and the date of acquisition of the corporation and employment of Larson there would be a period of time which might last for days or months. During that period Larson might conceive some new idea as to an improvement, might try it out sufficiently to satisfy himself it was practicable, and might embody it in an application, and perhaps a model, and file his application, all before his employment actually began. This might turn out to be a very valuable invention, for which a patent might thereafter issue. Within the same period he might also acquire some other patent relating to the same subject. But under the text of the earlier clauses of the contract he would not be obligated to transfer either of these to the corporation. It was to meet just this difficulty that the clause now under consideration was inserted. All inventive ideas, applications, and patents originating within that period would be covered by this clause, which provides for such ideas devised by him and patents acquired by him in a "future" which began to run the moment the contract was signed. That it was not contemplated that this "future" period of invention and acquisition should extend indefinitely is manifest from the clause which says the term of the license shall commence when the corporation commences business, a date which would presumably be coincident with the date when his employment began.

It would be impossible to make the term of license begin when the corporation commences business, in the case of an invention which was not conceived until months or years after such business had in fact commenced.

[2] We are satisfied that complainant will be accorded all the relief to which it is entitled under this contract, if all the inventions or improvements of Larson originating during the period of employment are assigned to it. We think that the clause covering such inventions and improvements should not be so narrowly construed as to restrict them to such only as relate to the particular valve and starting plug which Larson had devised before the contract was signed. It must have been the intention of the parties to provide for improvements in the particular art in which they undertook to engage, and any invention or improvement which may fairly be found to relate to a method of plunger elevator control would seem to be within the clause.

We concur, therefore, with Judge Holt in so much of the decree as requires an assignment of the patents enumerated in paragraph 15 of the bill, except 877,572, which relates, not at all to elevator control, but to drilling holes in the ground, for oil wells, artesian wells, and wells for plunger elevators.

We think, however, that complainant was entitled to a decree which would allow him to show, if he could, that there are patents for other devices than those enumerated in paragraph 15 of the bill, which were conceived of by Larson during his period of employment.

[3] With such modification the decree is affirmed. Since both sides appealed and neither has wholly succeeded, there will be no costs of this appeal.

E. H. TAYLOR, JR., & SONS, Inc., v. FIRST NAT. BANK OF AURORA, IND.

(Circuit Court of Appeals, Sixth Circuit. April 7, 1914.)

No. 2427.

1. **BILLS AND NOTES (§ 434*)—PAYMENT—RECOVERY.**

Where defendant, the maker of a note, voluntarily paid the same with knowledge of an alleged defense of failure of consideration, the payment was voluntary, and it was not entitled to claim the benefit of such payment as a set-off against other notes unpaid.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1268-1274; Dec. Dig. § 434.*]

2. **NOTICE (§ 5*)—LAWS OF FOREIGN STATE.**

Where defendant, a Kentucky corporation, for many years had been doing business with a cooperage company and plaintiff bank in Indiana, defendant was charged with notice of the statutes of that state (Burns' Ann. St. 1908, §§ 9071, 9072, 9073), under which a transferee of notes made therein under specified circumstances takes no better title than his transferor.

[Ed. Note.—For other cases, see Notice, Cent. Dig. §§ 3, 8-12; Dec. Dig. § 5.*]

What law governs negotiability of bills and notes, see note to *In re Quality Shop*, 125 C. C. A. 406.]

3. **BILLS AND NOTES (§ 451*) — DEFENSES — FAILURE OF CONSIDERATION — WAIVER.**

Where defendant executed a note in advance for the price of certain cooperage to be manufactured and delivered by the payee, and after transfer of the note to plaintiff before maturity, defendant, with knowledge that the payee had become a bankrupt, voluntarily promised to pay the note at the expiration of a specified extension, which had been granted, such promise to pay on a new maturing date ratified the instrument, and waived the defense of failure of consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1342, 1343, 1365, 1366; Dec. Dig. § 451.*]

In Error to the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Action by the First National Bank of Aurora, Ind., against E. H. Taylor, Jr., & Sons, Incorporated. Judgment for plaintiff, and defendant brings error. Affirmed.

This was an action at law to recover moneys alleged to be due from E. H. Taylor, Jr., & Sons, Incorporated (called defendant herein). Judgment was entered upon an instructed verdict, and defendant brings error. The instructed verdict is so far dependent upon the issues presented by the pleadings as to require a fuller statement of the pleadings than is usual, in order to show, not only what the issues were, but how they arose.

The first cause of action as stated in an amended petition was for a balance of \$6,244.56, with certain interest alleged to be due upon a promissory note of defendant dated August 18, 1910, executed and delivered at Frankfort, Ky., payable in four months to the order of the Samuel Wymond Cooperage Company, for \$26,240, at the Farmers' Bank in Frankfort. It is alleged that the Cooperage Company indorsed and transferred this note to the plaintiff below, the First National Bank of Aurora, Ind. (herein called plaintiff or bank), before maturity, for valuable consideration, and that payments were subsequently made to plaintiff by the defendant; one on December 15, 1910, of \$6,214.82, and another on October 5, 1911, of \$13,780.62. In the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

second cause of action it was alleged that on September 7, 1910, the defendant executed and delivered at Frankfort another promissory note to the Cooperage Company, payable to its order, for \$6,560, in four months after date at the Farmers' Bank before mentioned, that this note was likewise indorsed and transferred by the Cooperage Company to the plaintiff before maturity for valuable consideration, and that no part of the note had been paid.

The material parts of the answer, comprising three paragraphs, are, in substance, as follows: The first admits execution and delivery of both notes and the correctness of the sums alleged to have been paid on the first one; but payment is sought to be avoided through alleged defenses and also set-off and counterclaim against the Cooperage Company, all of which are alleged to be maintainable against the plaintiff. It is denied that the notes were executed or delivered at Frankfort, and it is alleged that this was done at Aurora, Ind.; and the authority of Wymond, as secretary and treasurer of the Cooperage Company, to indorse and assign the notes to the bank is denied for want of knowledge. It is alleged that at the time the bank acquired the notes the Cooperage Company was largely indebted to it, and that the notes were simply passed to its credit upon such pre-existing indebtedness; that the transfer of the notes to the bank was made in the state of Indiana, and, under a certain statute of that state set out in the answer, the bank acquired no better titles to or rights under the notes than the Cooperage Company itself possessed.

In the second paragraph it is alleged that the defendant in 1907 began a series of contracts with the Cooperage Company for the manufacture and delivery of large numbers of whisky barrels, and continued the same until shortly before the bankruptcy of that company in November, 1910; that it was provided by these contracts that no barrels were to be paid for until they were manufactured, and either stored in Aurora for account of the defendant, or delivered to it at Frankfort; that during this period the bank was the financial backer of the Cooperage Company, the president of that company being also the president of the bank and a director in each corporation, and Wymond, the secretary and treasurer of the Cooperage Company, being likewise a director in each corporation; that in order to aid the Cooperage Company further, it was agreed between it, the bank, and the defendant that the latter should deliver its "temporary notes" to the Cooperage Company in advance of the manufacture of the barrels, but that they were not to be paid until the barrels were actually manufactured and stored or delivered at Frankfort as stated; that the first note (for \$26,240), although given to take up certain of these temporary notes, was in reality for the purchase price of barrels theretofore delivered to defendant during the season 1910-1911, to wit, 8,000 barrels; that on September 7, 1910, the defendant contracted with the Cooperage Company for 4,000 additional barrels, and delivered to the company two temporary notes of that date, each for \$6,560, payable, according to their terms, one in three and the other in four months, but that they were not in fact to be payable until the barrels were manufactured and stored or delivered, when they were to be taken up by regular notes or acceptances; that one of these notes is the one sued on in the second cause of action; that, although there was a total failure of consideration therefor, the other note was presented for payment, with representation on the part of the bank that the barrels had been manufactured and stored; that the bank knew, and the defendant did not know, that this representation was untrue; that, believing it would either get the barrels for which the note was given, or could withhold a like sum against its unmatured paper then held by plaintiff, it paid the note, and "pleads the same as a set-off and counterclaim" against the balance "apparently" due on the first note.

In the third paragraph defendant refers to and makes part thereof the averments of its first and second paragraphs, and says, in further answer to the second cause of action, that the bank and the Cooperage Company knew, as early as the date of the note therein sued on (September 7, 1910), that the Cooperage Company was insolvent and wholly unable to manufacture the barrels for the amount of the two notes, and also knew the barrels would not be manufactured, but concealed these facts from defendant.

The first paragraph of the reply denies as follows: That either of the notes sued on was executed or delivered at Aurora; that either was not indorsed by the payee; that the Cooperage Company at the time of indorsement was largely indebted to the bank; that the proceeds of the notes were passed to the credit of the Cooperage Company upon any pre-existing indebtedness; or that the bank parted with nothing of value in the transaction. The second and third paragraphs of the reply are in terms answers to the set-off and counterclaim stated in the second and third paragraphs of defendant's answer. Plaintiff there admits that defendant and the Cooperage Company contracted through a course of years for the manufacture and delivery of large numbers of whisky barrels, including the contract of September 7, 1910, for 4,000 barrels, for which the two notes of that date were given, and one of which was paid and the other sued on; but plaintiff denies that an agreement was ever made concerning the giving of temporary notes, and plaintiff further and specifically denies the other averments relating to the set-off and counterclaim.

In the fourth paragraph of its reply, plaintiff alleges that on December 13, 1910, at defendant's request, and on its promise to pay at a later specified time, it granted an extension of time upon the second note sued on, according to a written memorandum then signed by the parties and set out in this paragraph of the reply; that this resulted in postponing payment of the second note (\$6,560) from the date of its maturity (January 7, 1911) till February 20, 1911; that on February 17, 1911, at defendant's request, and on its promise to pay at a later time agreed on, plaintiff further extended the time for payment of the second note in suit from February 20th, as fixed by the first extension, until March 2, 1911; that defendant refused and still refuses to pay such second note in suit; that on the faith of these new promises of defendant the plaintiff did not make demand or protest against the Cooperage Company as indorser or its trustee in bankruptcy. Defendant moved to strike the fourth paragraph from plaintiff's reply, and also demurred to the same, and both were overruled. Plaintiff then filed a rejoinder to this paragraph, admitting the execution of the memorandum of December 13, 1910, but alleging, in substance, that it was induced to sign the same through representations of plaintiff's president that the Cooperage Company "was still in condition that it could probably resume business and manufacture the barrels," and further that plaintiff's attorneys advised defendant that the execution of the memorandum would not prejudice its rights, and defendant denied that plaintiff failed to protest the notes on the faith of such promises, and said that it, defendant, called plaintiff's attention to the necessity of proving such claim, and on its refusal to do so defendant made proof of the claim against the bankrupt's estate in such a way as to give either plaintiff or defendant the benefit of such proof "according to the result of the issue in this case." The rejoinder contains no denial of the second extension. Plaintiff demurred to the rejoinder, and the court sustained the demurrer. The parties then announcing readiness for trial, the plaintiff introduced "evidence * * * of the transfer and ownership of the notes sued on"; and, this being all the evidence offered by the plaintiff, it was agreed in open court that it "showed such ownership and transfer of said notes to the plaintiff." The defendant announcing that it had no testimony to offer, the court directed a verdict as stated.

B. G. Williams and Hazelrigg & Hazelrigg, all of Frankfort, Ky., for plaintiff in error.

John Galvin, of Cincinnati, Ohio, and H. D. McMullen, of Aurora, Ind. (McMullen & McMullen, of Aurora, Ind., and Galvin & Galvin, of Cincinnati, Ohio, of counsel), for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above).
[1] Examination of the statement will show that this case finally

presents but two questions: The first is one of voluntary payment; the second, waiver of alleged defenses. These questions concern the two promissory notes each for \$6,560, which were given by the defendant to the Cooperage Company, September 7, 1910, to cover the price of 4,000 whisky barrels that the Cooperage Company then contracted to manufacture and subsequently deliver to the defendant. The Cooperage Company was adjudged bankrupt in the following November, and so failed to manufacture and deliver these barrels. Of these two notes, the one falling due in three months was paid by defendant at maturity, December 7, 1910, and this payment is made the basis of the set-off and counterclaim alleged and alone relied on to escape recovery of the balance admittedly owing on the note sued on in the plaintiff's first cause of action. It will be observed that this payment was made after the bankruptcy of the Cooperage Company, and it is neither alleged nor claimed that defendant was ignorant of that fact. True, defendant alleges that prior to the payment plaintiff had advised it that the barrels had been stored for defendant at Aurora, but this is distinctly denied in the reply. True, also, defendant alleged the existence of an agreement between the Cooperage Company and the plaintiff and defendant, in effect that such notes as these, including these particular notes, were temporary instruments, given for the accommodation of the Cooperage Company, and were not to be presented for payment until the barrels to which they related were either manufactured and stored at Aurora for defendant's account, or were delivered to it; but this, too, was met by express denial. In short, nothing was alleged that tended to excuse payment of this note at maturity that was not specifically denied; and yet defendant declined to offer evidence in support of any of its allegations, and so must be treated the same as if it had not made them. Further it was agreed in open court that the plaintiff's evidence showed transfer of the notes to and ownership thereof in the plaintiff. We are mindful of the omission of plaintiff to deny defendant's allegation that these notes were assigned to the plaintiff in Aurora, Ind., and also of the reliance of defendant upon a statute of Indiana (Burns' Revision of 1908, §§ 9071, 9072, 9073), which, it is in substance claimed, denied to plaintiff any better title to or right under the notes than the Cooperage Company had; but, if it were assumed that a good defense might thus have been available, it is hard to see how defendant could both pay the note and claim the benefit of the defense.

[2] Although defendant was a corporation of Kentucky, located at Frankfort, and of course under the general rule could not be presumed to know the law of another state (see, for example, *Haven v. Foster*, 9 Pick. [Mass.] 112, 129, 19 Am. Dec. 353), yet, concededly, it had for years been doing business with both the Cooperage Company and the plaintiff in Aurora, and so was bound, we think, to take notice of the laws of Indiana (*Hill v. Spear*, 50 N. H. 253, 261, 9 Am. Rep. 205); and, moreover, in view of such business relations, and of the well-known rule requiring a defendant to set up all the defenses it has, it is to be presumed that if defendant had not in fact

known of the existence of the Indiana statute at the time it paid the note, it would have so alleged; this was not done, nor is it even suggested that a mistake of fact concerning knowledge either of the existence or the meaning of this statute was made (*Norton v. Marden*, 15 Me. 45, 46, 32 Am. Dec. 132). As it seems to us, then, this portion of the case presents all the essential characteristics of a voluntary payment. As Mr. Justice Bradley said in *Lamborn v. County Commissioners*, 97 U. S. 181, 185 (24 L. Ed. 926):

"A voluntary payment, made with a full knowledge of all the facts and circumstances of the case, though made under a mistaken view of the law, cannot be revoked, and the money so paid cannot be recovered back."

See, also, *Utermehle v. Norment*, 197 U. S. 40, 56, 25 Sup. Ct. 291, 49 L. Ed. 655, 3 Ann. Cas. 520; *Brisbane v. Dacres*, 5 Taunt. 143, 151; *Elliott on Contracts*, § 1381, and citations.

[3] We come next to the second of these notes. This note has not been paid, and recovery upon it is sought. Bearing in mind what has thus far been said respecting the allegations of the answer and the denials of the reply, there would remain against the second note the defense that the barrels have not been delivered. However, it is further set up in the reply that upon defendant's requests, and its promises to pay at later specified times, plaintiff granted it two extensions of time respecting the payment of this note. The note as delivered was to mature January 7, 1911; and the first request was made and granted December 13, 1910, according to a written memorandum executed on that date, until February 20, 1911. February 17, 1911, the second request was made and granted, until March 2, 1911. The paragraph of the reply containing these allegations was met by a rejoinder admitting the execution of the memorandum of December 13, 1910, but alleging that defendant was induced to sign the same through representations of plaintiff's president and attorneys, which appear in the statement. We may lay the first extension and these alleged representations to one side, for (apart from the rule that would ordinarily exclude contemporaneous oral statements), the rejoinder contains neither denial nor allegation concerning the second extension; indeed, the request, promise, and extension, so alleged in the reply, were admitted by the defendant, as well by its motion to strike out the paragraph as by its demurrer thereto. The motion and demurrer were alike overruled; and here again is seen the effect of defendant's refusal to offer evidence. Under the pleadings it must be presumed that defendant was at this time familiar with all the material facts; if it could waive its defenses, it plainly did so here. The rule is that if one, with full knowledge of facts constituting a defense to his note, secures an extension thereof on the faith of his promise to pay it upon the new maturing date, he ratifies the instrument and so waives his defense. Mr. Justice Matthews had occasion to state the rule, and the reasons for it, in *Fitzpatrick v. Flanagan*, 106 U. S. 648, 660, 1 Sup. Ct. 369, 379 (27 L. Ed. 211):

"A subsequent promise, with full knowledge of the facts, is certainly equivalent to an original promise made under similar circumstances; and no one,

acting with full knowledge, can justly say that he has been deceived by false representations. 'Volenti non fit injuria.'"

See *Kingman & Co. v. Stoddard*, 85 Fed. 740, 746, 749, 29 C. C. A. 413 (C. C. A. 7th Cir.); *Doherty v. Bell*, 55 Ind. 205, 208; *Brown v. First National Bank of Indianapolis*, 115 Ind. 572, 578, 579, 18 N. E. 56; *Tuttle v. Stovall*, 134 Ga. 323, 330, 331, 67 S. E. 806, 20 Ann. Cas. 168.

The principle of these cases is analogous to that which is usually applied to the giving of renewal notes with full knowledge of the facts. *Griffith v. Trabue*, 11 Heisk. (Tenn.) 645, 650; *Odbert v. Marquet* (C. C.) 163 Fed. 892, 899, s. c. affirmed 175 Fed. 44, 99 C. C. A. 60 (C. C. A. 4th Cir.); *Hogan v. Brown & Co.*, 112 Ga. 662, 37 S. E. 880; *Franklin Phos. Co. v. Inter. Harvester Co.*, 62 Fla. 185, 190, 57 South. 206, Ann. Cas. 1913C, 1247; 1 Daniel, Neg. Inst. (6th Ed.) p. 302, and citations.

Thus, unless we misinterpret the pleadings, Judge Cochran was right in directing a verdict for the plaintiff. The notes are dated at Frankfort, Ky., are negotiable in form, and payable at a bank in Frankfort. They were offered in evidence, and, since they were admittedly transferred to and owned by the plaintiff, a prima facie case was made; this but emphasized the defensive character of the issues tendered by defendant and the need of supporting them by evidence.

The judgment is accordingly affirmed, with costs.

HARPER v. VICTOR, U. S. Marshal, et al.

(Circuit Court of Appeals, Eighth Circuit. March 30, 1914.)

No. 4034.

(*Syllabus by the Court.*)

1. COURTS (§ 406*)—COURT OF APPEALS—POWER TO REMAND.

Section 15 of the Enabling Act of the State of Oklahoma (Act June 16, 1906, c. 3335, 34 Stat. 276) provided that all appeals and writs of error taken from the United States Court of Appeals in the Indian Territory to the Supreme Court of the United States, or to the United States Circuit Court of Appeals of the Eighth Circuit, previous to the admission of Oklahoma into the Union, should be prosecuted to final determination as though that act had not been passed, and that in all cases in which final judgment had been rendered in such territorial appellate court in which appeals or writs of error might have been taken or sued out except for the admission of the state, they might still be taken or sued out and prosecuted to the Supreme Court of the United States or to the United States Circuit Court of Appeals and there held and determined, and that in either case the Supreme Court of the United States or the United States Circuit Court of Appeals, in the event of reversal, should remand the said causes either to the state Supreme Court or other final appellate court of the state, or to the United States Circuit or District Court in the state, as the case might require.

Held, that in view of the general power to remand granted to the United States Circuit Court of Appeals by Act March 3, 1891, c. 517, § 10, 26 Stat. 829, the United States Circuit Court of Appeals for the Eighth Circuit had authority to remand to the proper court below any of the cases

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pending in that court specified in section 15, when it affirmed the judgment or decree therein as well as when it reversed it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1103; Dec. Dig. § 406.*]

2. STATUTES (§§ 181, 183*)—CONSTRUCTION.

"The reason of the law as indicated by its general terms should prevail over its letter when the plain purpose of the act will be defeated by strict adherence to its verbiage."

A statute should receive a rational construction, one that tends to avoid or remove the mischief at which it was leveled, rather than one which promotes or permits the evil and avoids the accomplishment of the purpose of its enactment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 261, 263; Dec. Dig. §§ 181, 183.*]

3. CRIMINAL LAW (§ 1192*)—APPEAL—MANDATE—TRANSMISSION—RIGHT TO ENFORCE.

A judgment and sentence of the United States Court for the Northern District of the Indian Territory had been affirmed by the United States Court of Appeals for the Indian Territory and was pending on a writ of error in this court when the state of Oklahoma, which embraces the former Indian Territory, was admitted to the Union. This court subsequently affirmed both judgments and sent its mandate, which recited the affirmance of the judgments, directed further proceedings according to right and justice, and was directed to the Supreme Court of Oklahoma, to that court, which transmitted the case and the mandate to the United States District Court for the Eastern District of Oklahoma which had succeeded, under the enabling act of Oklahoma, to the jurisdiction of the United States Court for the Northern District of the Indian Territory. The District Court spread the mandate of this court upon its records and pursuant to the judgment and sentence affirmed thereby committed the defendant to the marshal with directions to deliver him to the keeper of the penitentiary that the sentence might be executed.

Held, the United States District Court for the Eastern District of Oklahoma after its receipt and record of the mandate of this court, which authentically informed it of this court's affirmance of the sentence, and of its direction that the sentence be executed, had jurisdiction to commit the defendant and to execute the sentence, and the questions whether the mandate should have been directed to the Supreme Court of Oklahoma or to some other court, and whether or not the Supreme Court of Oklahoma had power to transfer the case and the mandate to the United States District Court for the Eastern District of Oklahoma, were immaterial after the mandate had been received by that court and recorded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3231-3240, 3243; Dec. Dig. § 1192.*]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Petition for habeas corpus by S. D. Harper against Grant Victor, United States Marshal for the Eastern District of Oklahoma, and others. From an order denying the petition, petitioner appeals. Affirmed.

James S. Davenport, of Vinita, Okl., for appellant.

C. C. Herndon, Asst. U. S. Atty., of Muskogee, Okl. (D. H. Linebaugh, U. S. Atty., of Atoka, Okl., on the brief), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and RINER, District Judge.

SANBORN, Circuit Judge. S. D. Harper appeals from an order of the United States District Court for the Eastern District of Oklahoma, which denied his petition for discharge on a writ of habeas corpus from confinement by the United States marshal under his commitment to the marshal by that court with directions to deliver him to the penitentiary in execution of a sentence that he be confined therein for 4 years and 297 days for a violation of section 5209 of the Revised Statutes. Harper had been convicted of the violation of this section and had been sentenced by the United States Court for the Northern District of the Indian Territory to imprisonment in the penitentiary for five years therefor on November 4, 1905. That sentence had been affirmed on his appeal by the United States Court of Appeals for the Indian Territory on September 26, 1907. He had sued out a writ of error from this court to the Court of Appeals for the Indian Territory, and on April 30, 1909, this court had affirmed the judgment of that court and also the sentence of the United States Court for the Northern District of the Indian Territory. On July 14, 1909, this court had sent to the Supreme Court of the state of Oklahoma its mandate directed to that court which recited its judgment of affirmance and commanded that such proceedings be had in the case as according to right and justice and the laws of the United States ought to be had. The Supreme Court of Oklahoma had by its order transferred the case to the United States District Court for the Eastern District of Oklahoma, together with the mandate of this court, which the District Court spread upon the records of that court, and thereupon it deducted 68 days on account of Harper's jail term from his original sentence of 5 years, and directed his commitment for confinement in the penitentiary during the remaining four years and 297 days pursuant to the original sentence which was affirmed.

The state of Oklahoma was admitted into the Union while this case was pending in this court on writ of error on November 16, 1907, and the contention of counsel for Harper is: (1) That this court had no jurisdiction or authority to remand the case to any court after its affirmance of the judgments below; (2) that the Supreme Court of Oklahoma had no jurisdiction or authority to transfer the case or the mandate to the District Court below; and (3) that, if this court had any authority to remand, it had none to remand to the Supreme Court of Oklahoma, but could have remanded to the District Court below only. The position that this court had no power to remand the case to any court after its affirmance of the judgments below, and that for this reason this offender must go unpunished, rests upon the fact that the enabling act of Oklahoma (Act June 16, 1906, c. 3335, 34 Stat. 276) § 15, provides that all appeals or writs of error taken from the Court of Appeals of the Indian Territory to the Supreme Court of the United States or to this court previous to the final admission of the state of Oklahoma into the Union, shall be prosecuted to final determination as though the enabling act had not been passed and that in all cases in which final judgment has been rendered in such territorial appellate court at the time of the admission of the state in which appeals or writs of error might be had to the Supreme Court

or to this court, except for the admission of such state, such appeals or writs of error may still be taken or sued out and prosecuted to the Supreme Court or to this court under the provisions of existing laws, and that in either case the Supreme Court or this court in the event of reversal shall remand the said cases to either the Supreme Court or other final appellate court of the state of Oklahoma, or to the United States Circuit or District Courts in the state, as the case may require. It will be perceived that while this section provides for the remanding of the cases specified, one of which is that in hand, in every case of a reversal of any judgment below neither that section nor any other part of the enabling act makes any provision for the remanding of any of these cases in any case in which the judgment or decree is affirmed, and it is upon this state of this legislation that the argument is founded that this court has no power to remand any of these cases in which it affirms the judgment or decree below.

[1] The contention is too subtle, ingenious, and critical to be sound. Sections 16, 17, 19, and 20 of the enabling act provided for the distribution of all cases pending at the time of the admission of the state in the various federal and territorial courts of the Indian Territory and of the territory of Oklahoma among the United States courts in and the state courts of the state of Oklahoma, and their subsequent prosecution and further disposition by those courts. Section 10 of the act to establish the United States Circuit Courts of Appeals provided that:

"Whenever on an appeal or writ of error, or otherwise, a case coming from a District or Circuit Court shall be reviewed and determined in the Circuit Court of Appeals in a case in which the decision of the Circuit Court of Appeals is final such case shall be remanded to the said District or Circuit Court for further proceedings to be there taken in pursuance of such determination" (Act March 3, 1891, c. 517, 26 Stat. 829).

And the authority granted in this provision is broad and general enough to include the case at bar, for this case comes from the United States Court for the Northern District of the Indian Territory, although it comes through the Court of Appeals of that territory. Moreover, the evident object of the sections of the enabling act cited was to provide for the prosecution, the final decision, and the execution of the final judgment or sentence in every case that originated in the Indian Territory and was pending at the time of the admission of the state of Oklahoma.

[2] A statute should receive a rational sensible interpretation, one which tends to avoid or remove the mischief at which it was leveled and to accomplish the object sought by the legislative body which enacted it, rather than one which promotes or permits the evil and avoids the accomplishment of the purpose of the enactment. The first sentence of section 15 of the enabling act declares that cases pending in this court on appeal from or on a writ of error to the Court of Appeals of the Indian Territory at the time of the admission of the state of Oklahoma shall be prosecuted to final determination, and this provision is sufficient, when read in the light of the general power of this court to remand granted by the act which established it, to

sustain the deduction that the Congress intended by these acts to grant to this court the power to remand to the proper court the cases specified in section 15 in which the judgments were affirmed as well as those in which they were reversed. And when it is considered that any other construction would nullify affirmed judgments and decrees in such cases and leave reversals only effective, the case falls so far within the rule that "the reason of the law, as indicated by its general terms, should prevail over its letter, when the plain purpose of the act will be defeated by strict adherence to its verbiage," that all doubt of its proper interpretation vanishes, and our conclusion is that this court had full authority on affirmance of the judgments against Harper to remand his case to the proper court below for the execution of his sentence. *Pickett v. United States*, 216 U. S. 456, 461, 30 Sup. Ct. 265, 54 L. Ed. 566; *Church of the Holy Trinity v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226; *Lau Ow Bew v. United States*, 144 U. S. 47, 59, 12 Sup. Ct. 517, 36 L. Ed. 340; *United States v. Corbett*, 215 U. S. 233, 30 Sup. Ct. 81, 54 L. Ed. 173.

[3] Counsel for Mr. Harper concedes that if this court had power to remand his case to any court it should have remanded it to the United States District Court for the Eastern District of Oklahoma, but he still contends that that court had no jurisdiction to commit him to the marshal and thereby to carry into effect the affirmed sentence against him because our mandate was directed and sent to the Supreme Court of Oklahoma, and because that court had no authority to transfer the case or the mandate to the United States District Court below. Neither of these positions is, in our judgment, tenable; but we refrain from extended discussion of them because they have become immaterial. Nothing was required from any court to give the court below which, by virtue of the enabling act, had succeeded to the jurisdiction of the United States Court for the Northern District of the Indian Territory over this case, the power to proceed to issue the commitment and to execute the sentence of that court but authentic information that this court had affirmed the sentence, had renounced its jurisdiction by virtue of its writ of error, and had directed that the sentence be executed. That information was conveyed to it by the mandate of this court which, although directed to the Supreme Court of Oklahoma, was transferred by that court to the court below and spread upon its records before it issued its commitment. That mandate recited and informed the District Court that the judgment and sentence against Harper, as well as that of the Court of Appeals of the Indian Territory which affirmed it, had been affirmed by this court and that this court had remanded the case with directions that the sentence be executed. It gave to that court after its receipt and record therein as complete jurisdiction to issue the commitment and execute the sentence as a like mandate directed to that court could have given, and there was no error in its dismissal of Harper's petition for a discharge from custody.

Let the judgment below be affirmed.

GRONVOLD v. FEDERAL UNION SURETY CO.

(Circuit Court of Appeals, Eighth Circuit. March 7, 1914.)

No. 3980.

(Syllabus by the Court.)

1. BONDS (§ 20*)—NEGLIGENCE—DELIVERY OF BLANK BOND.

A maker who through confidence intrusts, or through culpable negligence permits to come, to the custody of a third party, a blank bond or promissory note, or other like instrument, which the third party completes by filling the blanks and then delivers for a purpose within the general scope and design of the instrument to an innocent obligee or purchaser who is thereby induced to change his situation to his legal injury in reliance upon the completed instrument, is thereby estopped as against such obligee or purchaser from denying that he executed and delivered the completed instrument to the obligee.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 17; Dec. Dig. § 20.*]

2. INDEMNITY (§ 4*)—BOND—ESTOPPEL TO DENY EXECUTION.

G. signed a printed blank application and a printed blank indemnity bond to a surety company and either intrusted them to or permitted them to come to the custody of the cashier of the principal in his bond, who caused the blanks to be filled, and delivered the instruments to the surety company which, in reliance upon them, gave its bond as surety for G.'s principal on account of which it suffered a loss for which it sued G. on his bond.

Held, G. was estopped from denying that he executed and authorized the delivery of the completed bond to the surety company to indemnify it against losses on the bond which it executed.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 2-6; Dec. Dig. § 4.*]

In Error to the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Action by the Federal Union Surety Company against F. T. Gronvold. Judgment for plaintiff, and defendant brings error. Affirmed.

Edward Engerud, Daniel B. Holt, and John S. Frame, all of Fargo, N. D. (A. E. Coger, of Rugby, N. D., on the brief), for plaintiff in error.

F. C. Masee, of East Grand Forks, Minn. (Arthur J. Stobbart, of St. Paul, Minn., on the brief), for defendant in error.

Before SANBORN and SMITH, Circuit Judges, and POPE, District Judge.

SANBORN, Circuit Judge. This writ of error assails a judgment against the defendant below on a bond of indemnity alleged to have been given by him to the Federal Union Surety Company, on the sole ground that the court below erred because it denied the defendant's motion to instruct the jury to return a verdict for the defendant because, as counsel for the defendant claimed, there was no substantial evidence that the bond was ever executed and delivered by the defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

I. M. McBride was the president, F. T. Gronvold, the defendant, was the vice president, and Andy Jones was the cashier of the First National Bank of Rugby. That bank was anxious to become a depository for state funds, but could not do so without giving a bond with a surety for \$10,000 to the state conditioned to hold the state harmless from any loss by reason of the failure of the bank to repay the deposits which it might receive from the state. The plaintiff made it a condition of executing such a bond as surety for the bank that the bank should give a bond to it with sureties satisfactory to it for the same amount conditioned to indemnify it against all loss that might result to it by reason of its execution of the bond to the state. Thereupon the bank delivered to the surety company an application for its execution as surety of the bank's bond to the state which contained a covenant of indemnity and an oath of the value of his property each purporting to be signed by the defendant, F. T. Gronvold. At the same time the bank delivered to the surety company a bond conditioned to indemnify it against any loss on account of its execution of the bond to the state. This indemnity bond purported to be signed and executed by the bank by F. T. Gronvold and I. M. McBride. The application and the indemnity bond bore the date of December 30, 1907, were fair on their faces, disclosed no defect or defense, and in reliance upon them the surety company on January 7, 1908, executed its bond to the state as surety for the bank. Subsequently the bank defaulted, the state secured a judgment against the surety company on its bond, which the latter paid, and this is a suit by the surety company to recover of Gronvold the amount it thus lost on the indemnity agreements to which his name appeared to be attached. The sole issue was: Did Gronvold sign and deliver the application and the bond to the surety company?

H. J. Sannan testified that he had been assistant cashier of the bank for a part of four years just preceding December 30, 1907, while Gronvold had been a depositor with the bank, that he had received and cashed many checks drawn by Gronvold, had examined and become familiar with his signature, that he knew it when he saw it, that the two signatures on the application, one to the covenant of indemnity and the other to the value of his property, were the genuine signatures of Gronvold, and that the signature of F. T. Gronvold on the bond of indemnity was also his genuine signature. He also testified that on December 30, 1907, after he had ceased his services with the bank, he was called to it by Andy Jones, the cashier, who presented to him the printed application which bore the two signatures of Gronvold and requested him to fill the blanks therein, which he did, that at the same time Jones presented to him the printed bond which bore the signatures of Gronvold and McBride, and requested him to fill the blanks in and complete that instrument, that he did so, and that at the same time Jones executed it on behalf of the bank, as its cashier. The blanks which were filled by Sannan consisted chiefly of places for names and amounts. Gronvold testified that he had signed other bonds for the bank, one to the state for the safe-keeping of its deposits and one for the safe-keeping of deposits of funds of the county. When shown the application and the two signatures F. T. Gronvold upon it, he testified:

"Those signatures look like my signature, but I never signed any application for indemnity for the Federal Union Surety Company. * * * I had never to my knowledge ever signed an instrument in blank for that company." When shown the bond and the signature F. T. Gronvold thereon he testified:

"It looks some like my signature. If it were not for the fact that I know I never knowingly signed such a document, I would have to say it looks so much like my signature it might be my signature. * * *"

He testified that he refused a request of Jones, the cashier, to sign some indemnity bond before Christmas, and he finally testified:

"I have never signed Exhibit B (the bond). I do not know if Exhibit B was the document he showed to me. He showed me an application there, a surety company application, and wanted me to sign. That is the only recollection I have of the surety company's bond, and after reading that over I told him I would not sign it."

The question for determination in this court is not the preponderance or the sufficiency of the evidence; it is whether or not there was any substantial evidence to sustain a finding of the jury that Gronvold executed and delivered the application and the bond. The testimony of Sannan is clear, direct, and unimpeached that Gronvold's signatures on these instruments were genuine and that the printed instruments were in the possession of Andy Jones, the cashier of the bank, with the blanks for the names and amounts unfilled on December 30, 1907, and Gronvold's testimony indicates that Jones was the officer who attended to the business of procuring necessary bonds for that institution. Here is substantial evidence to sustain the finding of the jury that Gronvold signed the printed blank application and the printed blank bond and that they were in the custody of the cashier of the bank, the officer who attended to procuring bonds for the bank on December 30, 1907, when they bear date. The jury was therefore warranted in finding, and it undoubtedly did find, those facts, and in the further discussion of this case they must be taken as established. This conclusion, together with the blank instruments themselves, presents substantial evidence not only that he signed them, but that he signed them for the purpose of indemnifying the surety company against losses on its bond and to induce it to execute its bond, and that he knew, or was estopped by his acts and omissions from denying that he knew, that it was the Federal Union Surety Company and no other that was to be indemnified thereby and induced to execute its bond. The printed application contained just above Gronvold's first signature the following covenant without any blank whatever in it:

"In consideration of the Federal Union Surety Company executing the bond for which the above-named applicant has applied, or any other bonds for which said applicant may hereafter apply, I hereby covenant and agree to indemnify and keep indemnified said company from and against any and all loss, cost, damages and expenses of every kind and nature which may be sustained or incurred by said company by reason or in consequence of the execution of any of said bonds."

The printed bond, omitting all writing inserted in the blanks, contained the following:

"This agreement witnesseth: That whereas, we, the undersigned, have requested the Federal Union Surety Company, a corporation organized under the laws of the state of Indiana (hereinafter called the company) to sign and execute a certain bond or undertaking, * * * reference to which is hereby made for the purpose of certainty, and a copy of which instrument is or may be hereto attached; and whereas, the company has signed and executed, or is about to sign and execute the said instrument upon condition of the execution and delivery hereof, and upon the security and indemnity hereby and herein provided:

"Now, therefore, in consideration of the execution of said bond, and the sum of one dollar in hand paid to us by the company, the receipt whereof is hereby acknowledged, we, the undersigned, hereby covenant and agree with the company, its successors and assigns, in manner following: * * * That we will at all times indemnify and keep indemnified the company, and hold and save it harmless from and against any and all demands, liabilities and expenses of whatsoever kind or nature including counsel and attorney's fees, which it shall at any time sustain or incur by reason or in consequence of having executed the said instrument; and that we will pay over, reimburse and make good to the company, its successors and assigns, all sums and amounts of money which the company or its representatives shall pay or cause to be paid, or become liable to pay, under its obligation upon said instrument, or as charges and expenses of whatsoever kind or nature, including counsel and attorney's fees, by reason of the execution thereof, or in connection with any litigation, investigation or other matters connected therewith; such payment to be made to the company as soon as it shall have become liable therefor, whether or not it shall have paid out said sum or any part thereof."

It was the duty of Gronvold to read the blank instruments which he signed and either placed or permitted to be placed in the custody of the cashier of the bank, for the printing in these blank instruments thus signed specified the plaintiff by its name and were clearly calculated to induce action by it. If he read these instruments he knew that they contained covenants to indemnify the Federal Union Surety Company by name against any loss it might incur by executing any bond that might be specified therein after the blanks were filled, and if he did not read them he was guilty of such culpable negligence that against the innocent obligee in these instruments who has been induced thereby to sign the bond of the bank as surety and to suffer the losses for which it sues, he is estopped from denying what he must have learned if he had read them. *Glenn & Pryce v. Statler*, 42 Iowa, 107, 110.

[1] It is a settled and salutary rule of law that a maker who through confidence intrusts, or through culpable negligence permits to go, to the custody of a third party a blank bond or promissory note, or other like instrument, which the third party completes by filling the blanks and then delivers for a purpose within the general scope and design of the instrument to an innocent obligee or purchaser, who is thereby induced to change his situation to his legal injury in reliance upon the completed instrument, is thereby estopped as against such obligee or purchaser from denying that he executed and delivered the completed instrument to the obligee or purchaser. *Angel v. N. W. Mutual Life Ins. Co.*, 92 U. S. 330, 339, 23 L. Ed. 556; *Pence v. Arbuckle*, 22 Minn. 417, 421; *Burson v. Huntington*, 21 Mich. 415, 432, 434, 435, 4 Am. Rep. 497; *Van Duzer v. Howe*, 21 N. Y. 531, 535, 536; *Dair v. United States*, 16 Wall. (83 U. S.) 1, 4,

5, 21 L. Ed. 491; *Bank of Pittsburgh v. Neal*, 22 How. (63 U. S.) 96, 107, 108; *Davidson v. Lanier*, 4 Wall. (71 U. S.) 447, 457, 18 L. Ed. 377; *Ingham v. Primrose*, 7 C. B. (N. S.) 82; *Schultz v. Astley*, 2 Bing. (N. C.) 544, 29 English Common Law, 414; *First Nat. Bank of Wilkesbarre v. Barnum* (D. C.) 160 Fed. 245, 250; *Violett v. Patton*, 5 Cranch, 142, 3 L. Ed. 61; *Russel v. Langstaffe*, 2 Doug. 514; *Montague v. Perkins*, 22 Eng. Law and Equity Reports, 516; *Putnam v. Sullivan*, 4 Mass. 45, 3 Am. Dec. 206; *Mauran v. Lamb*, 7 Cow. (N. Y.) 174.

[2] The general scope and design of the application and the bond appeared from their printed parts when Gronvold signed them. It was to indemnify the Federal Union Surety Company, which was specifically named therein, against loss on a bond or bonds to be described in writing in the blanks in the instruments or by the bond attached thereto, and after these instruments were completed they were delivered for a purpose within their scope and design. The facts that Gronvold signed them, that he had signed other bonds for the bank, that this blank bond was signed by McBride, the president, and by Gronvold, the vice president, of the bank and was in the possession of the cashier who gave attention to the procuring of the bonds for the bank, constitute substantial evidence to sustain the jury in finding that the bond and the application which accompanied it were intrusted to the cashier by Gronvold with authority to fill the blanks and deliver them to the surety company, and, even if he did not so intrust these instruments to the cashier, nevertheless they were in Gronvold's possession when he signed them, and his negligence in permitting them to go from his possession without canceling his signature in the absence of proof of their abstraction from him by theft, force, or fraud, which are never presumed, was such culpable negligence as to warrant the verdict on the ground that as against an innocent obligee in the bond he was estopped from denying that he had executed and authorized the delivery of the completed instruments.

There was therefore no error in the refusal of the court to instruct the jury for the defendant, and the judgment below must be affirmed.

SMITH, Circuit Judge, concurs in the result.

NELSON v. MARTINSON.

(Circuit Court of Appeals, Eighth Circuit. March 19, 1914.)

No. 3932.

MASTER AND SERVANT (§ 286*)—ACTION FOR INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANTS—QUESTION FOR JURY.

In an action by an employé against a contractor for the construction of a building to recover for a personal injury caused by the breaking down of a runway built by the carpenters on the sloping side of the roof, over which plaintiff was wheeling concrete for use by other workmen, the evidence held sufficient to warrant the submission to the jury of the ques-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion whether the building of the runway was left to the workmen generally, so that its defective construction was due to the negligence of fellow servants of plaintiff, or whether defendant had taken it out of their hands by directing the carpenters to do it and assumed the responsibility for its being reasonably safe for the use of the other employes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

In Error to the District Court of the United States for the District of South Dakota; James D. Elliot, Judge.

Action at law by Anton Martinson against J. B. Nelson. Judgment for plaintiff, and defendant brings error. Affirmed.

Morton Barrows, of St. Paul, Minn., for plaintiff in error.

Philo Hall, of Brookings, S. D. (Hall, Alexander & Purdy, of Brookings, S. D., on the brief), for defendant in error.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

SMITH, Circuit Judge. This was a suit by Anton Martinson, hereafter called the plaintiff, against J. B. Nelson, hereafter called the defendant, to recover damages for personal injuries. It resulted in a verdict for the plaintiff, and the defendant sued out this writ of error.

While the defendant had preserved numerous exceptions at the trial, he has submitted the case substantially upon the sole question of whether his motion for a directed verdict should have been sustained. This being the only question for consideration, it requires a somewhat detailed statement of the facts, assuming, however, that on all disputed questions the jury found for the plaintiff.

The defendant had the contract for building a new courthouse for the county of Brookings in South Dakota at the city of Brookings. This courthouse was of substantially fireproof construction. The defendant did not live at Brookings but went there often during the early stages of the work and less frequently thereafter. Oscar Johnson, a carpenter by trade, was the defendant's general foreman in charge of the construction of the building. He had under him various bodies of workmen, carpenters, brick masons, stone masons, plasterers, and common laborers. The principal work of the carpenters before the finishing of the building commenced was in building false work and scaffolds for the concrete workmen and bricklayers and inserting, if not constructing, window and door frames. The entire work was completed up to the roof which was to be of concrete. About three-fourths of this concrete was on and the portion at the southeast corner of the building was yet to be placed. The east side of the roof as planned sloped down from the dome to the edge of the roof at the rate of three inches of fall to a foot of horizontal distance. At the edge of the roof was a low parapet. It was necessary to construct a scaffold or runway along this roof and within a few feet of the eastern edge from north to south to carry material for the unfinished portion of the roof. The general foreman directed Evan Anderson, one of the carpenters, to take charge of the construction of this runway.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 212 F.—58

He did so by constructing first a series of brackets on the roof at a distance of about eight feet apart upon which to lay planks. These brackets were constructed by taking lumber two inches thick, eight or ten inches wide, and seven feet long and resting the west end upon the roof. A similar piece of lumber stood upright at the end of each of these horizontal pieces, the width of the uprights extending from north to south, and three or four spikes were then driven through this end piece of the bracket into the end of the horizontal piece. As the roof fell three inches to a foot, in seven feet it would fall 21 inches, and, as it was necessary for the end piece to extend at least as high as the top of the 8 or 10 inch horizontal piece, the end pieces must have been from 29 to 31 inches in height. It appears that the spikes used were 16 penny spikes, which are $3\frac{1}{2}$ inches in length, so that they penetrated the ends of the horizontal pieces slightly more than one inch and a half. There was no diagonal piece from the lower part of the upright to the horizontal piece in these brackets. Owing to the sloping character of the roof, the horizontal piece at the west end rested upon a line substantially as all lines are without width, and the same is true of the upright which supported the horizontal piece. It was thus possible for either end of the bracket to slide upon the roof. The method used is frequently applied in the construction of scaffolds, but there are other and more secure ways of accomplishing the same thing. If the end piece was cut to fit under the horizontal piece, there would be no possibility of its breaking down from the shortness of the spikes or the like, and if the upright piece had in its width extended from east to west, and had lapped over upon the horizontal piece, spikes would have held far more firmly than driven into the ends of the horizontal pieces. Upon the completion of the brackets 4 parallel planks 2x10 inches were laid upon them, thus making a runway about 40 inches wide. The plaintiff helped to carry some of the lumber to the place where this runway was erected for use by the carpenters in its construction, but he denies that he took any part whatever in the actual construction. On the following day the plaintiff was assigned to aid in the laying of the concrete upon the balance of the roof. The concrete was mixed upon the ground, put into a wheelbarrow, carried up an elevator to the roof, then along this runway to the place where it was needed. Each wheelbarrow load of concrete weighed about 300 pounds, and the plaintiff himself weighed about 180 pounds. As he was wheeling such a load, the runway gave way, when the bottom of one of the uprights slid down the roof some inches, the runway itself gave down, and the plaintiff was thrown over the parapet to the ground beneath, a distance of about 40 feet, and as a result was severely injured. An examination of the runway immediately following the accident showed that the spikes were partially pulled out of the horizontal piece.

It is contended by the defendant that the plaintiff was the fellow servant of the carpenters who built the runway, and the master is not liable for any negligence that the carpenters may have displayed in its construction.

The jury had a right to find under the evidence that the plaintiff had no part whatever in the construction of the runway except to carry material to the vicinity for use by the carpenters.

The doctrine that the master is not liable for an accident the result of the negligence of a fellow servant of the party injured dates back in this country to 1841, when it was first announced by the Supreme Court of South Carolina in *Murray v. South Carolina Railroad Co.*, 1 McMul. 385, 36 Am. Dec. 268. The same doctrine was announced the following year in Massachusetts in *Farwell v. Boston & Worcester Railroad Co.*, 4 Metc. (Mass.) 49, 38 Am. Dec. 339. It was first announced in England in *Hutchinson v. York, Newcastle & Berwick Railway Co.*, 5 Exch. R. 343. See *Chicago, Milwaukee & St. Paul Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787. Since these decisions there have been a vast number of cases before the courts upon this subject, and, as a matter of common law, the doctrine may now be said to be as firmly established as any rule known to it.

There is, however, a distinct tendency to the abolition of this doctrine by modern legislatures. This is illustrated by the Employers' Liability Act of April 22, 1908, §§ 1, 2, and 4, c. 149, 35 Stats. 65 (U. S. Comp. St. Supp. 1911, pp. 1322, 1323), and by numerous statutes in the several states abolishing the rule as applied to railroad employes and other statutes abolishing it as to those employed in mines. No such amendment of the common law with reference to buildings like the courthouse in question had been passed in South Dakota at the time of this action, and we will therefore determine this case according to the common law; but admonished, as we are, that the common law on this subject is being greatly modified by legislation, this cannot be regarded as a proper time to extend the doctrine beyond where it has been heretofore applied. The law of fellow servants will be enforced where not repealed just as it is without, however, extending it to classes of cases not heretofore covered by it.

Attention must first be called to the fact that the doctrine as to fellow servants is not based upon any negligence, actual or imputed, of the party injured. It is based essentially upon the doctrine of the assumption of risk. *Northern Pacific Railway Co. v. Dixon*, 194 U. S. 338, 24 Sup. Ct. 683, 48 L. Ed. 1006; *Chicago, Milwaukee & St. Paul Ry. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787; *American Car & Foundry Co. v. Uss*, 211 Fed. 862, 128 C. C. A. 240. A striking feature of this doctrine is that the very negligence of one employé which gives a cause of action to a third party against his principal would not give a cause of action by a coemployé against the same principal. Thus the employer has imputed to him as negligence, in a suit brought by a third party, what would not be imputed to him in a suit by a coemployé of the party actually guilty of the negligence. The coemployé thus injured is deemed to have assumed the risk of the injury by his fellow servant.

It is the general duty of the master to exercise ordinary care to furnish an employé a reasonably safe place in which to work and reasonably safe appliances with which to do the work.

We do not deem it necessary to stop to discuss the question whether the runway was a place or an appliance.

In general the duty thus incumbent upon the master is known as a nondelegable one. It is held, however, that the master may furnish reasonably safe materials for use by his servants in the construction of scaffolds and the like necessarily used in the progress of their work, and will not be liable if they or some of them are negligent in the manner in which such conveniences are constructed.

In *Kimmer v. Webber*, 151 N. Y. 417, 45 N. E. 860, 56 Am. St. Rep. 630, it is said:

"When a gang of masons are engaged in plastering or pointing a room, the construction of proper platforms or places upon which to stand, while doing the work, is one of the details of the business that is generally left to the workmen themselves. The master may, it is true, take this out of their hands and assume to do it himself, and in that case he would be bound to furnish an appliance reasonably safe and suitable for the purpose."

The question here is, in substantially the language of the Court of Appeals of New York, whether the master took the matter of this runway out of the hands of the workmen generally and undertook to do it himself by his carpenters. There was sufficient evidence that he did so to warrant the submission of the question to the jury. *Austin Manufacturing Co. v. Johnson*, 89 Fed. 677, 32 C. C. A. 309; *Chambers v. American Tin Plate Co.*, 129 Fed. 561, 64 C. C. A. 129; *Conner v. Pioneer Fire-Proof Construction Co.* (C. C.) 29 Fed. 629; *National Refining Co. v. Willis*, 143 Fed. 107, 74 C. C. A. 301; *Beattie v. Edge Moor Bridge Works* (C. C.) 109 Fed. 233; *Elliott v. Sawyer*, 107 Me. 195, 77 Atl. 782; *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124, 15 Am. Rep. 387; *Bartlett-Hayward Co. v. State*, 120 Md. 1, 87 Atl. 499; *Richards v. Riverside Iron Works*, 56 W. Va. 510, 49 S. E. 437; *Ehlen v. O'Donnell*, 205 Ill. 38, 68 N. E. 766; *Chicago & Alton R. Co. v. Maroney*, 170 Ill. 520, 48 N. E. 953, 62 Am. St. Rep. 396; *Chicago & Alton R. Co. v. Scanlan*, 170 Ill. 106, 48 N. E. 826; *Wilson v. Monmouth Pottery Co.*, 150 Ill. App. 477; *Sims v. American Steel-Barge Co.*, 56 Minn. 68, 57 N. W. 322, 45 Am. St. Rep. 451; *Combs v. Roundtree Construction Co.*, 205 Mo. 367, 104 S. W. 77; *Cadden v. American Steel-Barge Co.*, 88 Wis. 409, 60 N. W. 800; *Wnek v. Superior Shipbuilding Co.* (Wis.) 134 N. W. 1053; *Henry v. Kaw Boiler Works*, 87 Kan. 571, 125 Pac. 67; *Allison v. Stivers*, 81 Kan. 713, 106 Pac. 996; *Kansas City Car & Foundry Co. v. Sawyer*, 7 Kan. App. 146, 53 Pac. 90; *Penson v. Inland Empire Paper Co.*, 73 Wash. 338, 132 Pac. 39; *Marks v. Hurley Mason Co.*, 73 Wash. 437, 131 Pac. 1122; *McNamara v. MacDonough*, 102 Cal. 575, 36 Pac. 941; *Texas Co. v. Strange* (Tex. Civ. App.) 154 S. W. 327; *Texas Co. v. Strange* (Tex. Civ. App.) 132 S. W. 370.

It follows that the judgment must be affirmed.

PARKER v. SHERMAN.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

No. 91.

1. BANKRUPTCY (§ 287*)—PREFERENCES—FORM OF REMEDY.

Property transferred by a bankrupt, so as to effect a preference, or its value, may be recovered by a suit in equity.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 444-447; Dec. Dig. § 287.*]

2. BANKRUPTCY (§ 165*)—PREFERENCES VOIDABLE—TRANSFER OF PROPERTY.

That the proceeds of a transfer of property by a bankrupt were applied on a debt due the government did not prevent a recovery of the goods or their value, as, under Bankr. Act July 1, 1898, c. 541, § 64, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), there are four classes of payments to be made before the government is paid.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. § 165.*]

3. BANKRUPTCY (§ 166*)—PREFERENCES VOIDABLE—INTENT OF PARTIES.

Under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), providing that transfers of property by a bankrupt within four months prior to the filing of the petition with intent to hinder or defraud creditors shall be void except as to purchasers "in good faith" and for a present fair consideration, that a full and fair price was paid for the goods transferred would not alone sustain the transfer in the absence of good faith.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 166.*]

4. BANKRUPTCY (§ 166*)—PREFERENCES VOIDABLE—INTENT OF PARTIES.

An assistant postmaster, who had embezzled funds of the Post Office Department and who also kept a store, shortly before his bankruptcy gave the postmaster, who was liable to the government for the amount of the embezzlement, a bill of sale of the furniture and a chattel mortgage on the stock of goods. He then negotiated a sale of the goods to defendant, who was a personal friend of the postmaster and knew of the defalcation, the postmaster's liability, that the assistant postmaster had not sufficient funds to make the defalcation good, and who inquired as to liens on the property of a lawyer who knew about the bill of sale and chattel mortgage. The goods were removed in the nighttime by a little traveled road, and the cost of the removal paid by the postmaster. The entire purchase price was paid to the government, reducing its claim against the postmaster. *Held*, that defendant must have known of the postmaster's mortgage, and that the proceeds of the sale were to be paid to the government, for the postmaster's benefit, thus hindering and delaying other creditors of the assistant postmaster, and hence his purchase was not in good faith.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 166.*]

Appeal from the District Court of the United States for the District of Vermont.

This cause comes here on appeal from a decree of the District Court, District of Vermont, adjudging that the transfer of a stock of goods from the bankrupt to defendant was null and void and giving judgment to plaintiff against defendant for \$1,430.57 with interest and costs. 201 Fed. 155. Decree sustained.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

T. W. Moloney, of Rutland, Vt., and G. W. Platt, of Poultney, Vt., for appellant.

S. E. Everts and C. E. Parker, both of Granville, N. Y., for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. [1] The suit was in equity, and defendant, under properly reserved exceptions, contends that it cannot be maintained, because complainant has an adequate and sufficient remedy at law. The case is on all fours with the one before us in *Parker v. Black*, 151 Fed. 18, 80 C. C. A. 484, where, in order that uniformity in bankruptcy practice in the several circuits might be secured, we followed the decisions of two other Circuit Courts of Appeals, although inclined, had it been a new question, to take a different view.

As found by the District Court, one Allen was postmaster in Granville, N. Y.; he gave the required bond to the government. Owens, the bankrupt, was assistant postmaster and a resident of Granville, where he kept a store in which the post office was located; he gave no bond. It was generally known in Granville that he was financially embarrassed. He embezzled funds belonging to the Post Office Department, amounting to \$2,800, was arrested late in the fall of 1910, and released on bail. Allen as a bonded officer was, of course, liable to the government for the amount of money thus embezzled. On December 9, 1910, Owens gave to Allen a bill of sale of certain furniture, etc., that was exempt from attachment and also a chattel mortgage on his stock of goods. About that time there were several conferences between Owens and some of his creditors, including the officers of both the banks in Granville, as to raising more money. Both Allen and Owens consulted counsel before and after the giving of the bill of sale and chattel mortgage, and on the day following the last consultation (December 13th) Owens went to Poultney, Vt., and proposed to defendant Sherman to sell the latter his entire stock of goods at 50 per cent. of their cost price. Sherman told him he would take the goods if, upon conference with counsel, he found everything to be free from liens. Defendant then went to Granville, consulted a lawyer, and then informed Owens that he would take the goods on the terms offered and would come to Granville to work on the inventory. This he did, and two days later the goods, except some which he did not care to take, were removed from Granville and delivered to him at Poultney. He at once gave his check for upwards of \$1,400, the purchase price, to Owens. This was all that the goods were worth. The stock of goods thus bought comprised substantially all the bankrupt's assets; his indebtedness exceeded \$7,000 besides the amount of the defalcation. Immediately after the delivery of the goods, an involuntary petition in bankruptcy was filed against Owens, plaintiff was subsequently appointed trustee and brought this suit to set aside the transfer and recover the goods or their value.

Owens promptly cashed the check and turned over the entire proceeds to the government in part payment of the defalcation. To that

extent the claim of the government against Allen was reduced. The defendant and Allen were personal friends, frequently boarding at the same hotel and visiting each other.

It is contended that the sale of the goods was a violation of the statute of New York or of Vermont, depending upon the circumstance that it was consummated in one state or the other. That branch of the controversy need not be considered.

[2] It is also contended by the appellant that there can be no recovery because the goods, or rather their actual cash value was all turned over to the government, which has thus received what as a preferred creditor of Owens, it would have received had this estate been administered in the bankruptcy court, and that therefore as to the other creditors, the transfer was not preferential. This contention is unsound, what dividend the government would have received in bankruptcy proceedings cannot be told. Under section 64 of the Bankruptcy Act there are four classes of payments to be made out of the estate before the government receives anything.

[3] Much is made in argument of the finding of the District Court that the price paid for the goods was a full and fair consideration for them. But that circumstance alone is not sufficient. As provided in section 67e, the purchase must be not only "for a present fair consideration," but also "in good faith." Of the cases cited by appellant: In *Cook v. Tullis*, 18 Wall. 332, 21 L. Ed. 933, the court says such a transaction may be upheld "provided such dealing (the sale of bankrupt's property for a fair consideration) be conducted without any purpose to defraud or delay his creditors." In *Sawyer v. Turpin*, 91 U. S. 120, 23 L. Ed. 235, the transfer was made, "not with the purpose of defeating the section which provides for the ratable distribution of the property which the act undertakes to effect." In *Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 815, the court says "we have a strong conviction * * * that the transaction * * * was without any fraudulent purpose." In *Bernhisel v. Firman*, 22 Wall. 170, 22 L. Ed. 766, the facts are quite different from those in the case at bar.

[4] The defendant testified that he had no knowledge of the bankrupt's financial condition except that he was embarrassed. We concur, however, with Judge Martin in the conclusion that his information as to the situation was much more complete. He knew of the defalcation and that his friend Allen would be obliged to make it good to the government; he knew that Owens had not sufficient funds to make good to Allen. He came to Granville to make inquiries of a lawyer, McCormick, as to what liens if any there were on the property; McCormick knew all about the bill of sale and the chattel mortgage to Allen. We have no doubt defendant was informed of this situation, and it is inconceivable that while it continued he would buy the goods covered by the mortgage for hard cash. He must have known that there was some reason for changing the arrangement, so that Allen, his friend, would give up all claim under the mortgage, provided defendant would buy the goods. The goods were removed

in the nighttime by a road but little traveled; defendant said the sleighing was better on that road; and Allen paid for the removal.

We are satisfied that the whole performance was a scheme concocted between defendant and Allen to get Owens' goods turned into cash through defendant's purchase, the cash to be used to reduce the government's loss, and therefore to that extent to reduce its claim against Allen; defendant knowing that Owens was insolvent and that Owens' intent and purpose was to hinder and delay his other creditors by turning the entire proceeds of the goods over to the government. We think the purchase was not "in good faith."

Decree sustained with costs.

In re MILLER.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

No. 159.

1. BANKRUPTCY (§ 414*)—OBJECTIONS TO DISCHARGE—BURDEN OF PROOF.

Creditors objecting to a bankrupt's discharge had the burden of proving the alleged concealment of property and failure to keep books with intent to conceal his condition, and a discharge should not be refused on suspicion unless the objections were sustained by evidence satisfactory to the court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 720-722; Dec. Dig. § 414.*]

2. BANKRUPTCY (§ 408*)—REFUSAL OF DISCHARGE—FAILURE TO ACCOUNT FOR ASSETS.

Where a bankrupt four years before bankruptcy sold his business to a creditor for the amount of the indebtedness and \$385 in cash and thereafter worked on a salary of \$10 or \$15 a week, being out of employment a part of the time, his failure to account for such \$385 did not justify the refusal of a discharge, as it was reasonable to assume that he spent it for his support.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. § 408.*]

3. BANKRUPTCY (§ 408*)—REFUSAL OF DISCHARGE—FAILURE TO ACCOUNT FOR ASSETS.

That a bankrupt's sister, who some time prior to the bankruptcy engaged in the same business in which the bankrupt had been engaged, did not conduct the business herself, but employed the bankrupt on a salary, did not indicate that the bankrupt was in fact carrying on the business in his sister's name, in the absence of any showing that he shared in the profits.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. § 408.*]

4. BANKRUPTCY (§ 408*)—REFUSAL OF DISCHARGE—FAILURE TO ACCOUNT FOR ASSETS.

Where a bankrupt's sister prior to the bankruptcy, having \$600 to \$700, engaged in the business in which the bankrupt was formerly engaged, of purchasing photographers' used plates, cleaning them, and reselling them, the sale of the business over two years thereafter for \$1,750 did not show

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the bankrupt was in fact carrying on the business in her name, as the profits, if not spent, might have aggregated \$400 in a year.

[Ed. Note.—For other caess, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. § 408.*]

Coxe, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of New York.

This cause comes here on appeal from a decree of the District Court, Eastern District of New York, denying the application of the bankrupt for a discharge. The opinion of the District Judge will be found in 203 Fed. 170. Reversed.

A. Cohen, of New York City, for appellant.

J. M. Hickey, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. [1] The grounds of objection to discharge are alleged concealment of property and a failure to keep books of account with intent to conceal his condition. The burden of proof is on the objecting creditors; the court must be satisfied by evidence that the objections are sustained. A discharge should not be refused, when the evidence fails to support the averments, merely because some of the proof "looks suspicious."

Miller was adjudicated a voluntary bankrupt on May 22, 1911. The schedules are not before us, but from the opinion of the District Judge it appears that the only debts of any importance are two promissory notes which he made to Goldberg & Rathers of Boston. One of these was put in evidence, dated July 9, 1907, for \$1,846.15 payable in 4 months and indorsed to the objecting creditor.

[2] The bankrupt from 1902 to 1907 was in business for himself under the name of the "Brooklyn Glass Works," having filed the statutory certificate authorizing his doing business under that title. The business consisted in purchasing photographers' used glass plates, cleaning them with hot water and lye, and selling them when cleaned to framers. He made the purchases and sales, going himself from place to place, and hiring a man to clean them. It was a small business conducted on a cash basis and manifestly did not require any elaborate bookkeeping—a memorandum book and a bank account would be all that was necessary. Rathers was an old friend of his. He loaned him money when he could, and later signed notes to him (or rather to his firm) as an accommodation, which were always cared for by the payee and gave him no trouble. In September, 1907 (which was the year of the panic) the accommodation note above referred to was outstanding, not due till November. He also owed \$700 to a man named Fineberg, who was in the milk business, and was pressing him for payment. In order to pay Fineberg, he sold him his business with all its assets for \$1,085. Fineberg paid him with checks, two for \$350 each, one for \$385. The two \$350 checks he indorsed and delivered back to Fineberg; the \$385 he kept. Fineberg took over all there was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

some trumpery fixtures—there was no lease, Miller occupying his premises on a monthly tenancy—and all the glass, enumerated in a bill of sale. Fineberg did not carry on the business, but eventually got back his money from selling the glass. Fineberg testifies to this, and there is no apparent reason for doubting his account of his transactions with Miller. So far as we can see, the old business and all its assets, apparently all the property Miller owned, was disposed of fairly for a valuable consideration. The District Judge was of the opinion that the bankrupt had failed to account for the \$385. According to the bankrupt's testimony from that time to the present he has been working on a salary (at first of \$15, afterwards of \$10, a week), and for part of the time he was out of employment. It is reasonable to assume that he spent the money for his support during the four years.

[3] This transaction left Miller without remunerative occupation. He had a sister who had saved \$600 to \$700. She, we may presume at his suggestion, decided to go into the same sort of business he had been engaged in for several years. She took out a certificate for doing business as the Williamsburg Glass Works and put her money into it, employing him to conduct the business on a salary of \$15 a week and another man to clean the plates. There is certainly nothing novel, or startling, or necessarily suspicious about this. Countless men, who have gone broke, have had wives, or mothers or blood relatives who have done the same thing for them. Believing the experience and business enterprise of their relative would make their capital fruitful enough to insure him a living wage and possibly an additional profit for themselves, they have taken the risk. Sometimes, no doubt, the arrangement is merely a cover under which the person thus accommodated himself shares in the profits beyond his salary, but the ostensible arrangement is such a natural one that there must be some proof to indicate that it is a mere cover for something else. It is not sufficient proof of that, as the petitioning creditor seems to contend, that the female does not herself conduct the business about which she knows little or nothing. The vital question is who gets the profits and there is nothing in this record to indicate that during the two years that the "Williamsburg Glass Works" continued, Miller drew anything from it except his weekly salary.

[4] After two years and a half Yetta Miller, the sister, sold out the business to Louis Miller, a brother of the bankrupt, who is not on good terms with him, for \$1,750. Louis was also in the same sort of business, and since his purchase in 1910 has continued the business which he bought from his sister. The District Judge refers to this "Williamsburg" business as having grown from nothing to \$1,750 in a little over two years. But it did not grow from nothing; it started with Yetta's \$600 or \$700. If she did not spend the profits as they came in, it is not suspicious that they aggregated \$400 a year.

A few months after she sold out, the sister, who had in the meantime married, again started a glass business, under certificate as the North Side Glass Works, and employed her brother, the bankrupt, to conduct it on a salary of \$10 a week. We find nothing in the record

which will warrant the finding that this business is really Isaac Miller's; she keeps an account in the North Side Bank of Brooklyn in her own name and signs the checks. Except that she can sign her name, she cannot read or write. She produced the only book kept for the business, a sort of memorandum book, apparently all that that sort of business required—as to its contents we are not enlightened. Nor is there anything to show that checks for more than his salary and the money necessary to buy glass were given to the bankrupt.

On the whole case, we concur with the special commissioner in the conclusion that, although there may be a strong suspicion that the bankrupt has been himself conducting business under the three successive corporate names, there is not sufficient proof to offset the testimony of the sister and brother and to prove the business still belongs to the bankrupt. The decree is reversed.

COXE, Circuit Judge, dissents.

H. W. JOHNS-MANVILLE CO. v. LOVELL-McCONNELL MFG. CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

No. 226.

INJUNCTION (§ 55*)—UNFAIR COMPETITION—INTERFERENCE WITH BUSINESS.

Contracts between defendant, a manufacturer of automobile horns under patents owned by it, and trade journals for advertising, authorized defendant to cancel them if advertisements of products which in its judgment infringed its patents were published. In a suit prosecuted by it with reasonable promptness against a third party it obtained a decree sustaining its patents and giving their claims a broad construction. It then notified such journals that the publication of advertisements of the "following infringing instruments," naming plaintiff's among others, would subject the contract to cancellation, and a few days thereafter it brought suit against plaintiff for infringement. *Held*, that there was nothing unfair in the giving of such notice, as plaintiff could not complain of such contract, and, while defendant could not cancel the contract unless it acted in good faith, there was nothing to indicate bad faith, as it is not bad faith for the owner of a patent to wait until the decision in a test case before prosecuting other infringers.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 108, 109; Dec. Dig. § 55.*]

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from an order of the District Court, Southern District of New York, denying a motion for a preliminary injunction. The application was for an injunction restraining defendant from "interfering with the plaintiff's advertising contracts and from issuing advertisements threatening infringement suits against dealers, agents, or users" of plaintiff's auto-horn. The plaintiff is the sole distributor in this country for an automobile alarm signal, known as the Long horn. Defendant is the manufacturer of a similar horn, known as the Klaxon, owning the patents under which it is manu-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

factured. In a suit against another manufacturer these patents were recently sustained in the Eastern District of New York, infringement was found, and the claims of said patents were given a broad construction. Complainant has contracts for advertising its horns with several trade journals. The particular act complained of is the sending of a letter to the leading automobile trade journals which reads as follows:

"In accordance with instructions from our clients, the Lovell-McConnell Manufacturing Company, we hereby notify that under clause VII of the Lovell-McConnell Manufacturing Company's advertising contract, in event that the publisher prints in any issue subsequent to the receipt of this notification any advertisement illustrating or concerning following infringing instruments:

Newton

Spartan

Long

the Lovell-McConnell Manufacturing Company's advertising contract is subject to immediate cancellation.

"This notification is made as a result of Judge Chatfield's recent decision sustaining the validity of the Klaxon basic patents."

Clause VII of the various contracts which defendant has with the various trade journals with whom plaintiff has advertised, or was about to advertise, reads as follows:

"VII. Publication of advertisements of an unfair competition nature, or which, in the judgment of this company" (the defendant), "are of products infringing its patents, renders this contract liable to immediate cancellation."

Complainant contends that the sending of these notices by defendant to the trade journals is a "very vicious and willful case of trade interference." Order affirmed.

Hillary C. Messimer and Albert M. Austin, both of New York City, for appellant.

D. W. Cooper and George C. Dean, both of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. We do not see any ground on which to base an injunction. Certainly there was nothing unfair or of which plaintiff could complain in clause VII of defendant's contracts with the different periodicals in which its advertisements were inserted. If the publishers were willing to agree in advance that defendant might cancel its contract and cease its advertising, whenever products which it thought were infringements were advertised, surely no one else had any right to complain. So, too, by virtue of that clause, defendant might discontinue its advertising whenever some product advertised was in its judgment an infringement. Of course it would have to act in good faith; it could not avail of the seventh clause to get rid of its obligations under the contract, if the advertisement complained of related to a product which in defendant's judgment was not an infringement of any of its patents. But there is nothing here to indicate any such bad faith; on the contrary, the circumstance that they have brought suit to enjoin the manufacture and sale of plaintiff's horn in-

dicates that, rightly or wrongly, defendant believes that it is an infringement.

We do not understand that it is contended that defendant, assuming that it entertains such belief, might not notify the journals that the contract was cancelled and thereupon cease advertising. But if it took such a course, the first thing the journals would do would be to demand information as to what advertisement it was of which defendant complained, whose product it was that in defendant's judgment infringed its patent. Surely no one can contend that defendant should refuse to give such information. If, when such information had been given, a journal had offered defendant to discontinue further publication of plaintiff's product if defendant would renew its advertising contract, what possible cause of action would plaintiff have against any one? Nor can we see how the situation is changed by the circumstance that the information is given to the journals before, instead of after, the discontinuance of defendant's advertising.

The case at bar differs materially from *Adriance v. Nat. Harrow Company*, 121 Fed. 827, 58 C. C. A. 163, where defendant for years kept on sending circulars to the customers of a rival manufacturer, notifying them that they were infringing his patent and threatening wholesale suits, while at the same time defendant was careful to avoid bringing suit against any one. Here within a few days of the sending of the notices complained of suit was brought under defendant's patents against the plaintiff. It is true that plaintiff's horns have been manufactured, sold, and advertised for two or three years, but it appears that during that time defendant has been conducting a suit against another supposed offender, in which suit with reasonable promptness an interlocutory decree was entered which sustained defendant's patents and construed their claims. Immediately thereafter the notice was given to the journals. It is well settled that the owner of a patent is under no obligation to prosecute every supposed infringer simultaneously; it is entirely consistent with good faith on his part to wait until the decision in a test case has determined the validity and scope of his patent.

The order is affirmed, with costs.

UNITED STATES v. CANTINI.

(Circuit Court of Appeals, Third Circuit. April 21, 1914.)

No. 1806.

1. ALIENS (§ 62*)—NATURALIZATION—RESIDENCE—"RESIDED CONTINUOUSLY."

The words "resided continuously," as used in the Naturalization Law, requiring five years' continuous residence immediately preceding application for naturalization, do not mean that the alien's residence shall not be interrupted at all for such period, but the question whether he has "resided continuously" in the United States for five years immediately preceding his application is a question of fact to be determined from all the facts and circumstances in the case.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 123-125; Dec. Dig. § 62.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. APPEAL AND ERROR (§ 1009*)—FINDINGS BY TRIAL JUDGE—REVIEW.

The presumption in favor of the finding of fact by a trial judge is less strong where the hearing is on bill and answer than where a trial or hearing of the usual character has been had.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

3. ALIENS (§ 68*)—NATURALIZATION—CONTINUOUS RESIDENCE.

Where, during the five years immediately preceding an alien's application for naturalization, he left the United States and returned to Italy to visit his parents, expecting to return in three months, and requested his employers to retain his position, but, owing to his marriage abroad, the birth of a child, and other circumstances, he remained out of the United States for almost two years, he could not be lawfully said to have resided continuously within the United States for the necessary five years preceding his application.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138-145; Dec. Dig. § 68.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action by the United States against Giacinto Cantini to set aside a certificate of naturalization. From a decree in favor of defendant (199 Fed. 857), the United States appeals. Reversed, with instructions.

E. Lowry Humes, of Meadville, Pa., for the United States.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. This appeal is from an order dismissing a petition in which the government sought to cancel a certificate of naturalization on the ground that it had been illegally obtained.

[1] The facts are set out so fully in the opinion of the District Court, which will be found in 199 Fed. 857, that we need not repeat them. The brief for the government concedes that the question for decision is whether Cantini "resided continuously" within the United States for at least five years before the date of his application. To quote from the argument:

"Does that phrase require an applicant for naturalization to live and have his abode within the United States for the entire period of five years immediately preceding his application? Or may the applicant during a considerable part of such period maintain a constructive residence within the United States, by the mere intent on his part to return thereto while actually living outside its limits? If an actual physical existence within the United States is necessary, then the court below was undoubtedly in error in dismissing the bill of the United States, because it was admitted that the respondent had spent almost two years of the five years immediately preceding his application in his native land, and therefore he had been illegally admitted to citizenship. On the other hand, it is admitted that the respondent, although he married and lived in his native land for two years of said period of five years, intended ultimately to return to the United States and make his home there; and, if such intent is sufficient to establish the continuous residence mentioned in the statute, then the action of the court in refusing to cancel his certificate of citizenship was proper."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The case is not free from difficulty. It is scarcely to be doubted, we think, that the phrase "resided continuously" would be unreasonably restricted if it should be confined to the precise and literal meaning of the words. The continuous character of an alien's residence would thus be fatally interrupted by the briefest visit of pleasure, or friendship, or business, beyond the boundaries of the United States; and the rules of construction admonish us that we are not to suppose that Congress intends any statute to produce an unreasonable result, unless the language used be such as to leave no fair doubt that such a result was the object of the law. In the act of 1906 (Act June 29, c. 3592, § 4, par. 4, 34 Stat. 596 [U. S. Comp. St. Supp. 1911, p. 531]), the phrase in its common and ordinary use appears to have an elastic meaning, so elastic in fact that we may easily imagine two sets of circumstances in each of which the intention of the alien would be the same, although the conclusion would be different. For example, let us suppose that Cantini's absence in Italy had been due to the fact that he had been immediately arrested in that country on a groundless charge, and had been detained in prison for the period in question. Having left the United States with the intention of returning in a short time, and having been prevented by force from carrying his intention into effect, the continuous character of his residence would probably not be disturbed. On the other hand, it would be idle to contend that his residence had not been abandoned in fact, if he had bought a farm, established a family and a home, and entered the Italian army as a volunteer, although he might have continued to cherish the intention of returning. In a word, the question must of necessity be a question of fact in any given case, and the mere declaration by the alien that he intended to maintain his residence here may not be sufficient to overcome the persuasive facts that point in an opposite direction.

[2, 3] This record therefore presents a question of fact rather than a question of law. At all events, we do not feel called upon to attempt the difficult and elusive task of defining the phrase referred to, and for this reason we see no occasion to discuss any of the cases that have been cited. Among these are *In re Walton*, Fed. Cas. No. 17,127; *Ex parte Saunderson*, Fed. Cas. No. 12,378; *In re An Alien*, Fed. Cas. No. 201a; *In re Schneider* (C. C.) 164 Fed. 335; *Penfield v. Railroad*, 134 U. S. 351, 10 Sup. Ct. 566, 33 L. Ed. 940; *U. S. v. Simon* (C. C.) 170 Fed. 680; *U. S. v. Aakervik* (D. C.) 180 Fed. 137; *U. S. v. Rockteschell*, 208 Fed. 530, 125 C. C. A. 532; and *In re Deans* (D. C.) 208 Fed. 1018. We are merely required to decide whether an inference of fact drawn by the District Court from other conceded facts meets with our approval. The presumption in favor of a finding below exists, even where the hearing is upon bill and answer, but in such a case the presumption is naturally less strong than where a trial or hearing of the usual kind has taken place. In such a situation, differences of opinion will inevitably arise, and the prevailing opinion will reflect the view of the court of final appeal. Recognizing the difficulties of the present controversy, and disclaiming the intention to lay down a general rule, we can only say that the undisputed facts before us seem to establish the fact that Cantini had not resided continuously within the

United States for at least five years preceding his application. As a result, we think that the government's attack upon his certificate should have been sustained.

The decision dismissing the petition is reversed, with instructions to enter an order of cancellation, but without prejudice to the alien's right to make a new application at the proper time.

In re NATIONAL LUMBER CO.

PEOPLE'S BANK OF McKEESPORT v. FELL.

(Circuit Court of Appeals, Third Circuit. April 18, 1914.)

No. 1819.

BANKRUPTCY (§ 165*)—PREFERENCES—SET-OFF.

Defendant bank discounted a note for the bankrupt before it matured, with reasonable cause to know that the bankrupt was insolvent. Thereupon the bank and the bankrupt began to accumulate money in the bankrupt's deposit account, refusing to charge thereto other notes as they matured, and two days before bankruptcy, when the account was sufficient to pay the note, the bankrupt drew a check in favor of the bank for the amount and paid the note. *Held*, that such transaction constituted a preference, and was not excused on the ground that the bank, had it waited until after bankruptcy, might have offset the deposit against its claim, under Bankr. Act July 1, 1898, c. 541, § 68a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), providing that, in all cases of mutual debts or credits between the estate and a creditor, the account shall be stated, and one debt shall be set off against the other, and the balance only allowed and paid.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. § 165.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; James S. Young, Judge.

In the matter of bankruptcy proceedings of the National Lumber Company. Action by W. B. Fell, as the bankrupt's trustee, against the People's Bank of McKeesport. Judgment for plaintiff, and defendant bank brings error. Affirmed.

H. J. McAllister, of McKeesport, Pa., for plaintiff in error.

George R. Wallace, of Pittsburgh, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. On September 13, 1912, an involuntary petition was filed against the National Lumber Company, and in due course this was followed by an adjudication. This suit was brought by the trustee to recover a preferential payment of \$3,000 made to the People's Bank of McKeesport a few days before the bankruptcy. The facts were scarcely in dispute, but at all events the verdict has settled that they were as follows:

For several years the company had been a depositor in the bank, carrying an average balance of a few hundred dollars. On July 22, 1912,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a three months' note for \$3,000 indorsed by the company was discounted by the bank, and the proceeds were credited to the company. This note would not mature until October 22. Late in August or early in September the company was insolvent, and the bank either knew or had reasonable cause to know of this condition. Immediate payment of the note was regarded by the bank as important, and the company undertook to discharge the obligation before it fell due. As a means to that end the company began to accumulate money in its deposit account. The custom of the bank had always been to charge up the company's notes as they matured, but now three of the company's notes—one of \$544.27, falling due on September 3; one of \$380.81, falling due on September 6; and one of \$673.22, falling due on September 10—were refused payment and were protested, although there was money enough in the company's account on each of these dates to meet the notes just referred to. Several deposits of cash were made also, and two notes of solvent customers were discounted and the proceeds credited, thus bringing the account to the necessary point. Thereupon a check for \$3,000 was drawn to the order of the bank on September 11, and the note was paid and surrendered to the company. Two days afterwards the petition in bankruptcy was filed.

Clearly every element of a preference is here. The only defense is that section 68a applies and relieves the bank:

"a. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

The general meaning of this clause is plain enough, and we need hardly refer to the discussion in *Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, cited in *Bank v. Chicago, etc., Co.*, 229 U. S. 435, 33 Sup. Ct. 829, 57 L. Ed. 1268. The difficulty is that the decision does not fit the facts of the present case. If the company had allowed the money to remain in its account until after bankruptcy had supervened, a situation would have been presented to which the clause might have applied. But this was not done. The money was actually drawn out by the company—for this was the effect of its check—and was actually handed over to the bank in payment of the note, so that we do not have a case of mutual accounts where one may be set off against the other, but the case of the use of money to pay a debt under circumstances that made the payment preferential. The argument really comes to this: If the payment had not been made, the bank could have set off the deposit against the note, and the result would then have been just what it is now. The sufficient answer is—the contingency did not happen. The parties chose to pay and to accept the money in the ordinary course of events, and their conduct is to be judged by what they did, not by what they might have done. *Bank v. Campbell*, 81 U. S. (14 Wall.) 87, 20 L. Ed. 832.

The judgment is affirmed.

GROSS et al. v. SELIGMAN et al.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

No. 224.

1. COPYRIGHTS (§ 67*)—PICTURES—PHOTOGRAPHS—COPYING.

Where a model posed in the nude for a photograph which the artist copyrighted under the title *Grace of Youth*, other artists were free to form their own conception of the subject and avail themselves of the same model's services, and if by chance the pose, background, light, and shade of the new picture were similar, or if by reason of the fact that the same model was the prominent feature in both compositions, it might be difficult to distinguish the new from the old, the new, being in no sense a copy of the old, would not be an infringement.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 64; Dec. Dig. § 67.*]

2. COPYRIGHTS (§ 67*)—PHOTOGRAPHS—INFRINGEMENT.

An artist posed a model in the nude, and therefrom produced a photograph, which he named the "*Grace of Youth*." Having copyrighted the same, he sold all his artist's rights to complainant, and two years later placed the same model in the identical pose, with the single exception that in the second photograph the model wore a smile and held a cherry stem between her teeth, and was called "*Cherry Ripe*," while in the original she was posed with her face in repose, the backgrounds were not identical, and there were some slight changes in the contours of her figure, but otherwise the photographs were the same. *Held*, that the second could not be regarded as an independent conception, but constituted an infringement.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 64; Dec. Dig. § 67.*]

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from an order of the District Court, Southern District of New York, enjoining defendant from publishing a photograph. The suit is brought under the provisions of the Copyright Act. One Rochlitz, an artist, posed a model in the nude, and therefrom produced a photograph, which he named the "*Grace of Youth*." A copyright was obtained therefor; all the artist's rights being sold and assigned to complainants. Two years later the same artist placed the same model in the identical pose, with the single exception that the young woman now wears a smile and holds a cherry stem between her teeth. He took a photograph of this pose, which he called "*Cherry Ripe*"; this second photograph is published by defendants, and has been enjoined as an infringement of complainant's copyright.

House, Grossman & Vorhaus, of New York City (Chas. Goldzier, of New York City, of counsel), for appellants.

Archibald Cox, of New York City (R. W. Byerly, of New York City, of counsel), for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). This is not simply the case of taking two separate photographs of the same young woman.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

When the *Grace of Youth* was produced a distinctly artistic conception was formed, and was made permanent as a picture in the very method which the Supreme Court indicated in the *Oscar Wilde Case* (*Burrow-Giles Company v. Sarony*, 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349) would entitle the person producing such a picture to a copyright to protect it. It was there held that the artist who used the camera to produce his picture was entitled to copyright just as he would have been had he produced it with a brush on canvas. If the copyrighted picture were produced with colors on canvas, and were then copyrighted and sold by the artist, he would infringe the purchaser's rights if thereafter the same artist, using the same model, repainted the same picture with only trivial variations of detail and offered it for sale.

[1] Of course when the first picture has been produced and copyrighted every other artist is entirely free to form his own conception of the *Grace of Youth*, or anything else, and to avail of the same young woman's services in making it permanent, whether he works with pigments or a camera. If, by chance, the pose, background, light, and shade, etc., of this new picture were strikingly similar, and if, by reason of the circumstance that the same young woman was the prominent feature in both compositions, it might be very difficult to distinguish the new picture from the old one, the new would still not be an infringement of the old because it is in no true sense a *copy* of the old. This is a risk which the original artist takes when he merely produces a likeness of an existing face and figure, instead of supplementing its features by the exercise of his own imagination.

[2] It seems to us, however, that we have no such new photograph of the same model. The identity of the artist and the many close identities of pose, light, and shade, etc., indicate very strongly that the first picture was used to produce the second. Whether the model in the second case was posed, and light and shade, etc., arranged with a copy of the first photograph physically present before the artist's eyes, or whether his mental reproduction of the exact combination he had already once effected was so clear and vivid that he did not need the physical reproduction of it, seems to us immaterial. The one thing, viz., the exercise of artistic talent, which made the first photographic picture a subject of copyright, has been used not to produce another picture, but to duplicate the original.

The case is quite similar to those where indirect copying, through the use of living pictures, was held to be an infringement of copyright. *Hanfstaengle v. Baines & Co.* (L. R. 1894) A. C. 20, 30; *Turner v. Robinson*, 10 Irish Chancery 121, 510.

The eye of an artist or a connoisseur will, no doubt, find differences between these two photographs. The backgrounds are not identical, the model in one case is sedate, in the other smiling; moreover the young woman was two years older when the later photograph was taken, and some slight changes in the contours of her figure are discoverable. But the identities are much greater than the differences, and it seems to us that the artist was careful to introduce only enough differences to argue about, while undertaking to make what would

seem to be a copy to the ordinary purchaser who did not have both photographs before him at the same time. In this undertaking we think he succeeded.

The order is affirmed.

In re MITCHELL et al.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

No. 136.

1. BANKRUPTCY (§ 347*)—CLAIMS—PRIORITY—EXPENSE OF PRESERVING ESTATE.

Under Bankr. Act, July 1, 1898, c. 541, § 64b, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), specifying the debts to have priority and the order of payment, which specifies as the first class the actual and necessary cost of preserving the estate, debts incurred in recovering property transferred or concealed and the cost of administration, including reasonable attorney's fees, should not have been paid until watchmen employed by express authority of the court to care for a stock of jewelry had been paid for their services.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 538; Dec. Dig. § 347.*]

2. BANKRUPTCY (§ 474*)—LIABILITY OF TRUSTEE FOR IMPROPER PAYMENTS.

Where a trustee in bankruptcy paid attorney's fees, leaving an insufficient amount in his hands to pay watchmen employed to care for the property of the estate, he would have to stand the loss, unless he could obtain a refund from the attorneys.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 878-884; Dec. Dig. § 474.*]

Petition to Revise Order of the District Court of the United States for the Eastern District of New York.

This cause comes here upon petition to revise an order of the District Court, Eastern District of New York, which denied an application for an order directing the trustee in bankruptcy to pay to the late sheriff of Kings county \$160 which was due to two caretakers of the bankrupt's property, a stock of jewelry. On October 25, 1911, prior to the bankruptcy the sheriff levied on the property under an execution. Six days later a petition in bankruptcy was filed, and on November 1st an order was made by the bankruptcy court restraining the sheriff from interfering, disposing of, or turning over such assets until further order. This order also empowered the petitioning creditors to employ a watchman to take care of the property "now in the possession of the sheriff." Thereupon the attorneys for the petitioning creditors employed the sheriff to take care of said property and directed him to employ keepers. Reversed and remanded, with instructions.

See, also, 202 Fed. 806.

William J. Mahon, of New York City, for petitioner.

Cass & Apfel, of New York City (F. H. Van Houten, of New York City, of counsel), for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. [1, 2] The two caretakers, one by day, the other by night, actually performed the services they were employed to render for 32 days. They were employed by express authority of the bankruptcy court. Their compensation has been fixed by the court at \$160, and there seems to be no dispute as to the reasonableness of that sum. No claim is made by the sheriff for any poundage or fees. It is merely the payment of watchmen that is asked for. Apparently the reason for nonpayment of this claim is the circumstance that the trustee has disbursed substantially all the assets of the estate.

The trustee states that the net amount realized was \$492.22; that he paid out various sums, which are enumerated in his affidavit, aggregating \$195.60, and also for disbursements of attorneys for the petitioning creditors and himself \$128.11. This would leave a balance of \$178.51, which would be sufficient to meet the claim of these caretakers, had not the trustee paid \$150 to the firm of attorneys (of which he is a member) which appeared for the petitioning creditors and subsequently for the trustee, and \$75 to the attorney for the bankrupt.

The Bankruptcy Act, however, provides that the debts to have priority and to be paid in full out of the bankrupt estates and the order of payment shall be as follows:

"(1) The actual and necessary cost of preserving the estate subsequent to filing the petition."

Debts incurred in recovering property transferred or concealed and the cost of administration, including reasonable attorney's fees, are subordinated to the debts incurred for preservation of the estate, are to be paid only after the debts in class 1 have been paid in full. Section 64b. The trustee should not have paid out the funds of the estate for these purposes until he had first paid whatever was due for preserving the estate.

The order is reversed, and cause remanded, with instructions to the trustee to pay to the caretakers so much of their claim as represents services subsequent to October 31, 1911, the date when petition was filed. Presumably he will be able to obtain a refund of his payments to the attorneys; but, if he cannot do so, he will have to stand the loss of this improvident payment.

MANNING et al. v. INTERNATIONAL MERCANTILE MARINE CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1914.)

No. 187.

SHIPPING (§ 73*)—LIABILITY FOR DEATH—LAW GOVERNING.

The nationality of a steamer owned and registered in Belgium and flying the flag of that country was not changed by a demise charter to a New Jersey corporation, which officered, manned, and operated it; and hence liability for death caused by negligence on board such steamer while on the high seas was governed by the law of Belgium, and not by that of New Jersey.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 73.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the District Court of the United States for the Eastern District of New York.

This cause comes here upon appeal from a judgment of the District Court, Eastern District of New York, dismissing the complaint. The action was brought to recover damages for alleged negligence, causing the death of plaintiffs' testator. The deceased sustained his injuries while on the high seas on board the steamship Lapland, bound from Europe to New York. The steamer was owned by a Belgian corporation, was registered in Belgium, and flew the flag of that country. She was chartered to defendant, a New Jersey corporation, which under a demise charter officered, manned, and operates the vessel. The statute of New Jersey was pleaded, but not the law of Belgium. Upon demurrer it was held that the complaint did not set forth facts sufficient to constitute a cause of action. Affirmed.

Armstrong & Brown, of New York City (P. M. Brown, of New York City, of counsel), for plaintiffs in error.

N. B. Beecher and George H. Emerson, both of New York City, for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. Being owned and registered in Belgium and flying the Belgian flag, the vessel is, under many decisions, to be regarded when on the high seas as a floating part of the kingdom of Belgium. Plaintiffs contend that this condition is changed by the demise charter under which she was turned over to a resident of New Jersey. Demise, of course, effects some changes in the respective rights and obligations of owner, charterer, shipper, lienor, etc., and a convenient phrase for expressing such change is the one so often used, viz., that "the charterer is the owner *pro hac vice*," just as the common phrase "the law follows the flag" is a convenient one to use. But there is no authority for the proposition that a demise destroys a vessel's nationality, while her actual ownership, registry, and flag remain the same, and there seems to be no good reason why any such new doctrine should be announced. Plaintiffs, we think, confound contract obligations with torts. In order to recover for death from negligence, it must be shown that there is such a right of recovery under the law of the country of which the vessel is a part. The law of Belgium, not the law of New Jersey, should have been pleaded, and the demurrer was well taken.

The judgment is affirmed, with costs of this appeal, with leave, however, to plaintiffs to plead the Belgian law, if they be so advised.

KNIGHT v. RIEGER et al.†

(Circuit Court of Appeals, Fourth Circuit. February 3, 1914.)

No. 1188.

PATENTS (§ 328*)—COMBINATION OF OLD ELEMENTS—MAUSOLEUM.

The Knight patent, No. 979,965, for a mausoleum in which a number of features which were old in the art are brought together, does not disclose a patentable combination, since the parts do not co-operate to produce any new or unitary result, and is void for lack of patentable novelty.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit in equity by Maurice L. Knight against Henry P. Rieger, John Drobisch, Laura Praeger, Christian B. Ohrenschaß, and Henry P. Rieger & Co., Incorporated. Decree for defendants (203 Fed. 49), and complainant appeals. Affirmed.

E. Hayward Fairbanks, of Philadelphia, Pa. (William R. Barnes, of Baltimore, Md., on the brief), for appellant.

William B. Smith, of Baltimore, Md., for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. The patent in suit, No. 979,965, was issued to appellant, complainant below, on December 27, 1910, for a mausoleum. In the specification on which his application was made he states that his invention consists of (1) "improved means for obtaining ventilation and drainage of the crypts or loculi in a mausoleum or vault," (2) "improved means for closing and sealing the crypts or loculi in a vault or mausoleum," and (3) "other novel features of construction."

The appellees are sued for infringing this patent, and their defense, which was sustained by the trial court, puts in issue the fact of infringement and the validity of the patent.

It does not appear that anything is now claimed on account of "other novel features of construction," whatever the phrase may have been intended to include; nor do we discover in the record or brief of appellant any distinct assertion of novelty in the "improved means for closing and sealing the crypts." The only serious contention therefore relates to the "improved means for obtaining ventilation and drainage," as the same are described in different ways in all, except the third, of the six numbered claims of the specification.

It will aid a correct understanding of this contention if we first put aside certain matters of controversy which have no bearing upon the questions to be decided. In the briefs of counsel, and particularly in appellant's brief, much space is devoted to a history of the litigation. So far as this history relates to the development of the art of mausoleum construction, and serves to disclose the difference between plans and methods of appellant and those of other mausoleum builders, it is perfectly legitimate and entitled to full consideration. But the repeated charges of bad faith and unfair dealing, the multi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

†Rehearing denied June 2, 1914.

plied accusations of fraudulent conduct, not always expressed in temperate language, have no proper place in this discussion. The actual situation of the parties in relation to certain structures heretofore erected, and the acts or inducements which brought about that situation, could at most affect only the relief to which appellant would be entitled in some minor respects if he prevailed on the principal issues; but epithets are not argument and personal ill feeling has nothing to do with the merits of the controversy.

Still less relevant are the references to an alleged "Monument Builders' Trust," and the charge that appellees are parties to a conspiracy in restraint of trade whose operations are in flagrant violation of the federal anti-trust law. Even the learned judge presiding at the trial is criticised by implication because he "saw fit in the case at bar to absolutely ignore this feature of the case, and to thus indirectly place the seal of judicial approval upon the appellees' illegal combination in restraint of trade," etc. We cannot escape a feeling of surprise that counsel of standing should take such a position. Of what possible bearing upon the validity of this patent is the fact—if it be a fact—that appellees are violating the anti-trust law? The patent speaks for itself. The alleged invention is fully and clearly described in the several claims embraced in the specification. The validity of the patent and the fact of infringement are here for determination because both are denied. It is absurd to say that appellees' defenses can be overcome or their force in any degree weakened by proof that they have committed offenses for which, in a proper proceeding, they might be subjected to civil and criminal prosecution. It is even more absurd to say that the failure or refusal of the trial court to consider "this feature of the case" involves or implies any "judicial approval" of an illegal combination. If the patent in suit is invalid for any reason which the courts recognize, the appellant is not in the least aided by showing that appellees are guilty of violating the anti-trust law. The court below was clearly right in ignoring this contention, because it is plainly immaterial and should therefore be left entirely out of account.

The questions for decision then are simply these: Is the patent valid? If so, has it been infringed? In passing upon the first question we refrain from expressing any opinion as to the patentability of appellant's invention. The point is made and argued at length by appellees' counsel that section 4886 of the Revised Statutes (U. S. Comp. St. 1901, p. 3382) requires the patentee to be a person who has "invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof"; that the only patentable inventions are those belonging to the classes enumerated in the statute; and that appellant's invention does not come within any of the enumerated classes. We prefer, however, to rest our decision upon other grounds, and therefore deem it unnecessary to discuss a defense which involves the controverted meaning of the statute rather than the actual merits of the invention for which the patent in suit was granted.

The mausoleum of familiar type resembles in some degree a minia-

ture temple. As commonly constructed, the door in front opens into a transverse vestibule which occupies the width of the structure. An aisle or corridor extends at right angles from the vestibule to the rear wall of the mausoleum, and on each side of the corridor are crypts or loculi placed one above the other. These crypts are oblong stone or slate boxes, each of sufficient size to contain a burial casket, and the casket is placed in the crypt through the side which is toward the interior of the mausoleum. The opposite or back side of the bank of crypts is parallel with the inner face of the external wall of the structure.

The method of construction described in the patent is designed to afford means of ventilating and draining the crypts into the open air, while preventing the escape from them into the interior of the mausoleum of the gases or liquids resulting from decomposition. For the purpose of ventilation the patent directs that there shall be a space of some inches in breadth between the back walls of the crypts and the inner side of the wall of the mausoleum. In each crypt are apertures or vents, one or more on the plane of the upper surface of the bottom of the crypt and one or more near the under surface of its top or cover, and these vents open into the air space between the crypts and the mausoleum wall. The latter is pierced with one or more openings at or near the surface of the ground and one or more at the top of the wall. It is also stated to be desirable to have the ceiling fit closely upon the top of the crypts and to leave between it and the roof proper an air space connecting with the vertical air chamber mentioned. On the side next to the corridor the crypts are closed tightly with a suitable slab or wall to prevent any escape of offensive gases into the interior of the mausoleum.

Coupled with this means for obtaining ventilation and drainage of the crypts is the provision for interlocking or securing the back edges of the horizontal shelves, which form the tops and bottoms of the crypts, in or to the wall of the mausoleum, thus securing a solid, connected, and durable structure. The ventilating feature is preserved by cutting out of the rear edge of each shelf for the greater portion of its length a rectangular strip of the approximate width of the vertical air chamber. This rectangular cut is shorter than the length of the shelf, so that there is left at each end a projection which bridges the air chamber and is secured to or interlocked with the mausoleum wall. In the language of the patent:

"The back edges of the shelves are secured in the inner faces of the walls and interlocked with them excepting at the openings forming the air flues."

In the structure which is claimed to be an infringement no part of the shelves referred to extends across or into the air chamber. Instead, as appellant alleges, the back or inner edges of the shelves of the crypts are connected with the mausoleum wall by blocks or filler pieces arranged in pairs and fixed in cement, with suitable wiring, so that when the structure is completed and the cement hardened the shelves become permanently joined with the side wall to substantially the same extent as, and in practically equivalent fashion to, the projecting portions of the shelves of appellant's device. In other words, ap-

pellees' method is claimed to result in the same rigid and durable connection between the bank of crypts and the mausoleum wall. The appellees deny that their method of construction is of the character just described, but, on the contrary, say that what they do is to place a number of bricks or other substances in the air chamber between the back wall of the crypts and the inner face of the mausoleum for the temporary purpose of holding the crypts in place during the process of construction, and that such supports are in no sense a part of the permanent structure. The means of ventilation and drainage appear to be substantially the same in both structures.

With this description, which is reproduced in the main from the findings of the trial court, virtually admitted by appellant to be correct, we proceed to a brief analysis of his invention to see if it reaches that degree of novelty and utility which entitles him to the protection of a patent. The mausoleum is of ancient origin. The general plan of the interior of such a structure as above outlined, the construction and arrangement of the crypts, and various devices for securing ventilation and drainage, have been long known and frequently adopted. The specification and claims of appellant's patent appear to describe a complete or nearly complete mausoleum. Of the many parts which compose the described structure, no one separately considered is claimed to embody any new or novel principle. Each of the elements used by him has been often employed in substantially the same way and for substantially the same purpose. As we understand his contention, the appellant claims only the right to a patent "for a new combination of old devices, coupled with which is the additional element of the shelves for the support of the coffin or casket, each having their back edges secured in or to or interlocked with the juxtaposed wall of the mausoleum structure."

But precisely what are the "old devices" which he has combined? He disclaims contending "that there was any invention per se in attaching a shelf to a wall, or that the patent in suit involved as its salient feature such securing of a shelf to a wall." But apparently this form of construction must be one of the elements or "devices" which enter into his combination. Otherwise, it would not be so strenuously contended that appellees' method, or alleged method, of connecting the crypts with the mausoleum wall, produces the same result as appellant's method and should be held to infringe his device. Indeed, it seems evident that appellant regards his plan of projecting portions of the shelves to be secured in or to the mausoleum wall, or some similar contrivance, as one of the factors of his invention. But the only other factor or element, so far as we can perceive, is his system of ventilation and drainage, and this system is not shown to possess any feature of novelty which of itself would be entitled to a patent. Nothing else is pointed out as indispensable to or forming an integral part of the combination.

We say that appellant's plan of ventilation and drainage exhibits no novel features, because we are satisfied beyond a reasonable doubt that the fact was so established. The evidence of record shows clearly that for a number of years at least before appellant applied for his patent

mausoleums had been actually constructed, or described in patents already issued, with a vertical air chamber between the superimposed crypts and the mausoleum wall, with apertures or vents from the crypts into the air chamber, and with openings from the latter into the outer atmosphere. These are the three essential parts of appellant's design, and none of them singly or all of them in combination originated with him. It is quite true that his plan differs from others in such minor particulars as the indicated size, location, and number of vents and openings, and in various details of preferred construction. But the variations and departures from previous designs which he introduced, and for which he makes claim, embody no new principle and in our judgment involve no exercise of the inventive faculty. The mausoleum conforming to his specification may be of superior excellence in the respects here considered, but, if so, it is because the improvements are merely such as result from experience and practical judgment, and not because there is anything really novel in the means employed or the results attained. Without entering into minute comparisons, which would needlessly prolong this opinion, it suffices to repeat the conclusion stated above that appellant's plan of ventilation and drainage discloses no substantial feature or quality which entitles him to a patent.

Upon this branch of the case the views we have just expressed are sustained by the highest authority. For example, in *Smith v. Nichols*, 88 U. S. (21 Wall.) 118, 22 L. Ed. 566, decided 40 years ago and frequently quoted with approval, the rule is laid down as follows:

"A patentable invention is a mental result. It must be new and shown to be of practical utility. Everything within the domain of the conception belongs to him who conceived it. The machine, process, or product is but its material reflex and embodiment. A new idea may be ingrafted upon an old invention, be distinct from the conception which preceded it, and be an improvement. In such case it is patentable. The prior patentee cannot use it without the consent of the improver, and the latter cannot use the original invention without the consent of the former. But a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent. These rules apply alike, whether what preceded was covered by a patent or rested only in public knowledge and use. In neither case can there be an invasion of such domain and an appropriation of anything found there. In one case everything belongs to the prior patentee; in the other, to the public at large."

To the same purport is *Hollister v. Benedict Mfg. Co.*, 113 U. S. 73, 5 Sup. Ct. 724, 28 L. Ed. 901, where the rule is again stated in language which seems particularly applicable to this case:

"It is but the display of the expected skill of the calling, and involves only the exercise of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice; and is in no sense the creative work of that inventive faculty which it is the purpose of the Constitution and the patent laws to encourage and reward."

Other illustrations of the doctrine are furnished by the following cases, and the prior cases therein cited: *Burt v. Ivory*, 113 U. S. 349, 10 Sup. Ct. 394, 33 L. Ed. 647; *Consolidated Roller Mill Co. v. Walker*, 138 U. S. 124, 11 Sup. Ct. 292, 34 L. Ed. 920; *International Tooth*

Crown Co. v. Gaylord, 140 U. S. 55, 11 Sup. Ct. 716, 35 L. Ed. 347; Wollen Sak v. Sargent, 151 U. S. 221, 14 Sup. Ct. 291, 38 L. Ed. 137; Haughey v. Lee, 151 U. S. 282, 14 Sup. Ct. 331, 38 L. Ed. 162.

In the light of these authorities we cannot justly do otherwise than hold that appellant's plan of ventilation and drainage does not of itself disclose any patentable novelty.

The patent in suit therefore must rest upon the asserted novelty of combining means of ventilation and drainage, which are not new, with that form of construction, which is also not new, by which the shelves of the crypts are in some permanent manner fastened to or interlocked with the wall of the mausoleum. But the difficulty here is that the elements in question, whatever particular form either may assume, do not interact or co-operate with each other to produce the common and desired result. Though both are employed in the described structure, they do not appear to be mutually dependent. Obviously, the same means or method may be employed for obtaining ventilation and drainage, and those objects secured, without any permanent or substantial connection between the crypts and the wall of the mausoleum. It is equally evident that the crypts and mausoleum wall, though placed somewhat apart, may be united in such a solid and enduring manner as to be practically one structure, without providing either ventilation or drainage. In the former case the bank of crypts would not only rest upon a separate foundation, but be throughout independent of support from the exterior wall of the mausoleum. In the latter case openings would have to be made in the connecting material, like the rectangular cuts in the projecting shelves of appellant's device, in order to secure ventilation and drainage. In other words, as appears to us, appellant merely brings these two factors into juxtaposition and concurrent use, but does not in fact produce any new or novel combination within the meaning and intent of the patent law. As we see the matter, it comes in reality to the question of the relative desirability of different modes of construction neither of which involves any display of inventive genius. One may be better than another, the appellant's possibly, though by no means certainly, the best of all; but we are quite convinced that nothing has been done or devised by him which can be regarded as a substantial addition to previous knowledge on the subject, or which possesses that degree of novelty and utility which are requisite to sustain a patent based solely on combination.

This conclusion is supported by numerous cases which we have examined and which appear to us controlling. Among these are Hailes v. Van Wormer, 87 U. S. (20 Wall.) 368, 22 L. Ed. 241, where the doctrine is stated as follows:

"It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention. No one by bringing together several old devices without producing a new and useful result, the joint prod-

uct of the elements of the combination and something more than an aggregate of old results, can acquire a right to prevent others from using the same devices, either singly or in other combinations, or, even if a new and useful result is obtained, can prevent others from using some of the devices, omitting others, in combination."

Again, in *Reckendorfer v. Faber*, 92 U. S. 357, 23 L. Ed. 719, it is said:

"The combination, to be patentable, must produce a different force or effect, or result in the combined forces or processes, from that given by their separate parts. There must be a new result produced by their union; if not so, it is only an aggregation of separate elements."

And the same doctrine is clearly and forcibly stated in *Pickering v. McCullough*, 104 U. S. 318, 26 L. Ed. 749, in the following language:

"In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other; to draw an illustration from another branch of the law, they must be joint tenants of the domain of the invention, seised each of every part, *per my et per tout*, and not mere tenants in common, with separate interests and estates. It must form either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions. Otherwise it is only a mechanical juxtaposition, and not a vital union."

The earnestness with which appellant's claims are pressed in brief and oral argument has led us to give them the most careful consideration; but we are unable to find in the record before us any basis of fact which distinguishes this case, on any recognized or tangible principle, from the cases just cited and others of like import in which similar conclusions have been reached.

We are satisfied that the decision of the court below was correct, and the decree appealed from is therefore affirmed.

STANDARD PLUNGER ELEVATOR CO. v. STOKES et al.

(Circuit Court of Appeals, Second Circuit. February 10, 1914.)

No. 126.

1. PATENTS (§ 163*)—INFRINGEMENT—DEFENSES—LACK OF INVENTION—ESTOPPEL.

Where complainant obtained its patent sued on from defendants, the fact that defendants were estopped to claim that the patent was void for lack of invention did not preclude them from contending for as narrow a construction of the language as the claims would warrant and the conditions of the prior art might require.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 238; Dec. Dig. § 163.*]

2. PATENTS (§ 328*)—INFRINGEMENT—PLUNGER ELEVATORS—CONSTRUCTION.

The Larson patent, No. 963,905, for a plunger hydraulic elevator, claim 2, calls for the combination, with a cylinder, plunger, and stuffing box of a hydraulic elevator, of a guiding means for the lower end of the plunger, and a "reduced" connection between the guiding means and the end of the plunger, whereby water is allowed to escape through the stuffing box. Claim 3 is for the combination, with a cylinder, plunger, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

stuffing box of a hydraulic elevator, of a guiding means for the lower end of the plunger; the same having a reduced connection to the guiding means. *Held* that, in view of the state of the art, the "reduced" connection in such claims must be confined to that shown by the patent, to wit, one which no longer fills the area of the aperture through the stuffing box, as the plunger proper does, and, as so construed, the patent was not infringed by a device permitting the water to escape through the stuffing box, because the connection of the plunger's cylinder itself passed through the box, and the water in the plunger extension passed from a plane below the box to a plane above it, which method was old in the art.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing the bill in a suit for infringement of patent. The patent is No. 963,905, granted July 12, 1910, to Thure Larson, assignor to himself, Jones, and Stokes, for a plunger hydraulic elevator. Complainant sues as the owner of the entire right, title, and interest under certain agreements of September, 1902, which are discussed and disposed of in a decision in another suit between the same parties, handed down at the same time as this. 212 Fed. 893, 129 C. C. A. 413.

The specifications state that:

"The mechanism of the patent consists in providing a guiding mechanism which cannot escape through the stuffing box and in so arranging the parts that when the plunger exceeds its normal upward travel the working part of the plunger will move out of the stuffing box and allow the water to escape to stop the upward movement of the plunger, whereby a relief is obtained without allowing the plunger to escape from the control of its guiding mechanism or to jump laterally off of the stuffing box."

The claims in controversy are:

"1. The combination with a cylinder, plunger and stuffing box of a hydraulic elevator, of a guiding means connected to the lower end of the plunger and arranged to engage the stuffing box, the connection between the guiding means and end of the plunger being constructed to allow the water to escape through the stuffing box when the plunger exceeds its normal upward travel.

"2. The combination with a cylinder, plunger and stuffing box of a hydraulic elevator, of a guiding means for the lower end of the plunger, and a reduced connection between said guiding means and the end of the plunger, whereby water is allowed to escape through the stuffing box.

"3. The combination with a cylinder, plunger and stuffing box of a hydraulic elevator, of a guiding means for the lower end of the plunger, the lower end of the plunger having a reduced connection to the guiding means."

The complainant's title to the patent having come from defendants, the latter do not dispute the validity of the patent. The device of the patent is quite fully described in an opinion of Judge Mayer denying application for preliminary injunction. 196 Fed. 47. Judge Holt reached the same conclusion as Judge Mayer on the question of infringement, holding that defendant's device was not within the claims. See, also, 200 Fed. 770, 119 C. C. A. 292.

C. V. Edwards, of New York City, for appellant.

L. W. Southgate, of New York City, for appellees.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). [1] Although these defendants may not be heard to contend that the patent is void for lack of invention, they are entitled, as any one else would be, to whatever narrow construction the language of the claims may warrant and the condition of the prior art may require. The elements are functionally old, the art was a crowded one, and patentee's contribution was no broad advance.

[2] The plungers of elevators of this type are hollow cylinders themselves, moving up and down in other cylinders. They are therefore closed at the bottom, so that there will be something against which the water can exercise its lifting force, and which will expel the water below it when valves are reversed. Sometimes this closure was not at the very bottom of the plunging cylinder, but inside of it and some distance above the bottom, the water being freely admitted into the space between the bottom and the closure. When thus closed, the plunger proper, the plunger which rose and fell because its base rested on the surface of water, extended from the car down to the closure. All below was an addition to the operative plunger; it would be fairly described as a connection between the open bottom where the water could flow in and out of the plunger and the bottom surface (the closure) of the operative plunger. In the prior art there were such plungers, with the closure some distance above the bottom. The cylinder of metal which (with the bottom closure) constituted the plunger was extended beyond the closure to the open bottom, remaining, however, of the same diameter and contacting with the stuffing box just as the rest of the plunger did. In such a structure, so long as any part of the plunger proper or of its connection between the operative bottom and the open bottom remained within the stuffing box, it was impossible for any of the water operating below the closed bottom to escape through the stuffing box. The patent shows a plunger with closed bottom; below this operative bottom there is an extension of the plunger, not by continuing its walls downward, but by one or more rods which connect it with the guiding devices at the bottom of the entire structure. This is properly called in the 2 and 3 claims a "reduced connection"; it is so reduced in size that, when the plunger proper rises above the stuffing box the connection does not (as in a prior device of Wetherill) fill the stuffing box as the plunger did. In consequence the operating water in the cylinder can pass freely between the connection and the walls of the stuffing box. In view of the state of the art we are of the opinion that the "reduced" connection of these two claims must be confined to the reduced connection which the patent shows; a connection which no longer fills the area of the aperture through the stuffing box as the plunger proper does.

In a device of the prior art, where the bottom closure of the plunger was located some distance above the bottom of the whole moving structure, holes were bored in the cylindrical extension just below the operating bottom. In consequence, when the holes rose above the stuffing box the water flowed out. Defendants have the same arrangement; their "connection" between the operating bottom and

the bottom of the whole moving structure, where guides against vibration have long been placed, is not a "reduced" one; it fills the cross-area of the stuffing box aperture as the plunger proper does, and water is discharged through holes just below the plunger closure, as it was in the Wetherill device.

The first claim of the patent is for a device so "constructed (as) to allow the water to escape through the stuffing box"—as the water undoubtedly does in the device shown in the patent, flowing between the walls of the box and the "reduced" connection which no longer fills the aperture as the plunger did. In one sense—speaking broadly—it may be said that in defendants' structure the water escapes "through the stuffing box," because the connection of the plunger cylinder itself passes through the stuffing box, and the water in this cylindrical plunger extension passes from a plane below the stuffing box to a plane above it. But just such a method of arranging the by-pass was old in the art and we are of the opinion that the claim must be confined to the method of passing through the stuffing box which the patent discloses.

Decree affirmed, with costs of appeal.

STANDARD ELECTRIC WORKS v. MANHATTAN ELECTRICAL SUPPLY CO.

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

No. 98.

PATENTS (§ 323*)—INVENTION—MASSAGING IMPLEMENT.

The Wantz patent, No. 703,100, for a massaging implement, *held* void for lack of invention, in view of the prior art.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Standard Electric Works against the Manhattan Electrical Supply Company. Decree for defendant, and complainant appeals. Affirmed.

The following is the opinion of the District Court by Hand, District Judge:

I do not see why in the present case the defendant has not supplied the very link which alone was absent in the case against the Eureka Vibrator Company. At that time there was nothing in the art to show that any one had ever thought of putting the motor into the handle of a massage instrument. Small as such a step was, it apparently displaced the old tool and was a real answer to a need in the art. In the case now at bar the facts are different. Garnault's machine shows clearly enough that some one had put a motor into the handle of a massage instrument. It is true that this was of the "shaker-type," so called, and did not operate by means of a tool movable in relation to the piece. This was the type which afterwards Andreæ, 667,357, made for a shaft machine, thus showing Wantz, when his time came, the same type of massage tool driven by shaft and driven by motor in the handle. Certainly this was the basis for close suggestion if Wantz had looked at Pfanschmidt. Wantz followed Pfanschmidt almost exactly and Pfanschmidt's original predecessor was Liedbeck. It is perhaps significant that Garnault refers to Liedbeck's own machine in a footnote to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

his publication. He suggests that Liedbeck's end pieces could be used upon his own and that his will be a better instrument. For, he says, "Liedbeck's vibrator must be started by another person and the vibrations which it supplies are jars."

The complainant's answer to this is that, as Garnault appeared in 1894, it must have taken some invention to make the necessary adaptation if eight years elapsed before Wantz appeared, especially as Wantz at once occupied the field after his device appeared. To this the defendant answers that the difficulty was not one of adaptation, which was simple enough, but because the need did not exist till about 1900. At that time, the defendant has proved, without contradiction, it first became common for private houses to have the electric current which made such machines useful for home use. That is the use for which they are especially convenient, and until it became possible so to use them there was no need for their discovery. As to their use with batteries, dry batteries were not available till after 1900, for their life was too short when out of use, while it is obvious that wet batteries with all the care they require would make unpopular a machine which depended upon them for its use. So the defendant insists with justice that the need for a portable machine did not arise till about the time Wantz put together Garnault and Pfanschmidt, so to speak.

Moreover, the defendant further urges that when it appeared the invention by no means drove out the prior machines in the art, for the shaft-driven machines have still their place in the market, when there is a business need for a massage instrument. That is to say, for doctors' offices, barber shops and masseurs' rooms the larger and more bulky machines still hold ground. It is true that this probably is now a very small proportion of the field; in number it may not be more than 20 per cent. of the total machines in use, but that 20 per cent. shows, especially as the old type is much more expensive, that the Wantz machine is not a better implement for all purposes. There is no reason to suppose that, when a permanent and not transportable machine is wanted, Wantz displaced the old type, and there is reason to suppose that the need for a transportable machine arose only when the use of electricity became general enough to make it desirable to have a machine which could be carried about and attached to any socket.

Such consideration as these take most of its force away from the evidence of use and acceptance. It is good evidence of novelty only when the need has existed unfiled for some time before the inventor filled it; that, of course, gives strength to the conclusion that to make it took more than mere artisan's skill; it was an argument upon which I altogether relied in the former case.

There is still another consideration of some weight. Wantz's actual disclosure never gained any success whatever; indeed, it was scarcely sold at all. Only when a new machine appeared in which the motor was not embraced within the hand did the public begin to buy in any quantity. Whether they would in the end have bought Wantz' machine, as they did its successor, no one can say, except in so far as it is to be inferred that they would not, from the difficulty of selling any of the old type.

Now, when the complainant relies for novelty upon success, he is embarrassed when the only success has been gained by a subsequent adaptation of his ideas. It is impossible to know to what extent the subsequent adaptation contributed to the public's acceptance of the later machine, and yet his argument depends upon the assertion that it arose wholly from the factor which he contributed. If one were free to speculate one would conclude that it was in this case rather the subsequent factor, with which he had nothing to do, but it is not necessary to do more than show that the success cannot properly be attributed merely to Wantz's idea.

A court ought undoubtedly to be very chary of substituting its own idea of what seems easy after it is done. In the Eureka Case I gave this invention the fullest benefit of that doctrine, but there must be some limit unless the patent is to be final. All those elements upon which the complainant there succeeded have now disappeared, Mr. Messimer can only urge upon me that the art should have anticipated the advent of general commercial lighting by electricity and that as it did not it must have taken some one

out of the ordinary to put Garnault upon Pfanschmidt. I cannot feel that this is very forceful; the art does not make its inventions till the need either exists or is obviously imminent. What reason is there to say that prior to 1900 any one could see that there would be an immediate field for a transportable electric massage instrument? If it was easy with the materials at hand to get up one, why should any one busy himself about it, until the market could at once absorb it? Men do not invent such things because in two or three years they will be useful, but because they can be sold at once. As soon as that demand arose this appeared, and soon after the more serviceable machine mounted on a handle. I think it would be too much to see in this more than that normal progress of the art reaching out into new fields as the opportunity opens, which no mere first comer should be permitted to monopolize.

Under the opinion in the Eureka Case, and as a new matter, I see nothing for it but to dismiss this bill.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing bill of complaint in a patent infringement suit.

Hillary C. Messimer and Albert M. Austin, both of New York City, for appellant.

Howson & Howson and Charles Neave, both of New York City, for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. The patent sued upon is No. 703,100, granted June 24, 1902, to Julius B. Wantz for a massaging implement. A prior suit for infringement was brought by the same complainant against Eureka Vibrator Company, in which Judge Hand sustained the patent and held defendant's device to be an infringement.

The present suit was tried before the same judge, but the record was materially changed by the introduction of much testimony which was not in the earlier suit. In consequence he changed his opinion as to the validity of the patent, on the ground that in the later case the defendant had "supplied the very link which alone was absent in the case against the Eureka Vibrator Company." He held the patent void and dismissed the bill. We entirely concur with the reasoning which led him to that conclusion and do not think it necessary to add anything to his opinion.

The decree is affirmed, with costs.

WESTINGHOUSE ELECTRIC & MFG. CO. v. ROLLER-SMITH CO.

(Circuit Court of Appeals, Second Circuit. February 10, 1914.)

No. 142.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—AUTOMATIC SWITCH BREAKER.

The Wright and Alborg patent, No. 633,772, for an automatic switch breaker, *held* valid and infringed.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing the bill of complaint in a suit brought for infringement of patent. The patent is number 633,772, granted September 26, 1899, for an Automatic Switch Breaker to Wright and Alborg, assignors to complainant. Reversed and remanded, with instructions.

Kerr, Page, Cooper & Hayward, of New York City (Thomas B. Kerr and John C. Kerr, both of New York City, of counsel), for appellant.

Edwards, Sager & Wooster, of New York City (Clifton V. Edwards and Lawrence K. Sager, both of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. This patent has been several times before the courts and has been fully discussed in the several opinions filed from time to time. The first suit was brought against the Cutter Company; it was dismissed in the trial court, but upon appeal the patent was held valid and infringed by the Court of Appeals for the Third Circuit. 143 Fed. 966, 75 C. C. A. 152. A second suit against the same defendant to enjoin a modified form of its first device was also dismissed by the trial court but upon appeal the same Court of Appeals, despite a number of new defenses, again held the patent valid and infringed. 169 Fed. 634, 95 C. C. A. 162. In the Southern District of New York Judge Ray again held the patent valid and infringed by another defendant, the Condit Company. (C. C.) 159 Fed. 144, 154. His decision was affirmed by this court in an opinion which will be found in 167 Fed. 546, 93 C. C. A. 224. A modified form of the Condit device was also before the Circuit Court in the Southern District of New York and was held to be an infringement. 173 Fed. 82. In view of the elaborate discussions of this patent and of the art to which it relates, it would be a waste of time to thrash over old straw. It might be supposed that there would come a time in the history of a patent, when repeated decisions, all one way, would settle something about it, but however it may be in other circuits, our experience here seems to be the other way.

The record here as to validity is just the same as it was when the patent was first brought here with the exception of one solitary bit of prior art, referred to as the Helios patent. Since the Helios device required as an essential element a magnetic blow-off, which the Wright and Alborg patent dispenses with, we concur with Judge Mayer in the conclusion that it is of no importance whatever as bearing upon the questions raised here.

As has been seen various devices, gotten up to accomplish just what the patented device does and yet escape the claims of the patent, have been considered and disposed of in prior litigations. To us it seems that these decisions have settled some questions, and the present re-argument of the same questions certainly does not induce to a reconsideration of those decisions. For example although the specifications show and the claims enumerate a toggle-joint, it is now settled that a

cam operating in a similar way to produce the same result is a fair equivalent of the toggle-joint. It is difficult for us to understand how defendant's expert persuades himself that the roller 14 on the part pivoted eccentrically at 15 of defendant's device is not substantially a cam. Revolving on its own central axis it, of course, reduces friction, but so far as its action on the roller 11 on the arm 7 is concerned it acts just as if it were a nonrevolving projection of the part pivoted at 15, to wit—a cam.

Defendant has the locking and tripping devices, the tripping device susceptible of being moved by the operation of a magnetic field whenever an overload increases the power of the magnetic field. We think the District Judge gave too much importance to the circumstance that the lock could be broken by the operator moving the handle as well as by striking the tripper. This may be an improvement, of problematical value, but so long as it does not take the place of the tripper of the patent, brought into action by a magnetic field, potentialized by an overload, the device has all the elements of claim 2 (the only one relied on here) and is an infringement. Whether in actual experience the operator, assuming that he were standing by to watch for an overload, would when he observed it seize and move the handle or would strike the tripper with his hand or kick it with his foot is unimportant. The merit of these devices lies in the circumstance that they are automatic, will operate when the watchman is not present and, if he be present, will operate even quicker than he can. We can see no difference in operation when an overload comes over the circuit, and it is to provide for a sudden and unexpected overload that the whole mechanism is devised.

The two structures look unlike, but substantially they are the same. The laminated element, which was a double-ended bridge in Wright and Alborg's combination is cut in two, but it keeps its full contact with the lower stud and bus bar all the time and its laminated end contacts with a wiping motion, just as in Wright and Alborg's device; the progressive making and breaking of contacts, main and shunt, is also the same.

The decree is reversed with costs of this appeal and cause remanded with instructions to enter decree in favor of complainant as to claim 2.

WEBER ELECTRIC CO. v. NATIONAL GAS & ELECTRIC FIXTURE CO.
(UNION ELECTRIC CO., Intervener).

(Circuit Court of Appeals, Second Circuit. February 10, 1914.)

No. 122.

PATENTS (§ 328*)—VALIDITY—PATENTABLE NOVELTY—INCANDESCENT LAMP SOCKETS.

Weber patent, No. 743,206, for an incandescent light socket, consisting of a snap connection between the sleeve and cap, *held* to involve patentable novelty, to be valid, and infringed.

Appeal from the District Court of the United States for the Southern District of New York.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This cause comes here upon appeal to review a decree of the District Court, Southern District of New York, holding a patent to be valid and infringed as to its first four claims. The patent is No. 743,206, issued November 3, 1903, to August Weber for an incandescent light socket. The opinion of the District Judge will be found in 204 Fed. 79.

See, also, 212 Fed. 950, 129 C. C. A. 470.

F. C. Lowthorp, of Trenton, N. J., for appellant.

F. C. Curtis, of Troy, N. Y., for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The specifications and claims of the patent and the prior art are all set out very fully in Judge Ray's opinion, to which reference may be made.

When the patentee's snap connection between the sleeve and cap is first seen, the natural impression is that there could be no patentable invention in so simple a device. But perusal of the record leads quite persuasively to a different conclusion. In the first place, the precise combination of interlocking parts is undoubtedly novel; there is nothing just like this in the prior art. Even the Bray patent, which is relied upon, does not show just the effective clutch of the patent, and the "cover for a paint can," with which Bray's patent is concerned, is certainly not in an analogous art to that of fixtures for electric lights. In the second place there is more than mere novelty to indicate invention. The testimony of the witness Ball is most persuasive. He has been engaged in this very art since 1888, appreciated the evil results of the old style of clasp (bayonet joints and screws) and the difficulties to be overcome in devising something different. For some period before Weber's combination came out, the witness with other skilled workmen in the same factory devoted a considerable part of his time to designing sockets which would remedy existing defects. Not only did he fail to produce any, but when he first saw Weber's new snap connection he did not believe it would be practicable. He says:

"When I saw Mr. Weber's socket I was surprised at the audacity of the design for the reason that we had been working a number of years to perfect the socket put out by the General Electric Company, and, notwithstanding the fact that we knew of the weakness in the side screws, we were not able, through the ingenuity of myself and others, to overcome this objection. When I saw Mr. Weber's method of overcoming it I did not think it would be successful. There were too many uncertainties involved, the accuracy with which it had to be made, the resiliency of the metal, the irregularities that would creep in in manufacture and the seriousness of the lock giving way, all seemed to work against the successful introduction of a snap catch. The troubles with the side screws and other means of holding the shell and cap together we knew of. It was a common sight in those days to see sockets in fixtures and in other places with the shell entirely gone. The trouble was in the vibration loosening the screws, allowing them to drop out and the socket to fall to pieces. As I say it (the snap catch) would have to be very accurately made in order to be as safe as the side screws. At that time there were a number of manufacturers of sockets—eight or nine of them—each one showing considerable ingenuity in the development of the art, but in all of their sockets, they resorted to the side screws. This confirmed my own opinion regarding the side screws, that it was better to submit to known disadvantages and troubles than to court new ones."

This witness was not contradicted, nor did cross-examination in any way qualify his very positive statements.

Upon the record we are persuaded that, simple though it was, Weber's snap connection was a meritorious invention and are not satisfied that defendant's modification, with its "bridge" across the two apertures for engagement escapes the claim. It is not necessary to add anything to Judge Ray's full discussion of the case.

The decree is affirmed, with costs.

WEBER ELECTRIC CO. v. NATIONAL GAS & ELECTRIC FIXTURE CO.
(UNION ELECTRIC CO., Intervener).

(Circuit Court of Appeals, Second Circuit. February 10, 1914.)

No. 123.

1. PATENTS (§ 328*)—VALIDITY—CONSTRUCTION—CLAIMS.

Weber patent, No. 916,812, claim 2, for an incandescent electric lamp socket, calling for "other interengaging means" for preventing a relative rotative movement of the interlocking tubular members of the socket than that described, was void as in effect covering all the various interengaging means of the prior art.

2. PATENTS (§ 328*)—VALIDITY—INCANDESCENT LAMP SOCKETS.

Weber patent, No. 916,812, for an incandescent lamp socket, claims 1, 3, 8, 13, and 14, *held* valid and infringed.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, holding a patent valid and infringed. The patent is No. 916,812, issued March 30, 1909, to August Weber and others for an "Incandescent Electric Lamp Socket." The claims sustained are numbers 1, 2, 3, 8, 13, and 14. The opinion of the District Judge will be found in 204 Fed. 79.

See, also, 212 Fed. 948, 129 C. C. A. 468.

F. C. Lowthorp, of Trenton, N. J., for appellant.

F. C. Curtis, of Troy, N. Y., for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. This patent covers an improvement on an earlier device, the patent for which is considered in an opinion handed down at the same time with this one. The socket as thus improved has an additional protection against rotation by a cut-metal engagement of parts 19 and 20. We think the improvement was novel and meritorious and concur fully with Judge Ray's reasoning and conclusions.

We think, however, that he erred in holding the second claim to be valid. The first two claims read as follows:

"1. In a device of the class described and in combination, a pair of tubular, sheet-metal members, one adapted to telescopically receive the other, having

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mutually abutting cut-metal edges on the respective members to prevent relative rotative movement, and automatically interlocking means for preventing a telescopic movement of separation of one member from the other, said means permitting, without manipulation thereof, the telescopic application of the members to each other.

"2. In a device of the class described and in combination, a pair of interlocking, tubular sheet-metal members, one adapted to telescopically receive the other, having mutually abutting cut-metal edges on the respective members to prevent a telescopic movement of separation of one member from the other when interlocked; and having other interengaging means for preventing a relative rotative movement of the interlocked members."

[1] Claim 1, it will be observed, specifies the means for preventing relative rotative movement, viz., "mutually abutting cut-metal edges on the respective members." This means we are satisfied was patentable being an advance over whatever other means in the prior art had been employed to prevent relative rotation. But the second claim calls merely for "other interengaging means" for preventing relative rotation. This phrase would cover all the various interengaging means of the prior art, but the advance is a narrow one and the patent can be sustained only for the precise means which the patentee showed would accomplish the result. If claim 2 stood alone it might be saved by reading into it the specific device, but if this were read in it would be a mere duplicate of claim 1.

[2] With the elimination of claim 2 the decree of the District Court is affirmed, with five-sixths costs of this appeal to complainant.

READ MACHINERY CO. v. JABURG et al.

(District Court, S. D. New York. March 4, 1914.)

No. 7/88.

1. PATENTS (§ 26*)—"INVENTION"—COMBINATION OF OLD ELEMENTS.

"Invention" may be shown in a combination of old elements, where they coact to produce a novel and improved unitary result.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.*

For other definitions, see Words and Phrases, vol. 4, pp. 3749-3754.]

2. PATENTS (§ 51*)—"ANTICIPATION."

To establish "anticipation" of a patent, it is necessary that the defendant show that all of the elements of the patented device or their mechanical equivalents are found in the same description or machine, where they do substantially the same work by substantially the same means.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 66-69, 72, 74; Dec. Dig. § 51.*

For other definitions, see Words and Phrases, vol. 1, p. 411.]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CAKE MIXING MACHINE.

The Read patent, No. 966,765, for a cake mixing machine, while for a combination of old elements, was not anticipated and discloses invention, and the machine is of great utility as shown by its wide acceptance and use by practical bakers. Also, *held* infringed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the Read Machinery Company against John Jaburg and Hugo Jaburg. On final hearing. Decree for complainant.

Edmund Wetmore and Oscar W. Jeffery, both of New York City, for plaintiff.

A. G. N. Vermilya, of New York City, for defendants.

HUNT, Circuit Judge. The Read Machinery Company, assignee of Harry Read, charges John Jaburg and Hugo Jaburg with infringement of letters patent No. 966,765, issued August 9, 1910, alleged to cover certain new and useful improvements in cake mixing machines. The purposes and advantages of the device patented are stated and described in the application as follows:

"The object of the present invention is to improve the mechanical construction of such cake mixing machines, and in particular to provide an efficient and effectively disposed mechanism for operating the beater, a mechanism for changing the speed of rotation of the beater in mixing batches of material of varying consistency, a mechanism whereby the machine is stopped when it is desired to change the speed, and in means for moving the bowl into and out of engagement with the beater. * * *

"The construction illustrated and described possesses advantageous features. Among these may be mentioned the ease with which the parts may be constructed and assembled and thereafter adjusted, and the compactness and simplicity of the cake mixer as a whole. In a cake mixer of this type it is desirable not only that the speed should vary in order to facilitate the working of batches of goods of greater or less consistency, but also as a means of gradually furthering the process of aeration of certain kinds of goods required to be exceedingly light and spongy."

The acts of infringement claimed are the sale of cake mixing machines embodying the combinations set forth in the sixth and tenth claims of the patent in suit. Those claims read as follows:

"6. A cake dough mixing machine, comprising a standard, a bowl, a bowl support movably mounted thereon, a vertical screw engaging said bowl support for adjusting the position thereof, a beater, a main shaft, an auxiliary shaft parallel with the main shaft, speed changing gears interposed between the main shaft and the auxiliary shaft and a mechanism whereby the gears of one shaft may be shifted and brought into and out of engagement with the gears of the other shaft to alter the speed of the beater."

"10. In a dough mixer, a standard, a bowl, a bowl support movably mounted thereon, a vertical screw engaging said bowl support for adjusting the position thereof, a beater adapted to operate within the bowl, means for rotating the beater upon its axis and moving the same in a circular path in said bowl, a main drive shaft, an auxiliary shaft arranged parallel to the main shaft, complementary speed change gears mounted on the main and auxiliary shafts, and means for selectively combining said gears in operative relation."

Defendants allege that their cake mixers are made in accordance with letters patent No. 989,733, issued to them as assignees of Harry E. Townsend; that during the course of prosecuting the application for the patent in suit plaintiff acquiesced in the rejection of claims and amended the specification and claims in such manner that he estopped himself from ever claiming any construction of the patent which would include within its scope any article made, sold, or used by the defendants; that others within the United States have been making and selling, without hindrance or interference on the part of plain-

tiff, articles as fully within the terms of the claims of the patent as is any device made by defendants, whereby plaintiff is estopped from claiming infringement on the part of defendants; and that in view of the state of the art there was no invention and that the several elements of the claims of the alleged letters patent constitute only aggregations of old elements and no real combination.

The operation of the Read machine may be stated in this way: The power is applied to the flywheel which turns the main shaft; the gears on that shaft mesh with gears on the gear box which in turn are attached to the handle which projects from the front of the machine. Those gears mesh with gears on the auxiliary shaft so that the gear box may be turned by means of the handle to bring the gears in mesh in any one of the three speeds provided for; the power is transmitted through the gears referred to, through the auxiliary shaft, and on through the bevel gear mounted on the end of the auxiliary shaft and other gears provided therefor to the beater shaft which is mounted off the center of the bowl. The beater shaft is provided with a pinion meshing with a hollow gear, giving a planetary motion to the beater. Thus, power is transmitted from the flywheel to the beater so as to impart the necessary motion to the beater and to provide for change of its speed. By means of a vertical screw the bowl support holding the bowl is raised and lowered and the beater can be put at any depth in the mass which may be proper. Thus, the beater may be started on top of the batch of material and gradually pressed down on and through the mass, and the speed of the beater may be changed during this operation. The handles for changing the speed and raising the bowl are conveniently located at the front and top of the machine. The difference between mixing butter and sugar together and kneading flour was explained by one of the witnesses, who made it clear how important it is in manipulating materials such as go into the bowl that there shall be an opportunity to change the speed quickly, and how with the Read machine the operator stands with his hand on the screw and feeds it up gradually so as to incorporate the material by degrees, and as a higher speed is called for the gear box may be shifted in position by the handle in front and a higher speed given to it. The practical advantages of the machine appear to be: The saving of labor, economy in material, cleanliness and expedition, and its adaptability for use with mixtures of varying consistencies found in a bake shop.

It can be said that, although the patent for the cake mixing machine is a combination of generically old elements, under a well-established doctrine, if such parts or elements are so arranged as to unite in producing a novel and useful result, the combination as a whole is patentable. "The ease with which the parts can be constructed and assembled and thereafter adjusted and the compactness and simplicity of the cake mixer as a whole" is a recital of one of the advantages of the device; and the evidence clearly shows that the method of varying the speed in accommodation to the mixing of batches of dough is efficient. Obviously it is of great advantage to bakers that their workmen and material should be protected from grease and dirt

in any machine used for mixing dough. It is unnecessary to elaborate upon the advantages which bakers ascribe to the machine further than to say that they regard it as safe, simple, and capable of mixing any mixture, whether heavy or light, used in a bake shop, and to do it thoroughly and fast.

[1] Aggregation, as I understand it, will not apply where there is a combination of elements capable of coacting to produce a unitary result, provided such coaction produces novel and improved results which are useful. *Forbush v. Cook*, 2 Fish. 669, Fed. Cas. No. 4,930. Plaintiffs are well sustained in the proposition that if selected elements are adapted to a useful result, and an inventor utilizes such adaptability by uniting it with other elements of the combination to form a novel whole, invention may be claimed. *National Cash Register Co. v. American Cash Register Co.*, 53 Fed. 372, 3 C. C. A. 559; *San Francisco Bridge Co. v. Keating*, 68 Fed. 351, 15 C. C. A. 476. Taken by itself the change speed device of the patent in suit would operate without the presence of the vertical screw, yet as said in the *National Cash Register Co. Case*, *supra*, each of the several elements in coaction does its appointed share toward effecting the single result achieved by the co-operation of all and demonstrates that each is, by the co-operation of the others, capacitated to contribute, by acting in its own peculiar way, to the common end.

[2] Upon the contention that there has been anticipation it is necessary, as I understand it, that the defendant shall show that all of the elements of the plaintiff's patent, or the mechanical equivalents, are found in the same description or machine where they do substantially the same work by substantially the same means. *Owens Co. v. Twin City Separator Co.*, 168 Fed. 259, 93 C. C. A. 561.

[3] Applying this rule, defendant cannot prevail merely because there is in the present case a vertical screw in one of the former patents or publications offered in evidence, and speed change gears in another, and so on as to the various parts of the combinations of the sixth and tenth claims of the patent in suit. All of the parts of each combination in a single machine co-operating to produce the same result as is accomplished in the Read machine must be proved in order to justify the conclusion that the Read patent is invalid for lack of patentable novelty. And while there is testimony to the effect that there may be a substitution of some different member of the same class of devices as that of some particular device shown and described in the patent, still such showing does not negative the invention, particularly where such substitution, if attempted, would involve a substantial total reconstruction of the whole machine and still fail in producing the result achieved by the patent. In *Cohn v. U. S. Corset Co.*, 93 U. S. 366, 23 L. Ed. 907, the Supreme Court said anticipation would not be had "unless the prior patent describes the invention of the later one so fully that one acquainted with the art as it stood at the date of the prior patent could, without invention or assistance from the latter patent, practice it."

A vertical screw and a rack and pinion are not mechanical equivalents in the situation or environment wherein they are used in the

patent under examination. As pointed out in the testimony, the use of the vertical screw accomplishes a result advantageous in the Read machine and one which the rack and pinion will not achieve. It was explained by Prof. Main that for each revolution of the pinion the rack is shifted for a distance equal to the circumference of the pinion which, with machines the size of those here involved, would be several inches, while for each revolution of the screw the distance would be about a quarter of an inch; so that the movement of a screw is much slower, more powerful, and far more accurate than that of a rack and pinion, and when the screw is stopped it stays there. It therefore takes the place of a ratchet and pawl which would be required to hold the rack and its attachments in a given place after the pinion had been revolved for a certain distance. Stiff mixtures have to be fed up gradually in order to avoid throwing the stuff about, and when a rack and pinion is used, especially by operatives not skilled mechanically, the tendency would be always to bring it up too fast and to break beater blades. He also explained the use of the two devices on ordinary machinists' lathes where it is clear they are not equivalents.

Cone pulleys and speed change gears may be equivalents for transmitting power, but the cone pulley with its belt cannot be substituted for the change speed gears on the Read machine, because, as explained by one of the witnesses, it would be necessary to shift the belt, which would either involve stopping the machine or impose risk on the operator and require him, according to the usual way, to shift the belt with his hands and to start the belt upon another step of the pulley. This manipulation would require care and time and would necessarily dirty the fingers of the operator. Furthermore, in a bake shop where the mixture when started is heavy and stiff, slow motion is required in the beginning, and thereafter the speed accelerator is called into use by shifting the handle, the operator dropping it over to one side and giving it a shove and dropping it into place again without soiling his hands. The gear box is therefore for practical purposes an essential feature of the construction, economical in its use of space and free from the objectionable ground of dirt.

Referring to what is called the auxiliary shaft of the Read machine, it appears that at the front end of such shaft is the pinion which gives the motion to the planetary mechanism whereby all changes of speed are effected through such auxiliary shaft at all times. The different speeds of such shaft are obtained by the intermediate gear box mechanism which drops into gear with either one or the other of the different gears there provided. In the Lynn Superior machine, upon which the defense can rest its strongest contention of anticipation, when a gear specifically referred to was thrown to the left only slow speed and no other was obtained, and a short parallel shaft shown in the mechanism of the Lynn Superior machine is not used in the sense that it is in the description of the Read patent and in the specifications of the patent which describe the auxiliary shaft. An essential difference seems to be in there being no mechanism between the two shafts of the Lynn Superior machine for obtaining dif-

ferent speeds as there is in the Read machine; but we have to go to the other end of the machine to find the mechanism for obtaining other speeds, which are not obtained by gears mounted on main and auxiliary shafts.

The Read patent should not therefore be defeated because of the law of equivalents, for, as already explained, there could be no substitution for the change speed gears of the Read patent by the use of cone pulleys in the sense that the cone pulleys and the speed gears are equivalents. With respect to the mechanism for obtaining different speeds, there is no great variance between the testimony of the several experts. When the handle of the Read machine with its gear box is moved to its different positions and thrown into mesh with the gears on the main and auxiliary shafts, the speed of the beater on its axis and the speed of the beater around the bowl are changed; while in the Lynn Superior machine the speed of the beater around the bowl is fixed by the operator moving the gear into position, and then by the handle at the other end of the machine the speed of the beater on its axis is changed. The contention that the change speed gears of the Lynn Superior machine in themselves are means for selectively combining the change speed gears in operative relation is not persuasive, for in the Read machine the handle and mechanism attached are the means and mechanism required by the claims of the patent and are an improved and useful element in the machine. There is a difference in design and construction between the change speed mechanism of the Lynn Superior machine and the change speed mechanism of the Read patent; and it was satisfactorily explained to my mind that in order to enable the Lynn Superior machine to accomplish the results of the Read machine, or to make it into the combination shown in the patent of the Read machine, radical changes would have to be made.

The specifications of the patent are to be resorted to in ascertaining what is meant by the terms used in the claims, and under the rule that the claims of the patent are to be fairly construed so as to cover if possible the invention, especially if it be a meritorious one, phrases used in the claims should receive a restricted construction with due regard to the environment of the thing described and to the purposes set forth in the specifications and drawings of the patent. *Walker on Patents*, 117a; *Mossberg v. Nutter*, 135 Fed. 95, 68 C. C. A. 257.

It appearing that there is a radical difference between the Lynn Superior and the Read machines in the mechanism referred to, the question whether or not the Lynn Superior machine was an abandoned experiment becomes immaterial.

It is significant that prior to the devising of the machine described in the Read patent no machine had done the work and obtained the results of Read's machine. Practical bakers clearly establish this fact, and dealers in mixing machines give evidence of the great commercial success of the Read device. Having due regard to the presumption of validity arising from the patent, the success it has attained, the nonexistence of any anticipation, and the adoption of it

by the defendants with express notice of the patent, lead me to think that the claims under consideration should be held to be valid. *Sanders v. Hancock*, 128 Fed. 424, 433, 63 C. C. A. 166.

Infringement is proven. Differences of a slight character are to be found in defendants' structure from that of the patent, but they are immaterial. When claims 6 and 10 are read on the defendants' machine, they apply, and the words "mechanism," in claim 6, and "means," in claim 10, indicate the parts of the combination which give motion to other parts and which do a specified part of the work in the combination. The change speed mechanism in the defendants' machine is substantially the same as that in the Read patent, notwithstanding the fact that, instead of two gears mounted on the main shaft and two on the auxiliary shaft, defendants' machine has four gears mounted on the auxiliary shaft and one on the main shaft. The method of operation and the principle of the change speed devices of the patent in suit and the defendants' machine are identical. There is also some difference in the means by which the so-called planetary movement of the beater is obtained in the defendants' machine, in that, instead of a fixed hollow gear as described in the patent in suit, defendants' machine has two beveled gears revolving in opposite directions; yet the planetary movement is not changed.

There was a point made by the defendant with respect to the necessity for stopping the machine of the patent in suit when the speed is changed. Power is cut off from the beater or auxiliary shaft during the instant required for the movement of the handle which is used in changing the speeds. When the handle is down so that the gears are not in mesh, no connection exists between the main shaft and the beater shaft; but the main shaft is running if the power is not turned off, and the time consumed by an experienced operator in turning the handle is only a fraction of a second. It was shown that the drawings of the patent illustrate a worm meant to turn the belt onto a loose pulley which would stop the machine during the operation of changing speed. The evidence is that in actual practice this has been dispensed with, and, as this feature is no part of either of the claims involved in the present suit, it is not important that it be dwelt upon. The defendant's machine, however, operates as does the Read machine; that is to say, when the operator turns the handle, the path of the power from the flywheel to the beater is broken and the power is interrupted for the instant required to change the speed. It would therefore be correct to say that the machine is not stopped for part of it is still in motion, although there is an interruption of the operation of the beater, very slight, and apparently of no consequence in the performance of the work.

The foregoing views dispose of what appear to be the real points in the case.

In conclusion, I find that claims 6 and 10 of the patent in suit show a combination not contained in the any prior patent, publication, or machine which achieved a new and useful result and was followed by decided commercial success, and that defendants have appropriated the said combination and so infringed upon the patent. Decree for

injunction and accounting before a master, as is usual in such cases, is ordered, subject to the obligation of any stipulation heretofore entered into waiving damages or profits on account of any machine manufactured by the Triumph Manufacturing Company previous to the filing of the bill of complaint herein.

IMPERIAL MACHINE CO. v. JACOBUS.

(District Court, S. D. New York. April 3, 1914.)

PATENTS (§ 328*)—VALIDITY—INFRINGEMENT—MACHINE FOR PEELING VEGETABLES—PRELIMINARY INJUNCTION.

Robinson Patent, No. 809,582, for machine for peeling vegetables, *held prima facie* valid and not anticipated, so as to entitle complainant to a preliminary injunction restraining defendant from selling certain alleged infringed machines *pendente lite*.

This is a motion for a preliminary injunction to restrain defendant from selling machines alleged to be infringements of United States patent to Henry Robinson, No. 809,582, issued January 9, 1906, for "Machine for Peeling Vegetables."

H. S. MacKaye, of New York City, for complainant.

F. Warren Wright, of New York City, for defendant.

LACOMBE, Circuit Judge. The claims involved are Nos. 1 and 3. These were held valid and infringed by Judge McPherson in *Robinson Machine Co. v. American Fruit Machinery Co.*¹ The particular detail of construction in question relates to the revolving disk with abrading surface; the flat surface of the disk having on it "rising portions extending inward from the circumference toward the center, preferably bounded by radial sides, higher at the circumference, sloping toward the center." The same patent was before Judge Hough at final hearing in a suit by the present complainant against *Smith & McNell*. He held the patent valid and infringed as to the first claim. Since the device complained of here is the same as in the *Smith Case*, and there is no additional prior art, it would seem that preliminary injunction should issue.

The application is opposed mainly because, since the *Smith* decision, Judge Hazel in the Western district of New York has refused an injunction. That refusal came about in this way: A patent relied upon as showing anticipation is one to *Lehman*, 91,238, issued in 1869. There is no testimony to show that any device was ever made under this patent. It was before Judge Hough, who, referring to the *Lehman* drawing and specifications, held that:

"This diagram shows a 'hump' or 'agitator', which apparently has sharp edges and looks like a kind of slat or lath-like projection affixed to the usual revolving disk. It is plain that this device of *Lehman's* is an agitator, but it is equally plain that it will not agitate in the same way as does the sloping hump which is described in *Robinson's* patent and found in the alleged infringing machine."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

¹ See note at end of case.

In the suit before Judge Hazel, defendant undertook to fortify the Lehman patent by the affidavit of an expert with a drawing which the expert testified illustrated the Lehman raised portion or agitator. The same testimony is produced here. Complainant in the Western district did not meet this testimony with other affidavits, and Judge Hazel, therefore, seems to have taken the drawing and affidavit at their face value. Since this drawing is substantially a Chinese copy of the drawing of the patent in suit, which shows Robinson's raised portion, Judge Hazel's conclusion was sound, if the expert's affidavit and drawing were taken as accurate.

In the case at bar, however, there are replying affidavits; but, without them, I am entirely satisfied that the expert's drawing, like many other expert's drawings and models, is wholly unwarranted by anything disclosed in the Lehman patent. The drawing shows the sides of the projection sloping downward to right and left from its highest portion; nothing in Lehman indicates this sloping; and nothing therein negatives its presence. The drawing shows the foot line of these slopes not parallel, but inclined toward each other; nothing in Lehman indicates such inclination. The drawing shows the projection extending inward from the circumference until it reaches the central core of the pot; nothing in Lehman's patent indicates this, but, on the contrary, its Fig. 1 shows the projection terminating abruptly some distance before it reaches the central core. The drawing shows the summit of the projection sloping downwards as it runs from circumference to center; nothing in Lehman indicates this, but, on the contrary, Fig. 1 shows the summit of the projection at exactly the same height above the disk through its entire length. Under these circumstances, it is difficult to see how either the expert's drawing or his affidavit could possibly have any probative value.

I see no force in the objections to proof of title. Injunction may issue on claim 1.

NOTE.

The following is the opinion of J. B. McPherson, Circuit Judge, in *Robinson Machine Co. v. American Fruit Machinery Co.*, referred to above:

"The patent in suit, No. 809,582, was granted to Henry Robinson on his application filed in January, 1905. It is for an improvement in machines for peeling vegetables; potatoes being evidently the vegetable chiefly in the patentee's mind. The prior art is concerned mainly with two classes of machines, and these are briefly described in the specification as follows:

"This machine has relation to improvements in that type of machines for peeling vegetables wherein an abrading-disk rotates at the bottom of a containing vessel provided with an abrading lining. Machines of this type have been hitherto designed according to two principal plans. In following one plan of construction, inelastic sharp cutting edges are provided for, acting upon the material to be treated, and the turning of individual vegetables is accomplished by special devices introduced in the path of movement of the mass. The second plan of construction involves the use of brushes as abrading agents, and the turning of the vegetables to bring all parts successively against the active surfaces is supposed to be accomplished by the elasticity of the wires or bristles in such brushes. In this form a free path of movement is left for the mass to be treated."

"The present dispute is solely over the abrading-disk, and the claims involved are the first three:

"1. In a device of the class described, an impelling and abrading member

comprising a rotary disk composed of a horizontal flat striated portion and a raised portion extending from near the circumference inward and having two sides sloping down to the flat striated portion of said disk, substantially as described.

"2. In a device of the class described, an impelling and abrading member comprising a rotary disk composed of a number of horizontal flat striated portions separated by raised portions at intervals extending from near the circumference inward, substantially as described.

"3. In a device of the class described, an impelling and abrading member comprising a rotary disk composed of a horizontal flat striated portion and a rounded raised portion rising gradually from near the center toward the circumference, substantially as described."

"As it seems to me, not much discussion is needed about this matter. In my opinion the patent discloses meritorious invention and deserves protection. The device has met with much approval, and sales have been numerous and steadily continued. The merits of the machine are obvious. It unites in the disk the three functions of abrading, impelling, and turning; for the first time it deals successfully with a deep mass, as contrasted with a shallow layer; it does not grind or bruise the vegetables, but confines its action to removing the thin outer layer of skin; and it leaves the surface of the potato comparatively smooth instead of pitted or hacked. These advantages have never before been combined in a single machine, and the invention seems to mark a distinct and decided advance in the art. It is therefore entitled to a reasonable range of equivalents, and in my opinion it is well within such range to coat the disk with carborundum. The sharp particles of this substance are disposed in striations, although the lines are broken and irregular; and this I think is one of the 'variety of methods of striation' to which the specification refers. Similarly, the raised portions of the disk—which are of the essence of the invention, and are to extend from near the circumference inward, or gradually from near the center toward the circumference—need not necessarily be radial in direction. If they are spiral, as they are in the defendants' machine, the spirit of the invention would, I think, be clearly invaded. And so, also, a surface that is not exactly 'flat,' but deviates only slightly from a plane, would be fairly comprehended by the claims. Indeed, I do not see how infringement can be successfully denied if the disks now made by the defendants and the complainants respectively be inspected side by side. As I think, the defendants' machine is plainly an attempt to secure the advantages of the patent and at the same time avoid infringement. Of course, if the frontier has actually been crossed, the defendants are secure; but in my opinion they have not succeeded in reaching a position of safety. The Blache machine belongs to the brush type, has not been effective, and does not seem to need detailed discussion.

"I think the three claims in question are valid, and have been infringed. A decree to that effect, with costs, may be entered."

THE SENATOR RICE.

THE RESOLUTE.

(District Court, E. D. New York. March 21, 1914.)

COLLISION (§ 95*)—TOW AND ANCHORED BARGE—IMPROPER NAVIGATION OF Tow.

In drilling to remove a rock in the bottom of the Hudson river about 600 feet northwest from the piers at the Battery, the contractor built a platform for the workmen, and beside it anchored a barge for use as their quarters and for storage purposes. As a tow of coal barges was passing up on the east side of the drill barge, on a strong ebb tide, it was met by another tow coming down in charge of the tug Senator Rice; the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tows passing starboard to starboard. A collision occurred between the tows which forced one of the boats of up-bound tow against the drill barge, and the platform was broken and material lost. *Held*, that the collision was due solely to the fault of the Senator Rice in attempting with such a tow and at that stage of the tide to pass between the platform and the piers, instead of to the westward, when it was her duty to pass any meeting tow port to port.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*]

In Admiralty. Suit for collision by John D. Miller against the steam tugs Senator Rice and Resolute. Dismissed as to the Resolute, and decree against the Senator Rice.

Foley & Martin, of New York City (Wm. J. Martin, of New York City, of counsel), for libellant.

Amos Van Etten, of Kingston, N. Y., for The Senator Rice.

Burlingham, Montgomery & Beecher, of New York City (Chauncey I. Clark, of New York City, of counsel), for The Resolute.

CHATFIELD, District Judge. The present alleged cause of action arises from an injury to a structure in the Hudson river, maintained there under contract with the United States government, for the removal of a rock shown upon the government charts at a point substantially northwest by west from the southerly extremity of Manhattan Island and just outside or to the westward of a straight line between the outer end of the Liberty Street pier and the southwestern extremity of the enlargement to Governor's Island. This rock, as is shown by the testimony, and as indicated upon the chart, left a clear passage of some 600 feet to a boat rounding the Battery and passing either up or down the Hudson river between the rock and the Manhattan pier line.

According to the testimony, an ebb tide also sets a boat down along the face of the Manhattan piers, almost directly upon the dock in question, and the distance saved by passing inside of the rock, when turning from the Hudson river around the Battery into the East River, is not great, but it is easier to make the turn than when passing outside.

The various transfers of title by which through bankruptcy the right to a cause of action, if any existed, has become vested in the present libellant (as purchaser from the trustee in bankruptcy), and the way in which those rights are traced back to the company maintaining the structure and having the contract with the United States government, need not be discussed, as there seems to be no substantial basis for questioning the *prima facie* title of the libellant. Nor do the terms of the contract with the government affect the situation.

The removal was being accomplished by the use of dynamite placed in drills in the rock, and the plant for drilling was located upon a platform erected above the water, by means of four large pointed girders or spuds some 60 feet in length, to one of which the platform was attached at each corner. This platform was 12x20 feet

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexer
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square, and a large barge, maintained in position by anchors leading to the barge by cables, served as quarters for the men and all other purposes except the actual platform from which the work was conducted. This barge was so placed beside the platform and held firmly in position by the anchors as to cause no strain upon the platform or the spuds, and also so as not to be carried against the platform either by the ebb or flood tide.

The accident in question occurred at about 5 o'clock in the afternoon of Sunday, June 30, 1907, and is described by one of the workmen upon the barge (who seems to be the only one who can now be located) as having been the result of collision between the westernmost or port barge of a tow of empty coal boats passing up the Hudson river. This barge was forced against the boat or barge moored at the drilling platform, by contact between the starboard barge of that tow and one of two loaded boats passing down the river and still further toward the New York shore, in tow of the Senator Rice.

The tide was running strong ebb, and the testimony of the witnesses is sufficiently definite as to the actual contact between the barge and the drill boat, by which the actual injury to the platform was caused. In the deep water and swift tide, before repairs could be made or new anchorage obtained, the work boat or barge was carried against the platform, the platform itself was tipped over, breaking off one of the spuds, and the loss of much time and material resulted before things could be set to rights.

A number of incidental questions of fact have arisen in the case which seem to have no bearing upon the result and can be disposed of by mere mention.

The libelant produced a fireman of the city of New York stationed at Pier A North River, who testified that at about 5 o'clock, on the last Sunday afternoon in June, 1907, in clear weather, with no other boat in sight in the neighborhood, he distinctly and definitely remembered seeing the steamtug Senator Rice with a tow of barges coming down the Hudson river on the Jersey side of midchannel, turn across toward New York, and attempt to come between the platform in question and the battery. This witness testified that the ebb tide carried the tow against the platform, that the tug backed away, came on around the platform, and proceeded into the East River.

These facts do not accord at all with the testimony of the other witnesses as to the collision upon which the libelant sought to recover, and the matter remained a mystery until nearly the close of the trial, when the captain of the Senator Rice, in a frank and colloquial manner, referred to another occasion than the one involved in the present action, in which, in coming down the river, he had come in collision with the platform used for dredging, under the influence of the ebb tide, and that his tow had rebounded from the platform without damage thereto, and that he had proceeded on his course.

Another matter of the same sort is raised by the bringing of the present action against the tug Resolute as well as against the Senator Rice. This tug is one of two having a stack of the sort described by the witnesses and owned by a towing company. She is shown by

the testimony of her captain, corroborated by his log, to have been near the entrance to New Haven Harbor on a trip to the eastward at the time of the accident in question, and that she could not have been in New York so as to have met the Senator Rice and her tow on the day upon which this accident occurred. The Resolute has a marking or device upon her stack borne only by the other tug of this same company around New York Harbor, and according to the testimony in the case this second tug was supposed to be laid up for repairs on this day.

It is necessary therefore to hold that the case against the Resolute has not been proven, and that whether it was the second tug of the line in question, or whether it was another tug with a tow whose identity was confused with that of the Resolute because of some similarity of marking, it is impossible to establish upon the libellant's proof, the identity of the tug concerned, and the libel at least as far as the Resolute is concerned must be dismissed.

We must, however, bear in mind the positiveness with which the witnesses identified the Resolute in considering their recollection of the occurrence which was long before the trial, and we must also consider the question of responsibility for the accident as between the Senator Rice and the unidentified or unknown tug, even though the Resolute be relieved and dismissed from the case.

In addition to the testimony of the workman upon the platform, who came out from the house in time to see the boats just after contact with the platform, we have the testimony of the master of the Senator Rice as to certain phases of the collision, and the testimony of one of the barge captains in tow of the Senator Rice, whose boat seems to have been the one directly in contact with the tow coming up the river.

According to the master of the Senator Rice, his tow was proceeding down the Hudson river, and, as he subsequently testifies, another tow of the Cornell Steamboat Company was somewhere in the neighborhood, also coming down the river. In a vague way he confuses his own position and gives, as his reason for passing between the platform and the New York shore, that the other Cornell tow, and other boats going up and down the Hudson river, forced him to take the inside course, under the influence of the ebb tide, in order to get through and to make the turn around the Battery into the East River.

It is manifest that his course down the Hudson river should have been far enough from the New York shore to safely pass port to port any tows coming up the river, and that his only reason for approaching the New York shore was to save time and distance and to easily and quickly get out of the main current of the ebb tide by making as close a turn as possible at the Battery.

It is manifest, also, that these objects could be accomplished, if the river were clear, by passing inshore of the dredging platform, but that in so doing the Senator Rice ran the risk of striking the platform or of getting into difficulties through proximity to the New York pier line, while he also ran the risk of meeting boats turning around

the Battery and into the Hudson river and proceeding up on the starboard or right-hand side of the channel.

The tow of the Senator Rice consisted of two barges—the Philbrick loaded with brick, and the Katy loaded with coal. The Philbrick was the starboard or westernmost boat of that tier. Her captain testifies that, as they were proceeding down the Hudson river, he came out on deck, and that his attention was attracted to a tow which had come up past the Battery and of which the tug had already gone by or was going by his barge. He became apprehensive that the starboard boat in the tow of this tug would not clear his own barge, and what he feared did happen. The two barges came together side by side and a small part of his rail was carried away. The effect of the collision does not seem to have been great, but the momentum of the vessels and the pressure resulting from the blow seems to have been considerable and to have moved the barge of the tow coming up the river considerably out into the river. Her momentum was checked and her sidewise movement imparted to other boats in that tow. The situation is identified by the workman upon the dredging platform, and it is apparent that the force of the ebb tide, together with the transmitted blow of the collision, caused the injury to the dredging plant at the other side; that is, with the port boat of the tow coming up the river.

The evidence indicates that the tow, coming around the Battery and up the river, could have passed safely between the dredge and the Battery, and that the tug in charge of this tow could successfully stem the tide if not interfered with by other vessels. The captain of this tug, whether it was the Resolute or some other, took the responsibility of passing through the place in question, but had the right to depend upon freedom from interference from boats passing down the river and bound to pass him port to port.

We need not consider what his position would have been or what responsibility would have rested upon him with respect to some boat coming out of the slip on the New York side. The only force which rendered it impossible for this tow to have successfully passed up the river seems to have been that of the collision of the barge Philbrick, in tow of the Senator Rice. The ordinary duty of the Senator Rice when proceeding down the Hudson river was to pass a tow coming up river on the outside or port to port, and it was negligence and breach of duty on the part of the Senator Rice to attempt to cross the river and pass through between the platform and the shore, with the tide at such a stage, and with the tow of the Senator Rice in such a position that any vessel met in this narrow space could not be passed in the proper way.

The effect of the rule upon the Senator Rice would be that, unless she were in such position as to see that no vessel could meet her before rounding the Battery, she was bound to take the outside course (where it was possible to obey the rule) or be held responsible for the consequences.

In addition to the responsibility resting upon the Senator Rice from the violation of this rule, it is apparent that the action of her captain

in attempting to work across the Hudson river, so as to go through the narrow space with a tow of the width of the one which he had upon this trip, under the conditions of tide shown, was careless and likely to land his tow against the dredge or to get him in difficulties with any other tow in the neighborhood, unless fortune favored his reckless act. Such navigation is of itself a breach of the rules and of the duty resting upon the captain of a tug in charge of a tow, and is sufficient to impose liability upon the vessel if accident results therefrom. But further than this, the position of the Senator Rice in making the turn would be such that she would be entirely too close to the New York shore and the pier heads when proceeding down with the ebb tide, and, while the accident did not result from this situation, the carelessness of such navigation adds to the persuasive quality of the proof as to carelessness in other particulars.

It appearing therefore that the dredging platform standing stationary against the force of the ebb tide was free from fault, and was injured by the impact of a barge forced against the platform through the movement of other barges, in tow of a tug as to which no fault has been shown, and it further appearing that the movement of these barges was caused by contact with the barge in tow of the Senator Rice, and that responsibility for the situation has been fixed by the negligent actions of the Senator Rice, it must be held that the libellant has made out his case and that he may have a decree against the Senator Rice, but that the libel against the Resolute must be dismissed.

THOMPSON-LOCKHART CO. v. CITY OF PHILADELPHIA.

(District Court, E. D. Pennsylvania. March 5, 1914.)

No. 56.

NAVIGABLE WATERS (§ 20*)—BRIDGES MAINTAINED BY CITY—LIABILITY FOR OBSTRUCTIONS TO NAVIGATION.

A city having general authority to build and maintain bridges over navigable streams is liable in a court of admiralty for an injury to a vessel while being properly navigated under such a bridge, caused by a timber used in the construction of an abutment and left projecting under water, where it cannot be seen, without being protected or marked, and where it constituted a dangerous obstruction to navigation.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 73-99; Dec. Dig. § 20.*]

Obstruction of navigable waters, jurisdiction of federal courts, see note to Bailey v. Mosher, 11 C. C. A. 318.]

In Admiralty. Suit by the Thompson-Lockhart Company against the City of Philadelphia. Decree for libellant.

J. Frank Staley and Lewis, Adler & Laws, all of Philadelphia, Pa., for libellant.

Edgar W. Lank, Asst. City Sol., and Michael J. Ryan, City Sol., both of Philadelphia, for City of Philadelphia.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

J. B. McPHERSON, Circuit Judge. The witnesses in this case were heard in open court; I find the facts to be as follows:

The libellant is a Pennsylvania corporation, and on January 17, 1913, was the owner of Lighter No. 4, a deck barge 104 feet long and 24 feet 6 inches beam, with sides running straight up and down. She was then employed in carrying ashes and rubbish between points upon the Schuylkill river within the port of Philadelphia. The city owns and maintains a drawbridge crossing the river at South street, and on the date mentioned was charged with the duty of maintaining and safeguarding the abutments, or piers, of the bridge, so that vessels navigating the river and using the narrow channels under the bridge with proper care might proceed in safety. Between half past 3 and 4 o'clock in the afternoon of January 17—the weather being clear and calm, and the tide at low water—the lighter loaded with ashes and rubbish, and the scow Reliance loaded with garbage, were taken in tow by the tug Helen, to be moved south from Fairmount wharf to Penrose Ferry Bridge. The lighter was made fast to the starboard side of the tug, and the scow, to the port side. The Reliance was also a large vessel of 18 or 20 foot beam, and as the tug was 14-foot beam, the whole tow was about 60 feet in width. The channel through which the tug and tow were about to pass was the first on the western side of the draw, and was 70 or 71 feet wide on the surface of the water, not much margin being left on either side of the tow. The lighter was drawing from 6 to 7 feet. The tow was properly made up in the usual manner, and at the time of the collision the lighter and the tug were seaworthy and properly manned and equipped, and were proceeding carefully and slowly down the river. The tug was in charge of a licensed master, who had seen more than 30 years of service, was well acquainted with the river, and had often conducted similar tows under this and other bridges. While the tow was passing through the narrow channel under one bell, the starboard side of the lighter being a short distance from the visible and flat stone face of the pier, this side of the lighter collided with a projecting timber that had been part of a temporary structure, or caisson, erected either when the pier was built or when it was repaired about 15 years ago. The caisson had not been wholly removed, and the part that remained was hidden below the surface of the water. None of it was visible at any stage of the tide, and as it was also unmarked and unprotected, it was dangerous to vessels passing through this channel even with due care. The presence of the obstruction was unknown to the master of the tug and to the man in charge of the lighter.

It may be desirable to describe the situation a little more in detail: Two stone or concrete ledges make part of the construction of this western pier. Both are always under water, and at half ebb—the stage when a diver of many years' experience made an examination on January 31, 1913—the upper ledge, projecting 12 inches, was found to be about 5 feet below the surface, and the lower ledge, 4 feet further down and projecting 18 inches, was found to be about 9 feet below the surface. Outside of both ledges was part of the caisson referred to, built of heavy timbers, 12 by 12, and from the upper part of this caisson one timber had been partly detached, and was extending up-

ward about 2 feet above the lower ledge. At low tide—the stage when the injury was done—the timber would be from 2 to 3 feet nearer the surface, and would be near enough to account for the injury complained of. I have no doubt, and I so find, that the timber delivered the blow in question. No spring piling or other device then protected vessels from the hidden danger, and no notice or warning of any kind had been given to call attention to the situation.

The damage received by the lighter is shown by the photographs that were taken while she was being repaired. She was struck amidships, and not far from her bottom, and the blow was evidently severe. There is no appearance of injury above the broken planks, and none above the water line. The collision was not due to any fault in navigation or otherwise on the part of the lighter or of the tug, but was wholly due to the fault of the city in so maintaining the pier or abutment as to be an obstruction to careful and proper navigation. The precise fault now involved is permitting the projecting timber to remain without proper protection by piling or other means, and without any warning of its presence, either by marking or otherwise. It is of some weight that in other narrow channels in and near Philadelphia similar piers or abutments are usually protected.

Situations resembling this have been considered frequently by other courts, and the decisions seem to make discussion superfluous. *Railroad Company v. Towboat Co.*, 64 U. S. (23 How.) 209, 16 L. Ed. 433; *Towing Co. v. Wilson*, 63 Fed. 626, 11 C. C. A. 366; *Southern, etc., Co. v. Railroad Company* (D. C.) 196 Fed. 550, affirmed 205 Fed. 732, 124 C. C. A. 26; *Milwaukee v. Kensington, etc., Co.*, 199 Fed. 109, 120 C. C. A. 228; *The Nonpareil* (D. C.) 149 Fed. 521, and cases cited in these decisions.

The Pennsylvania cases cited by the city (*Clarke v. Bridge Co.*, 41 Pa. 147, and *Childs v. Crawford Co.*, 176 Pa. 139, 34 Atl. 1020) do not apply. No evidence was offered concerning the extent of the city's authority in reference to the construction and maintenance of this bridge; but, if its general authority to build and maintain be assumed, the question is still presented, whether the city is liable for maintaining an obstruction to navigation within the jurisdiction of a court of admiralty. And this question, in my opinion, should be answered in the affirmative.

As a result of the collision the side of the lighter was broken in, about 18 inches or 2 feet above the bottom, causing her to fill, and requiring her to be put aground. It was necessary, also, to remove her cargo before she could be raised and repaired. No objection is made to any item of the claim, and a decree may therefore be entered in favor of the libellant for \$1,415.67, with interest and costs.

BERNARD & SAMSEL v. CITY OF PHILADELPHIA.

(District Court, E. D. Pennsylvania. March 5, 1914.)

No. 42.

NAVIGABLE WATERS (§ 20*)—BRIDGES MAINTAINED BY CITY—LIABILITY FOR OBSTRUCTIONS TO NAVIGATION.

A city having general authority to build and maintain bridges over navigable streams is under the duty of making the channels under such bridges safe for navigation, and is liable for an injury to a vessel being properly navigated, caused by a projection of a stone abutment under water, which cannot be seen, and is unguarded and unmarked.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 73-99; Dec. Dig. § 20.*]

In Admiralty. Suit by Bernard & Samsel, managing owners of the tug Augusta, as bailees, etc., against the City of Philadelphia. Decree for libelants.

J. Frank Staley and Lewis, Adler & Laws, all of Philadelphia, Pa., for libelants.

Edgar W. Lank, Asst. City Sol., and Michael J. Ryan, City Sol., both of Philadelphia, Pa., for city of Philadelphia.

J. B. McPHERSON, Circuit Judge. The witnesses in this case were heard in open court; I find the facts to be as follows:

On May 28, 1911, the libelants were the managing owners of the tug Augusta, and were also bailees of the hinged barge, or canal boat, No. 124, and four other boats with their cargoes of coal. All the boats and their cargoes belonged to the Lehigh Coal & Navigation Company, and the tug had been engaged to tow them from a point on the Delaware river to points on the Schuylkill river within the port of Philadelphia.

The city of Philadelphia owns and maintains a drawbridge crossing the Schuylkill river at South street, and on the date mentioned was charged with the duty of maintaining, and safeguarding the abutments and piers of the bridge so that vessels navigating the river and using the narrow channels under the bridge with proper care might proceed in safety. About half past 9 o'clock on the morning of May 28th the tug was in charge of a competent and duly licensed master, who had had several years' experience in similar work and was well acquainted with the river. She had the five loaded canal boats in tow, and was proceeding north up the Schuylkill river. The boats were in two tiers, the first tier comprising three boats abreast, and the second tier comprising two boats abreast, made fast to the preceding tier. The boats were made fast to the eastern, or starboard, side of the tug, No. 124 being the starboard boat in the second tier. Each boat was 10 feet 6 inches beam, and the tug was 14 feet beam. No. 124 was 88 feet long, the boxes being about equal in length. The channel through which the tug and tow were about to pass was the first on the eastern side of the draw, and was 70 or 71 feet wide on the surface

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the water, leaving a margin of about 25 feet. The boats were drawing about 5 feet 3 inches. While the tug and tow were in the act of passing through the channel referred to, No. 124 collided with a submerged obstruction, or stone ledge forming part of the eastern abutment of the draw, the blow doing such damage to her planking that she sprung a leak and afterwards sank. At the time of the collision the tide was the young flood, a few minutes after low water, and the weather was clear and calm. The tow was properly made up in the usual manner, and the tug and boats, including No. 124, were seaworthy and fully manned and equipped. The tug and tow were proceeding carefully through the channel in the usual manner; but the ledge or obstruction referred to, which was part of the construction of the abutment, was submerged and hidden below the surface of the water at any stage of the tide, and was unmarked and unprotected. It was therefore dangerous to vessels using the channel even with proper care. The existence of the obstruction was unknown to those in charge of the tug and tow.

The damage received by No. 124 and her cargo was not due to any fault of navigation or otherwise on the part of the tug or of the boats, but was due solely to the fault of the city, especially in maintaining the abutment, or pier, referred to in an improper manner, unsafe to navigation, without marking or giving notice of the submerged ledge, or protecting it by piling or any other device. As a result of the collision the side of No. 124 was broken in so that she filled and sank soon afterwards. The cargo of the boat was pumped out and the boat was raised and repaired, the claim for salvage of cargo and boat and for making repairs amounting to \$341.66. In addition thereto a claim is made for losing the use of the boat for 33 days, at the rate of \$5 per day, or \$165, making the total damages claimed by the libelants as bailees the sum of \$506.66.

When the bridge was originally constructed, the western face of the eastern pier of the channel referred to had a flat stone surface above the surface of the water, but below the surface there were two stone ledges, one about a foot below the surface of the water at low tide, projecting into the channel about 12 inches, and the other, about 4 feet, 6 inches below the surface, projecting into the channel from 18 inches to 2 feet. The existence of these ledges was discovered by sounding with a pole at low water several months ago; the conditions being unchanged. The ledges were not visible at any stage of the water, and had never been protected. No. 124 did not strike the face of the pier above the surface, clearing it by a short distance, but struck one of the submerged ledges, probably the second. The blow was delivered nearly amidships, about the junction of the two boxes, battering and splitting the planks and letting in the water rapidly. It is of some weight that in other narrow channels in or near Philadelphia similar piers or abutments are usually protected.

It is not necessary to discuss the city's liability. In my opinion this is established by the cases cited in the opinion (filed herewith) in *Thompson-Lockhart Co. v. City of Philadelphia*, 212 Fed. 965, to which reference is hereby made. The city is at fault in failing to protect these dangerous ledges by piling or some equivalent device.

No objection is made to any item of the claim, and a decree may therefore be entered in favor of the libelants for \$506.66, with interest from July 1, 1911, and costs.

THE JAMES L. MORGAN.

THE NEW BRUNSWICK.

(District Court, S. D. New York. March 4, 1914.)

COLLISION (§ 93*)—STEAM VESSELS CROSSING—CROSSING SIGNALS.

A steam ferryboat, starting diagonally across North river, *held* solely in fault for a collision between a steam lighter and a tug, both of which were passing down, for failing to comply with the signals of the lighter, which was the privileged vessel, and to keep out of her way, instead of which she gave cross signals and attempted to cross the lighter's bows, causing the latter to turn sharply to starboard, which brought about the collision with the tug.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 194, 195; Dec. Dig. § 93.*]

In Admiralty. Suit for collision by the Bush Terminal Company against the steam lighter James L. Morgan and the steam ferryboat New Brunswick, impleaded. Decree for libelant against the New Brunswick alone.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones, of New York City, of counsel), for libelant.

Carpenter & Park, of New York City (Samuel Park, of New York City, of counsel), for steam lighter James L. Morgan.

Burlington, Montgomery & Beecher, of New York City (Chauncey I. Clark, of New York City, of counsel), for ferryboat New Brunswick.

HAZEL, District Judge. On May 6, 1912, at about 6 p. m., the steam tug Eleanor Bush, with a car float lashed to her starboard side, proceeded down North river, and, on seeing the ferryboat New Brunswick on her port side, blew a signal of one whistle to indicate her intention of keeping her speed and course. The ferryboat replied, assenting to the proposed movement. At this time the steam lighter James L. Morgan was also bound down the river, with the ferryboat on her right at a distance of from 75 to 100 feet, and the Eleanor Bush on her left at a distance of about 400 feet. She was going with the tide at the rate of about 12 miles an hour, and after giving two signals of one whistle each to the ferryboat, and receiving replies of two whistles each, she blew a danger signal, her master believing a collision with the ferryboat imminent, and reduced her headway, turning sharply to starboard and into the Eleanor Bush, striking her amidships. The libel was originally filed solely against the steam lighter, but the ferryboat was brought into the case under Admiralty Rule 59.

That the Eleanor Bush was injured without fault on her part is conceded on both sides, and therefore she must be compensated for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

her damages by the vessel in fault. The testimony offered on behalf of the ferryboat and that offered on behalf of the steam lighter is in sharp conflict, and cannot be reconciled, but I think it is fairly proven by credible witnesses and the probabilities that the Morgan, on first seeing the ferryboat emerge from her slip and proceed down the river on a course parallel with her, immediately indicated by one whistle her intention to keep her course; that upon receiving a reply of two whistles, she again blew one, and upon again receiving a reply of two, she immediately blew an alarm and reduced her headway, and that the ferryboat at the same time slightly turned from her course to carry out her intention of crossing the bows of the Morgan on her journey across the river to New Jersey, whereupon the master of the Morgan, to avoid striking the ferryboat, deemed it expedient to sheer sharply to starboard.

The testimony of the ferryboat is to the effect that she properly initiated the exchange of signals by blowing two blasts of her whistle to indicate her purpose of crossing the bows of the Morgan, but that the latter crossed her signal by blowing one whistle, and continued steadily on her course with a speed faster than that of the ferryboat, and negligently sheered when the ferryboat blew an alarm, and while she was still on a parallel course. But I think the witnesses were mistaken and confused the signals. The steam lighter was the privileged vessel, and had the right to keep her speed and course.

As the ferryboat had slightly turned for the purpose of crossing the bows of the Morgan, I think a situation was presented within rule 2 of the Inland Rules of 1897, in which it became her duty to keep out of the way, especially as she had received a signal of one whistle, to indicate the intention of the Morgan to keep her course and speed. The ferryboat must be held primarily in fault for giving a cross signal, for failing to keep out of the way, and for endeavoring to cross the bows of the privileged vessel.

I have examined the adjudication, *The Montauk*, 180 Fed. 697, 103 C. C. A. 663, to which counsel for the New Brunswick directed my attention as sustaining his contention that it was the duty of the Morgan to reduce her speed and sound an alarm on the instant that the ferryboat blew two whistles, assuming such to have been the fact, to indicate her dissent to the proposed movement; but the situation in that case is not the same as here, and the authority is therefore not thought in point.

It is also contended that had she been properly navigated, the steam lighter Morgan could have safely passed without striking the *Eleanor Bush*, as there was plenty of space between the ferryboat and the *Eleanor Bush*; but, in view of the oblique direction of the ferryboat and her speed, I am not convinced of this. The master of the steam lighter had sufficient cause to believe in the imminence of a collision with the ferryboat, and in this situation his sheering sharply to the right into the *Eleanor Bush* was not a fault.

A decree may be entered in favor of the Bush Terminal Company against the claimant of the New Brunswick for its damages, with interest and costs.

STEELE et al. v. HIGHLAND PARK MFG. CO. et al.

HIGHLAND PARK MFG. CO. v. STEELE et al.

(District Court, E. D. South Carolina. January 15, 1914.)

1. COURTS (§ 367*)—FEDERAL COURTS—AUTHORITY OF STATE DECISION.

A federal court is not bound by the decision of the highest court of a state as to the construction of a particular deed, where the law of the state on the question involved was not settled at the time the deed was executed and the rights of the parties accrued, but under the rule of comity it will lean toward a concurrence with the state decision.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. § 367.*]

2. DEEDS (§ 128*)—TRUSTS (§ 114*)—CONSTRUCTION—RULE IN SHELLEY'S CASE—EXECUTORY TRUST.

A man conveyed a tract of land in South Carolina to his son, to hold one-half of the same, however, in trust for the use and benefit of a grandson of the grantor during his natural life, and then convey to the appointee by will of the grandson, or, failing such appointment, to his heirs in fee simple. The son died intestate, and the grandson sold and conveyed the land by deed of general warranty, afterward dying intestate. *Held*, concurring with the Supreme Court of the state, that the trust upon which the deed was made was executory, the trustee being required to convey the land on the death of the life tenant, and the rule in Shelley's Case, although in force in the state, did not apply, and that the deed of the grandson, so far as it related to the one-half held under the trust, conveyed only his life estate.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 413-415, 419-421, 427; Dec. Dig. § 128; * Trusts, Cent. Dig. § 164; Dec. Dig. § 114.*]

3. REMAINDERS (§ 17*)—SUIT BY REMAINDERMEN—LIMITATIONS.

Limitation does not begin to run against a suit by remaindermen to recover property from grantees of the life tenant until the death of the life tenant, although his deed purported to convey the entire estate.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. §§ 12-17; Dec. Dig. § 17.*]

In Equity. Suit for partition by E. G. Steele and others against the Highland Park Manufacturing Company and others, with cross-bill. On exceptions to master's report. Sustained in part.

Finley & Marion, of Yorkville, S. C., and McCullough, Martin & Blythe, of Greenville, S. C., for plaintiffs.

Spencer & Spencer, of Rock Hill, S. C., and Tillett & Guthrie, of Charlotte, N. C., for defendants.

SMITH, District Judge. This is a proceeding for partition originally filed in the court of common pleas for York county on 29th of April, 1910. The complaint alleged that the complainants were entitled to a one-half undivided interest in four tracts of land in York county, viz.: Tract A, containing 27 acres, tract B, containing $\frac{4}{5}$ of an acre, tract C, containing $\frac{64}{100}$ of an acre, tract D, containing $\frac{94}{100}$ of an acre. The defendants E. H. Johnson and T. L. Johnson answered, denying that they or either of them had or ever had had any interest in the property sought to be partitioned, and the cause was, on the 16th of May, 1910, removed to this court by the defendant the High-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

land Park Manufacturing Company, on the ground of diverse citizenship as involving a controversy wholly between the plaintiff, a citizen of South Carolina, and the defendant, a citizen of North Carolina. The defendant the Highland Park Manufacturing Company answered, denying the title of plaintiff, and pleading sole seisin, and thereafter filed a cross-bill praying the refusal of a partition until the question of title was determined, and especially refusal as to tract A, on the equitable ground therein stated, and that if partition be decreed, then that in any partition the cross-complainant, for the protection of tract A and its improvement, have the benefit of an interest of $\frac{5}{18}$ in the tract, divided between Watson and others hereinafter set out, and acquired by cross-complainant, and have a just compensation allowed for the improvements placed by it on all the property sought to be partitioned in case a sale became necessary. The cross-defendant filed an answer to the cross-bill, and by a consent order of this court dated 23d June, 1910, the two suits were directed consolidated and tried together; and by a consent order, made 22d of April, 1911, it was referred to a special master to take the testimony on all the issues raised by the pleadings in the causes and report the same with his conclusions of law and fact. The special master has made his report, and at the October term, 1913, the cause came on to be heard upon the pleadings, the testimony reported, and the reports of the special master and the exceptions thereto. Before his report was made, however, a motion was made before the special master for leave to amend the cross-bill by incorporating certain allegations of fact so as to show that the three small tracts, B, C, and D, above mentioned, under the facts sought to be alleged similar to those alleged originally as to tract A, were not subject to partition. The master refused to allow the bill to be amended, but the motion by agreement between counsel was renewed before the court with like effect as if heard before the master. Exceptions were filed to the master's report, and after the filing of the exceptions, due notice was given that a motion would be made before the court at the time of the hearing for leave to amend the exceptions filed in behalf of the Highland Park Manufacturing Company, in several particulars.

The facts in this case appear to be as follows:

On the 16th November, 1860, John Steele, of the county of York in South Carolina, executed a deed of conveyance, whereby he conveyed to his son Joseph A. Steele a tract of land in York county, in the deed described as containing 494 acres. The deed to Joseph A. Steele is to his heirs and assigns forever of the whole tract in fee simple; but—

"in trust as to the one-half of said piece, parcel or tract of land to stand seised and possessed of the same for the use and benefit of my grandson, the above mentioned John G. Steele for and during the term of his natural life; and at his death to transfer and convey the same to such person or persons as he the said John G. Steele may by his will direct, or in default of such will and direction to the heirs of him the said John G. Steele in fee."

The John G. Steele so mentioned in the deed was the eldest son of the grantee, Joseph A. Steele. Joseph A. Steele, the grantee named in the deed died thereafter intestate, leaving as heirs at law his widow,

Eliza Jane Steele, his son John G. Steele, above mentioned, and his five daughters, Fannie M. Whyte, Jennie E. Smith, Mattie M. Steele, Alice E. McLure and Lizzie I. Steele. After the death of Joseph A. Steele, viz., by deed dated the 3d day of August, 1868, the said John G. Steele conveyed with general warranty to James Pagan, agent of R. Patterson & Co., the whole of the above-mentioned tract of 494 acres. By deeds subsequently executed James Pagan acknowledged that the conveyance to him was as agent of R. Patterson, under the name of R. Patterson & Co., for whom he held title.

On the 13th day of April, 1875, R. Patterson executed his deed of conveyance, conveying to Amelia J. Pride 120 acres, being part of the 494 acres conveyed to James Pagan as agent, and on the 23d day of October, 1882, the executors of R. Patterson executed a deed conveying to A. R. Smith and W. B. Wilson, Jr., all of the remainder of the tract of 494 acres stated in the deed to be 400 acres, making the entire land conveyed by Patterson, as acquired by him under the deed to Patterson, 520 acres. On the 1st day of December, 1882, Fannie M. Whyte, Jennie E. Smith, Mattie M. Steele, Alice E. McLure, and Lizzie I. Steele released and quitclaimed to A. R. Smith and W. B. Wilson, Jr., all their interest in the 494 acres. This release does not include any release from Eliza Jane Steele, the widow of Joseph A. Steele. She, by deed dated the 4th of August, 1868, conveyed to James Pagan, as agent of R. Patterson & Co. all her right, title, and interest in the 494 acres. This deed, however, would have only conveyed the life estate, as there are no words of inheritance; but, as there appears to be no question of any claim or right as subsisting in Eliza Jane Steele, it is to be presumed that Pagan is still alive and the life estate of force, or that she had died and her interest had vested in her children, the same as were the heirs at law of her husband, Joseph A. Steele. By deed dated 1st of March, 1877, Amelia J. Pride conveyed to John L. Watson the 120 acres conveyed to her by R. Patterson. On the 13th of October, 1884, John L. Watson executed his deed of that date, in which he declared that, by virtue of the conveyance to him from Amelia J. Pride, he had an undivided interest in the tract of land conveyed to him by her, containing about 97 acres (and not 120 acres), and that Andrew R. Smith and W. B. Wilson, Jr., by virtue of the deed to them of Jennie E. Smith, and others, heirs at law of Joseph A. Steele, had an undivided $\frac{5}{18}$ interest therein, and that they had mutually agreed to make a partition of the said tract of land according to the respective rights, and thereupon conveyed to them $27\frac{1}{2}$ acres, a part of the said tract of 97 acres, being, by estimation, equal in value to $\frac{5}{18}$ of the whole of the tract of 97 acres. By deed dated 31st of December, 1884, W. B. Wilson, Jr., conveyed to A. R. Smith all his undivided right, title, and interest into the same $27\frac{1}{2}$ acres. On the 12th day of May, 1888, A. R. Smith, by deed dated of that day, conveyed to the Standard Cotton Mill of Rock Hill the same $27\frac{1}{2}$ acres.

From this recital it appears that of the 494 acres conveyed by John Steele to his son Joseph A. Steele, one-half was owned absolutely by Joseph A. Steele, and upon his death intestate descended to his heirs at law, viz., his widow and children. There appears to have never

been any division of the land between the grantee, Joseph A. Steele, and his son, John G. Steele, so that at Joseph A. Steele's death intestate there went to his estate one-half, or $\frac{9}{18}$ of the whole, his widow taking $\frac{3}{18}$, and each of his six children $\frac{1}{18}$. Upon the sale of the entire tract by his son John G. Steele in 1868 to James Pagan as agent of R. Patterson & Co., there passed a $\frac{1}{18}$ in the whole which John G. Steele had inherited at the death of his father, Joseph A. Steele, intestate, and also the whole or such part of the other undivided one-half or $\frac{9}{18}$ as John G. Steele took under his grandfather's will. After the sale of the 400 acres to A. R. Smith and W. B. Wilson, Jr., there was released to them the $\frac{5}{18}$ of the other children of Joseph A. Steele in the property. This release to A. R. Smith and W. B. Wilson, Jr., of $\frac{5}{18}$ covered the entire interest of the five daughters of Joseph A. Steele in the whole property, and so had the effect of releasing to A. R. Smith and W. B. Wilson, Jr., $\frac{5}{18}$ of that portion, of the tract of 494 acres, stated in the deeds to be 120 acres, which Patterson had sold to Pride and Pride had sold to Watson. Watson seems to have claimed to own in this 120 acres only the one-half undivided interest which John G. Steele took under his grandfather's will, the $\frac{1}{18}$ which John G. Steele took as one of the distributees of his father, Joseph A. Steele, and the $\frac{3}{18}$ which should have gone to his widow, Eliza Jane Steele. He admitted that Smith and Wilson were entitled to $\frac{5}{18}$ in the 120 acres as conveyed to them by the other distributees of Joseph A. Steele, and upon an agreed partition had conveyed to them $27\frac{1}{2}$ acres as their share of the whole of the 120 acres (alleged to be only 97 acres) of the 494-acre tract as was conveyed by Patterson to Pride, which was by A. R. Smith conveyed to the Standard Cotton Mill of Rock Hill. Some time later, viz., in 1898 the Highland Park Manufacturing Company, by a master's deed from Julius H. Heyward, master, acquired the above-mentioned $27\frac{1}{2}$ acres. No exact date for this deed is given in the testimony. Subsequently thereto the Highland Park Manufacturing Company acquired from M. S. Kimbrell, by deed dated February 8, 1899, $\frac{64}{100}$ of an acre, and from the same party, by deed dated April 4, 1899, four-fifths of an acre, and from the firm of W. L. Roddey & Co., by deed dated February 7, 1899, $\frac{64}{100}$ of an acre, which had been conveyed by Kimbrell to Bigger, and by Bigger to Roddey & Co. These three small tracts of four-fifths of an acre, $\frac{64}{100}$ of an acre, and $\frac{64}{100}$ of an acre, were all parts of the 120 acres (or 97 acres) originally conveyed by Patterson to Pride, being that part of it which was allotted to Watson upon the partition between himself and Smith and Wilson when he conveyed the $27\frac{1}{2}$ acres; Watson having conveyed with general warranty $18\frac{2}{3}$ acres of his part to Kimbrell. John G. Steele, the grandson named in the will of John Steele, died on the 5th of July, 1905, intestate. The plaintiffs in these proceedings are his heirs at law, who after the death of John G. Steele in 1905 instituted in 1910 these proceedings.

The tracts of land in question are all parts of the tract first severed from the 494 acres by the conveyance from Patterson to Pride of 120 acres afterwards found to cover but 97 acres. The 27 acres covers that part of the 97 acres allotted to Smith and Wilson as representing

the $\frac{5}{18}$ in the 97 acres acquired from the five daughters of Joseph A. Steele, and the three smaller tracts being parcels of the rest of the 97 acres retained by Watson.

The first point for determination and one which, if determined in one aspect, may close the whole case, is as to the estate that John G. Steele was possessed of at the date of his deed in 1868 to Patterson, or rather to Pagan as agent of Patterson. The contention for the plaintiffs is that at that date John G. Steele was entitled to but a life estate, and could only pass such by any deed of conveyance made by him. That in addition to his life estate under the will of his grandfather he was vested with a power of appointment as to the remainder, which could be exercised only by will, and, having never been exercised by will, the remainder under his grandfather's deed passed at the death of John G. Steele to his heirs at law, treating the word "heirs" as a word of purchase and not of limitation. In brief their contention is that under the deed of John G. Steele to Pagan in 1868 nothing passed but a life estate, which terminated absolutely upon the death of John G. Steele in 1905. The construction of this identical will has been before the Supreme Court of South Carolina in proceedings by the same plaintiffs against different defendants. The decision is reported in the case of *Steele v. Smith*, 84 S. C. 468, 66 S. E. 200, 29 L. R. A. (N. S.) 939. In that decision the Supreme Court of South Carolina upholds the contention of the complainants in this action by holding that the rule in *Shelley's Case* does not apply, by reason of the interposition of a continuing active trusteeship, and that the effect of the language of the deed from John Steele, the grandfather, was to create two estates, viz., an equitable estate for life in John G. Steele, which became transformed into a legal estate for life under the statute of uses, with a general power of appointment by will, and an equitable estate in remainder, depending upon the contingency of the life tenant designating the beneficiary by his will, the estate in remainder remaining executory and equitable, and that in default of an appointment by will by the life tenant, John G. Steele, it followed that upon his death his heirs became vested with the fee in remainder as a legal estate, not by inheritance from the ancestor, John G. Steele, but as purchasers under the grant of John Steele, the grandfather.

[1] If this decision were controlling in this court upon this case between different parties, there would be an end of the question on this point. The defendant, however, claims that the defendant, being entitled to the jurisdiction of this court, is entitled to have the decision of this court upon the question, and that this court is not bound in its construction of the will by the construction placed upon it by the Supreme Court of the state of South Carolina. The rules upon this subject upon the construction of a deed are laid down by the Supreme Court of the United States in the case of *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228, as follows:

"1. When administering state laws and determining rights accruing under those laws, the jurisdiction of the federal courts is an independent one, not subordinate to, but co-ordinate and concurrent with the jurisdiction of the state courts.

"2. Where, *before the rights of the parties accrued*, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the federal court as authoritative declarations of the law of the state.

"3. *But where the law of the state has not been thus settled*, it is not only the right, but the duty of the federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrine of commercial law and general jurisprudence.

"4. So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, *or when there has been no decision by the state court on the particular question involved*, then the federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the federal court should always lean to an agreement with the state court if the question is balanced with doubt."

In the case of *Barber v. Pittsburg, etc., Ry.*, 166 U. S. 83, 17 Sup. Ct. 488, 41 L. Ed. 925, there had been a decision by the Supreme Court of Pennsylvania construing a will. The will in question had been construed by the Supreme Court of Pennsylvania as vesting an absolute estate in fee simple in the devisee named. A second action of ejectment on the same will was brought in the Circuit Court of the United States, and the questions certified up by the Circuit Court of Appeals to the Supreme Court of the United States were two: First, was the decision of the Supreme Court of Pennsylvania conclusive? and next, What estate did the devisee named take under the devise? The Supreme Court of the United States held that the decision of the Supreme Court of Pennsylvania was not conclusive as constituting an adjudication of the rights of the parties, inasmuch as under the laws of that state a single verdict and judgment in ejectment was no bar to a second action of ejectment. As to whether it was otherwise conclusive, the court held:

"When the construction of certain words in deeds or wills of real estate has become a settled rule of property in a state, that construction is to be followed by the courts of the United States in determining the title to land within the state, whether between the same or between other parties. * * * But a single decision of the highest court of a state upon the construction of the words of a particular devise is not conclusive evidence of the law of the state, in a case in a court of the United States, involving the construction of the same or like words, between other parties, or even between the same parties or their privies, unless presented under such circumstances as to be an adjudication of their rights."

[2] Under these decisions the question in this court to be determined is whether or not the decision made by the Supreme Court of South Carolina in the case reported in 84 S. C. is binding on this court as being the expression of the settled rule of property in the state as of the time of the accrual of the rights of the defendants. Inasmuch as the admitted attempted sale of the whole property (i. e., so much as was owned by John G. Steele) was made on the 3d of August, 1868, the question is: What was (if there was any) the expressed rule of property in South Carolina as shown by the decisions of its highest court of jurisdiction on the 3d of August, 1868, as to the effect of an

estate created by the words in the deed of John Steele creating the trust in favor of his grandson John G. Steele?

The deed in question conveys the undivided one-half interest to Joseph A. Steele in trust as to the same for the use and benefit of John G. Steele for and during the term of his natural life, and—

"at his death to transfer and convey the same to such person or persons as he the said John G. Steele may by his will direct, or in default of such will and direction to the heirs of him the said John G. Steele in fee."

The deed, therefore, gives to John G. Steele a full life estate, with a power of appointment by will to anybody to whom he saw fit. There were no vested rights, vested in any third parties. By making his appointment by will John G. Steele could enjoy the entire and absolute usufruct and result of the property, and there was no one named in the will who in such case would have any right to complain. The deed is that in default of any direction by John G. Steele by will, the remainder was to go to the heirs of the said John G. Steele. The right of the heirs to succeed to and enjoy the estate was in no way vested or absolute, as given to them directly under the terms of the deed, but would depend in the most favorable view for them upon the uncertain contingency of John G. Steele's failing to exercise his right of appointment.

The position was taken in argument by counsel for plaintiff that the sale by John G. Steele in 1868 was in some way an attempted invasion of the plaintiff's rights by depriving them of a beneficial estate given them directly under the deed of John Steele in 1860. This is wholly erroneous. That deed gave to John G. Steele an entire power of disposition by appointment by will. He could have by his will exercised the power of appointment for the benefit of an entire stranger. There can be no doubt that if John G. Steele had followed up his deed of 1868 by leaving a will of force giving the remainder in the property to Patterson that would have disposed of the question, and disposed of any claim on the part of the complainants in this cause. If John G. Steele in 1868 received full and satisfactory value for the property and undertook to sell an estate absolute for that consideration, he intending to sell and Patterson expecting to receive such an estate, the obligation might be all in the line of requiring him to make a will carrying out his intention. If the power of appointment held by John G. Steele could have been exercised by deed during his lifetime so that he could have enjoyed the proceeds of such an estate absolutely while alive, a court of equity might have compelled the execution of a sufficient appointment by him in aid of his deed, if insufficient, so as to have him carry out the sale accepted by his vendee in good faith. The power of appointment given to him, however, was to be exercised only by will, and the question thus turns upon the extent of the estate actually given him by a proper construction of the deed of 1860, and which he could himself dispose of by deed in his lifetime.

The rule of property known as the rule in Shelley's Case has been, by the highest court in South Carolina having jurisdiction anterior to 1868, declared to be a rule of law governing the devolution of estates

in South Carolina. In the case of *Porter v. Doby*, 2 Rich. Eq. (S. C.) 52, decided in 1845, it was decided to be a rule of property of force in South Carolina, and the definition approved by the court in that case is as follows:

"When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and, in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate."

This definition would apply to the estate given to John G. Steele under his grandfather's deed, in the present case. Under that he was vested with a life estate, and there was a limitation by way of remainder over in a certain contingency to his heirs. The remainder to his heirs was given by way of limitation as consequent upon the determination of the prior life estate, and contingent upon the nonexecution of the power of appointment. Taking away the power of appointment, it would leave it in the shape of a limitation over to the heirs of John G. Steele. The devolution and effect of the rule in *Shelley's Case* is often misunderstood. It has been sometimes condemned as a mere artificial rule, very often defeating the intention of the testator or grantor. This criticism is not one that is well founded when the history and the meaning of the rule is considered.

A grant to a man and his heirs might, in common parlance, be now popularly supposed to mean a grant to a man in common with his heirs or his children. At common law, however, it had a clearly defined meaning. It meant an estate absolute to the grantee. His heirs took no interest in it except by inheritance. He could assign it according to the nature of his estate and grant it himself as he saw fit. The word "heirs" had only the effect practically of showing that the estate was absolute as extending beyond his life, and the property was his, and such is still the rule of law. Under such a grant a man had a life estate because he had the entire property. So, in the case of the original application of the rule in *Shelley's Case*, where a deed was to a man for life, and after his death to his heirs, or any intervening estate of that kind was created, it was held to be in effect the same thing as a grant in fee. In the grant to a man and his heirs he had a life estate necessarily involved in the larger estate, and so, when he was by surplusage of wording given a life estate and the remainder to his heirs, it went to the same heirs by inheritance that it would have gone to in the first instance had the clause as to a life estate been omitted. The word "heirs" was therefore construed to be a word of what was termed limitation or inheritance, because the persons who took as heirs would take in that capacity from the holder of the life estate or the previous estate. Where it was intended to give the property to some one else by express intention and not to heirs, such others were said to take by purchase, and other words than the word "heirs" should be used. In view of the disinclination of the law to have estates tied up and always to lean to give to a party the property with power of alienation, the rule in *Shelley's Case* was a most salutary one. It gave

to the word "heirs" its true common-law definition and application as a word of limitation, and wherever property was given to "heirs," the word was used in the sense of the persons who would take through their capacity as such to the holder of the preceding estate, and the result was as in the case of a grant to a man and his heirs. The rule as carrying out the policy of the law in this respect was looked upon as a most salutary and proper one, tended to give a clear and definite meaning to words of conveyance in deeds of conveyance, and to give clearly defined ascertained estates at law. Under the statute of uses the same effect took place when the conveyance was in the form of one to the use for another. The estate vested under the statute of uses in the cestuis que usent at once in like manner as under the wording it would have vested if the grant had been direct. Under the law appertaining to written trusts, however, and in the subsequent construction of wills which were supposed to be more inartificial and less definitely phrased than deeds, distinctions as to the application of the rule in Shelley's Case arose, and the courts have revolted from what they deem an artificial rule of legal construction for the purpose of giving to a deed a plain and fixed meaning in order to carry out what a court in the case before it thought was the intention of the grantor or the testator. The effect has been in such cases to change the rule from a rule of law to a rule of construction. The rule in Shelley's Case was a perfectly natural, historical development of the common law with regard to the conveyance of an estate in fee. In pursuance of the inclination of courts to avoid conclusions apparently unintended, it was held in the case of written trusts that where a fee under the statute of uses did not vest directly in the party entitled to the beneficial usufruct of the estate, the rule in Shelley's Case would not always apply, and that where the instrument showed an intention that the legal title should continue in the trustee, for the effecting of some purpose by him that would rebut any presumed intention from the language of the common law that the heirs of the grantee would go in by virtue of their position as heirs of such grantee, and evidence an intention on the part of the grantor that they should take directly by reason of some grant emanating directly from the grantor under the terms of the instrument. Under the general rule, however, such exceptions were held to prevent the operation of the rule in Shelley's Case only where there was clearly lodged in the trustee some such duty to perform as would prevent the application of the statute of uses by executing the use at once into the cestui que usent.

In South Carolina the rule was that the word "heirs" is ordinarily, and in its strict sense a word of limitation, and not of purchase, and, used as a word of limitation, would carry the estate to the taker under the rule in Shelley's Case as in the ordinary deed in fee simple to a man and his heirs. *Seabrook v. Seabrook*, McMull. Eq. (S. C.) 201. The Supreme Court of South Carolina bases its decision upon the construction of this will upon two grounds: (1) That the present case was the case of an executory trust, and the rule in Shelley's Case did not apply; (2) that that rule did not apply unless the estate for life, and that in remainder were of the same quality, both legal or both

equitable, and that in the present case the life estate was legal and the remainder equitable. The Supreme Court of South Carolina further rests its conclusion that the trust was an executory one upon the requirement in the deed of 1860 that the trustee should "convey" the property as might be directed by John G. Steele in his will, or in default of such will then to his heirs holding that "the duty to 'convey' in a case like this will prevent the execution of the trust in the remaindermen under the statute until after the death of the life tenant." Was this the rule in South Carolina in August, 1868? The same case of Porter v. Doby held that "the doctrine seems to be well settled that executory trusts alone are, as a general class, exempted from the operation of the rule," and, "the test of an executory trust is that the trustee has some duty to perform, for the performance of which it is necessary that the title be regarded as abiding in him."

In the case of Wilson v. Cheshire, 1 McCord, Eq. (S. C.) 233 (in 1826), it was held that "where the trustee was required to act, and not merely to hold the estate," the use was not executed, and "where therefore there is a conveyance to trustees in trust to convey or to sell, or to pay the proceeds to a feme covert, * * * the legal estate remains in the trustees, unexecuted by the statute."

In Posey v. Cook, 1 Hill (S. C.) 413 (in 1833) the court held:

"Perhaps the rule might be more accurately expressed to say that, where the intention is that the estate shall not be executed in the *cestui que use*, and any object is to be effected by its remaining in the trustees, there it shall not be executed."

In Jenney v. Laurens, 1 Speer (S. C.) 356 in 1843) the court holds:

"The general rule, as stated in the elementary books, and to be collected from decided cases, is that the statute executes the use in all cases where there is no act to be done, or discretion to be exercised by the trustee, which he cannot do or exercise, if the estate be another's."

And:

"The trust will be executed unless the object of creating it would be defeated, as in the cases of trusts for married women, and to preserve contingent remainders, or where the trustee has some discretion to be exercised in relation to the estate or the manner of applying the proceeds."

In this case a direction that the trustees were to hold the estate and "apply" the rents, etc., to the parties entitled was held not to be sufficient to defeat the execution of the use, and that the trust was not executory.

In McCaw v. Galbraith, 7 Rich. (S. C.) 74 (in 1853) the direction of the will was that the trustee should hold the lands in trust for the use of the testator's brother, an alien until he should become naturalized, and then to execute to such brother a conveyance of the land, the rents and profits of the land to go to the brother from the day of testator's decease. The court held that the trust was an executory and not executed trust, saying:

"Concerning the execution of uses, as concerning other matters of construction, more indulgence is extended to wills than to deeds, and the cardinal principle of interpretation, applicable to all of these matters in a will, is the *intention of the testator*. Where he simply gives to one in trust for another.

or to one in trust to permit another to take the profits, or otherwise uses technical terms whose *sensé* is well fixed, his words will, without explanation given by himself in the instrument, be understood in their technical sense; but where, by a plain expression, or a necessary implication arising from the duties which he imposes upon the trustee, he shows that he intends a legal estate to abide in the trustee, his intention will be respected. Thus expressed, the intention is as manifest as if it appeared in the form of a use upon a use (which form is usually adopted in deeds to evade the statutes of uses), and it is no more opposed to law or policy, than is any other contrivance for making that separation of the legal from the equitable estate, which is involved in every trust."

There appear to be no other decisions in the courts of South Carolina prior to 1868 which would affect the question. The inference from these decisions is that in South Carolina it was a matter of intention to be gathered from the instrument. That the use was not executed or executory by any fixed wording, but that, where the intention of the testator would appear to be plainly defeated by holding the trust executed, the court would lay hold of anything in the instrument expressing that intention as controlling that which might ordinarily be the effect of the language used in creating the trust. Thus it might well be argued that the intention of the donor was to prevent a disposition of the property by John G. Steele in his lifetime so as to restrain possible waste and recklessness and allow him the privilege only of disposing of it by will. There is some conflict between the reasoning in *Jenney v. Laurens* and that in the other cases. The conclusion in *Jenney v. Laurens* is more in harmony with the conclusion reached as to the general rule by the Supreme Court of the United States in *Webster v. Cooper*, 14 How. 488, 14 L. Ed. 510, under the principles of which decision the trust in the present cause would be an executed one, and under the rule in *Shelley's Case* the deed made by John G. Steele in 1868 would have passed the fee to his one-half interest. The question is, not what was the correct general rule, but what was the rule in South Carolina in 1868? and under the decisions in the cases above cited, it would appear at least "in doubt" whether the word "convey" would not be sufficient to prevent the execution of the use by vesting in the trustee some duty to perform in cases where there would be ground for holding that the intention of the grantor would be otherwise defeated.

There appears to be no distinct adjudication in the South Carolina reports prior to 1868 that the use would never be held executed in the case where the two estates were of different quality, one legal and the other, equitable, but the conclusion of the court in the case in 84 S. C. resting upon *Porter v. Doby*, *supra*, that such was the rule in 1868 is entirely in accord with the conclusion reached by the Supreme Court of the United States in *Vogt v. Graff*, 222 U. S. 404, 32 Sup. Ct. 134, 56 L. Ed. 249.

Nor is this result obviated by the fact relied on by the defendants that upon the death of Joseph A. Steele the legal title held by him as trustee descended to John G. Steele as his eldest son and heir at law. John G. Steele then held, under the decision of the South Carolina Supreme Court, the legal estate for life, and if he did then, he became the holder of the legal estate in two capacities, viz., of the life estate

as his own and of the estate in remainder in trust for the remaindermen, his appointees under the will, or his heirs, as an equitable estate, which last legal estate would, on his death, descend to his heirs at law at common law. It has never been held in South Carolina that the vesting of the legal title in a trustee by descent, where he was not the beneficiary or only one of several beneficiaries, would have the effect of defeating the other equitable interests. It is necessary that the party entitled to both the legal and equitable estates must be the same before a merger or coalescence can take place.

Whilst the strict enforcement of the rule in *Shelley's Case* may be in the long run most salutary, both for reasons of public policy and for the certainty of the quantity of the estate and the giving proper effect in the great majority of cases to the intent of the testator, and whilst this court is itself doubtful of the conclusion reached by the Supreme Court of South Carolina in its construction of this will, and might, if the case were *res integra*, reach a different conclusion, yet this court finds that it cannot be said that the conclusion reached by the Supreme Court of South Carolina in its construction of this will is clearly at variance with the announcements as to the law made by the courts of highest jurisdiction in South Carolina prior to 1868, and it is therefore the duty of this court, where the question is doubtful, to lean to an agreement with the state court for the sake of comity and to avoid confusion. To do otherwise would, in the language of Mr. Justice Miller in *Brine v. Hartford Fire Ins. Co.*, 96 U. S. 627, 24 L. Ed. 858, be to introduce into the jurisprudence of the state of South Carolina the discordant elements of a substantial right which is protected in one set of courts and denied in the other, with no superior to decide which is right.

It is therefore found as a conclusion of law that the trust in this case was executory, and that under the deed of 1868 John G. Steele conveyed to his grantee so far as the one-half undivided interest was concerned only his life estate.

[3] The defendant has pleaded the statute of limitations in that, John G. Steele having lost possession in 1868 and this suit not having been commenced until 1910, more than 40 years had elapsed since the complainants, or any one through whom they claim, had been in possession, and under such circumstances the complainants are barred under section 109 of the Code of Civil Procedure of 1902. The plea is not well founded. The life tenant, John G. Steele, died in 1905. During his lifetime no action could be instituted by the remaindermen. The possession of the grantees of the life estate was in effect the possession of the life tenant, and the statute did not begin to run against the remaindermen entitled to the fee until the death of the life tenant.

The defendant has taken the further position in its exceptions that, even if the contention of the complainants be sustained as to their right to claim as remaindermen under the deed of 1860, yet that they are not now entitled to any further partition of the lots in the complaint designated as A, B, C, and D for the following reason, viz.: That John L. Watson was the owner in fee of an undivided $\frac{4}{18}$ in-

terest in the 120 (or 99) acres conveyed to Pride and by Pride to Watson. This upon the assumption that in any event, when John G. Steele conveyed to Pagan, he conveyed his $\frac{1}{9}$ of his father's $\frac{1}{2}$ or $\frac{1}{18}$ of the whole tract, and that Watson was also entitled to Mrs. Eliza J. Steele's $\frac{3}{9}$ of her husband's $\frac{1}{2}$ or $\frac{3}{18}$ of the whole, and thus Watson was the owner of $\frac{4}{18}$ of the 120-acre tract. So when Watson and Smith and Wilson had their partition, the part set aside to Watson represented, not only the $\frac{3}{18}$ he claimed for the John G. Steele $\frac{1}{2}$, but also the $\frac{4}{18}$ he thus owned absolutely and that when he sold 18 acres to Kimbrell, the 18 acres so sold did not represent more than the value of the $\frac{4}{18}$ so belonging to him, and standing for that $\frac{4}{18}$ was his own, and neither in the hands of Kimbrell nor of Kimbrell's grantees was subject to partition at the suit of the complainants, the complainants having already had their partition of the rest of the part of the 120-acre tract allotted to Watson, which partition was made in the case of Steele v. Smith, decided by the Supreme Court in 84 S. C.

But there is nothing in the record in this case which shows exactly what was the particular part of the 494 acres involved in the proceedings in Steele v. Smith in the state court. Further, there is nothing to show that Watson owned anything more than an estate for the life of Pagan in the $\frac{3}{18}$ of Mrs. E. J. Steele. The evidence contains an admission of the death of Mrs. Steele, but gives no date. It may be that adverse possession as against her $\frac{3}{18}$ has ripened into the presumption of a deed, but so far as the testimony shows, it may be that James Pagan is still alive, and that all that Watson and his grantees own is an estate for Pagan's life in that $\frac{3}{18}$.

No partition made between Watson and Smith and Wilson could bind the complainants, not being parties or privies. As co-tenants holders of an undivided one-half interest, they hold per my et per tout and are entitled to their full one half of every part of the original 494 acres. Where the other half interest is owned by different persons in separate parcels of the 494 acres, then ordinarily the partition is a separate one in each case as between the owners of the undivided interest in each separate tract. In this case the complainants are as much entitled to a one half interest in the tracts B, C, and D, as in tract A, and the defendant the Highland Park Manufacturing Company being the party before the court claiming the other half interest in all the same tracts, the partition should be made of all the tracts.

The court further finds as a conclusion of fact from the testimony that the cross-complainant has put very valuable improvements and betterments to a very large amount on the premises sought to be partitioned, and that all these improvements and betterments have been made by the cross-complainant on the premises in good faith, and under the belief in the validity of its title. The court further finds as a conclusion of law that, in the partition of the premises as prayed in the bill, the cross-complainant is entitled to a decree allowing it the benefit and advantage of the value of those improvements and betterments, but in such a way as not to deprive the complainants of their

right to one-half of the land or one-half of its value, as the same may be independent of the value of the improvements and betterments so placed upon it.

Under these circumstances the complainants are entitled to a partition of the property, but such partition is to be made so as to preserve to the defendant and cross-complainant the value of its improvements. The testimony in the case is not sufficient for the court to base a conclusion on as to whether the land is incapable of division so as to allot, in the division to the defendant and cross-complainant, that portion of the premises upon which all its improvements and betterments are situated. Nor is the testimony sufficient for the court to come to a conclusion whether or not the property as a whole is incapable of a division in kind and should be sold for the purposes of a partition.

The special master reports that the rental value of the premises sought to be partitioned is alleged to be \$200 per annum, and he finds it to be \$150 per annum, and recommends that the complainants have judgment for \$75 per annum against the defendant from the period of the death of the life tenant, and the findings of the special master on this point are confirmed.

It having been found that the defendant placed its improvements on the property in entire good faith and under a belief as to the validity of its title, and that under the cross-complaint it is entitled to a decree excluding such betterments from the partition, there is no reason why the usual rule in partition should not be followed in this case, and both parties pay their own costs, and where costs are common to both, they should be equally divided and paid. The effect of making the amendment asked for to the cross-bill under the motion made at the hearing would, under the principles decided herein, be to introduce unnecessary matter, and is not at this stage of the cause called for by any requirement of the cross-complainant's position, and the motion is refused.

The motion to permit the amendment of the exceptions to the master's report, made on behalf of the Highland Park Manufacturing Company, is granted.

All exceptions on either side, and all conclusions of the master inconsistent with the findings of this decree, will be overruled, and all exceptions of either party and conclusions of the master in conformity therewith will be sustained.

The defendants E. H. Johnson and T. L. Johnson are not shown to have any interest in the subject-matter of the suit, or to have been in any wise proper parties thereto. The bill is accordingly dismissed as to them, with costs against the complainants.

A formal decree will be drawn embodying and carrying into execution the results of the conclusions of law and fact found in this decree.

CHICAGO, R. I. & P. RY. CO. v. KETCHUM et al. (eight cases).

(District Court, S. D. Iowa, C. D. August 2, 1913.)

No. 2-A.

1. CARRIERS (§ 12*)—STATE REGULATION OF RATES—EXCURSION RATES.

Conceding the right of a state to compel railroads to grant reduced or excursion rates to persons attending the state fair, on the ground that it is an educational institution, there is no constitutional provision, national or state, which requires the extension of such rates to all passengers going to and from the city where the fair is held during its continuance, regardless of whether or not they attend it, but on the contrary such extension is not only not within the reason of the law, but operates as a clear discrimination against the industries and business interests of other cities of the state.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.*]

2. CARRIERS (§ 12*)—CONSTITUTIONAL LAW (§§ 242, 298*)—STATE REGULATION OF RATES—LIMIT OF POWER—EXCURSION RATES.

Code Iowa, § 2077, fixes maximum passenger rates to be charged by railroads in the state according to a prescribed classification. By Acts 35th Iowa Gen. Assem. 1913, c. 165, it is provided that round trip tickets from any point in the state to any town or city in the state where an annual fair or exposition is being held at which the attendance in the preceding year was 75,000 shall be sold by all railroads during the continuance of such fair at prescribed rates which are materially less than those fixed by the general statute. *Held*, that the rates fixed by the general statute are presumably just and reasonable, and that the Legislature, having prescribed such rates, had no power to make exceptions thereto in favor of a particular class of passengers or a particular locality; that the act was an illegal interference with the right of the railroad companies to fix their own rates of fare within the limits of the general statute and was unconstitutional and invalid as depriving them of their property without due process of law and denying them the equal protection of the laws.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12;* Constitutional Law, Cent. Dig. §§ 691, 847; Dec. Dig. §§ 242, 298.*]

In Equity. Suit by the Chicago, Rock Island & Pacific Railway Company against N. S. Ketchum, D. J. Palmer, and Clifford Thorne, as members of the Board of Iowa Railroad Commissioners, George Cosson, as Attorney General of Iowa, and J. H. Henderson, as Commerce Counsel for said state, with seven other cases. On motions for preliminary injunction. Motions granted.

F. W. Sargent, of Des Moines, Iowa, for complainant.

George Cosson, C. A. Robbins, J. H. Henderson, Dwight N. Lewis, and Clifford Thorne, all of Des Moines, Iowa, for defendants.

Before SMITH, Circuit Judge, and McPHERSON and VAN VALKENBURGH, District Judges.

SMITH, Circuit Judge. In 1874, by chapter 68 of the Acts of the Fifteenth General Assembly of Iowa, all railroads in this state were classified as follows:

Class C includes all roads whose gross annual earnings per mile are less than \$3,000.

Class B includes all whose gross annual earnings are \$3,000 per mile or over, but less than \$4,000 per mile.

Class A includes all whose gross annual earnings are \$4,000 per mile or more per annum.

This classification has been maintained and still constitutes the classification prescribed by statute. Section 2076, Supplement to Code.

The Fifteenth General Assembly fixed the passenger fare including ordinary baggage not exceeding 100 pounds in weight upon Class A roads at 3 cents, Class B $3\frac{1}{2}$ cents, and Class C 4 cents per mile. These rates were perpetuated by section 2077 of the Code of 1897.

About 1905 there was a considerable demand for a reduction of passenger fares in the state, but the Legislature of that year failed to pass any legislation upon the subject. In his message to the Thirty-Second General Assembly, which convened in January, 1907, the Governor of Iowa said:

"The representatives of the railway companies, during the last session, insisted that the average actual rate paid by passengers in Iowa was not more than two cents per mile; some of the roads showing a fraction higher and some a fraction lower than two cents. In making this computation an arbitrary division of certain large expenses was assumed, and, as I understand it, free transportation was not included.

"This condition has been brought about by the railroads themselves, through mileage books, credentials, and other reduced rates to privileged classes. When it is remembered that the vast majority of those who travel a great deal pay but two cents per mile, and that the travel of all those of our people who pay three cents per mile is necessary to bring the average up to two cents per mile, the extent of travel which pays less than two cents per mile assumes tremendous proportions. Granting, for the moment, that it would be unfair to reduce the revenue from passenger service a single penny, it is still manifest that the adjustment is hopelessly wrong. It costs the railway company just as much to carry a passenger who has purchased a 2,000-mile book, per mile, as it does to carry a passenger who has bought a single ticket for 100 miles. Indeed, I think the former costs a little more, for the use of the mileage book entails more expense in the maintenance of extensive bureaus for identification, auditing, and rebating, than the sale of tickets at stations. The only advantage derived by the railway company is the interest upon the payment in advance, and this does not warrant any appreciable reduction in the rate.

"If the practice of making low rates for excursions, conventions, meetings of associations, and the like, is unprofitable, the railway companies can easily abolish it. For my part, I can see no justice in the custom which compels the farmer and his family, or the merchant and his family, as they go from place to place, either for pleasure or for business, to pay a part of the cost of carrying men to conventions or to gatherings of any kind; and much less can I perceive the wisdom of making our people pay, as they move about engaged in their ordinary affairs, for losses incurred in taking train load after train load of pleasure seekers to points of entertainment or amusement, or land seekers, as they journey to distant states in the hope of finding riches that they could more easily discover at home."

Thereupon the Legislature increased the ordinary baggage allowance for each passenger to 150 pounds and reduced the fare on Class A roads to 2 cents, Class B to $2\frac{1}{2}$ cents, Class C to 3 cents, and for children 12 years of age and under provided for one-half of such fare. This was coupled with some additional provisions as previously with reference to the failure to purchase tickets and other matters.

The position of the Governor has been stated simply that the contemporaneous setting of the law may be more fully understood and it

is not to be implied that the court are of the opinion that anything the Governor or Legislature of 1907 did could bind the Legislature of 1912, much less make the action of the latter unconstitutional.

For many years there has been conducted at Des Moines, Iowa, a state fair on grounds owned by the state. Until 1900 this was conducted by the State Agricultural Society, but since that time by the Iowa Department of Agriculture. The state does not provide any support fund for the maintenance of this fair nor pay any of the yearly expenditures or premiums of the same, the statute providing that all expenses connected with the holding of the fair are to be paid out of the fair receipts. The state does, however, appropriate for improvements upon the state fair grounds as it appropriated originally for their purchase. This fair is one of the largest annual exhibitions in the country and is an educational institution on a large scale. It is a highly commendable enterprise and should be aided by all.

The Legislature of 1913, in an attempt to increase the attendance and the opportunity for attendance, passed the following law:

"All railroad corporations, according to their classification, as herein prescribed, shall be limited to compensation per mile, for the transportation of any person, with ordinary baggage not exceeding one hundred fifty pounds in weight, who shall purchase a round trip ticket from any point within this state to any town or city within said state at which an annual fair or exposition is being held, said ticket being good for return trip of said purchaser to point of origin during said fair or exposition, and at least one day after the conclusion of the same, as follows: Class A one and one-half cents; Class B two cents; Class C two and one-half cents; and for children twelve years of age or under one-half of the rate above prescribed, all of the aforesaid rates to apply to each mile traveled; provided, however, that said maximum rates of charge shall only apply on transportation to such points at which an annual fair or exposition has been held during one or more preceding years, and where the attendance during the immediately preceding year for any week or part thereof was not less than seventy-five thousand bona fide paid admissions; and it is further provided that upon application being made by any interested party, the state board of railroad commissioners shall, after full hearing, determine whether or not any given fair or exposition comes within the provisions of this statute; and in case such commission shall find that any given fair or exposition comes within said provisions, then, and in that case, the said commission shall prescribe the time and place at which the carriers shall perform the services for the rates of charge, as hereinbefore stated; and said commission shall by order designate what reasonable notice shall be given by said railway companies to the public of the rates aforesaid; and the said orders of the board of railroad commissioners shall be enforced in the same manner as is provided by law for the enforcement of other orders of the said commission." Acts 35th Gen. Assem. c. 165.

Thereupon the Iowa Railroad Commission, upon a petition filed by the Department of Agriculture of the state, entered the following order:

"It is therefore ordered that all railway companies operating in the state of Iowa, according to their classifications, as herein prescribed, shall be limited to compensation per mile for the transportation of any person, with ordinary baggage, not exceeding one hundred and fifty pounds in weight, who shall purchase a round trip ticket on any day from August 20th to 28th, inclusive, of this year, from any point within this state to Des Moines, said ticket being good for return trip of said purchaser to point of origin on any day between August 20th and 29th, inclusive, of this year, as follows: Class

A one and one-half cents; Class B two cents; Class C two and one-half cents, and for children twelve years of age or under, one-half of the rate above prescribed, all of the aforesaid rates to apply to each mile traveled. Said maximum rates of charges shall apply only to trips wholly within this state.

"The said companies are further required to give notice to the public of the said reduced rates by filing with the secretary of the board of railroad commissioners on or before ten o'clock July 17, 1913, a certified statement to that effect, and also by sending notice of the same on or before the fifteenth day of July to each and every passenger agent of said companies on duty within the state of Iowa."

These suits are brought by various railroads to enjoin these rates. While some at least of the bills charged that the rates thus established are confiscatory, applications for temporary injunctions have been submitted on the grounds that the legislation: First, denies to the railroads the equal protection of the laws; and, second, deprives them of their property without due process of law, in violation of the Constitution of the United States.

There can be no doubt of the right of the state to establish maximum rates of transportation so long as they are compensatory, but the question here is how far this power extends in the making of rates such as commutation rates, party rates, mileage rates, and excursion rates.

As to such rates there has been little legislation and still less of adjudication. It will be observed, however, that the rates here in question are not limited to those attending the state fair, but any person desiring to obtain a round trip ticket to Des Moines may do so for three-fourths of the ordinary fare at any time between August 20th and 29th of this year. It is insisted that this provision was necessary in order to make the rates legal. That is, that the state could not authorize the sale of round trip tickets to Des Moines to those attending the state fair unless it authorized the sale of the same tickets to all other persons at the same time. In this we cannot wholly concur.

[1] If the fact that the state fair is an educational institution furnishes the basis for this rate as contended, then we think it would have been lawful to have authorized the sale of such tickets only to persons going to the state fair. We cannot agree that the character of the state fair is such as to make it legal to make a discriminatory rate to Des Moines and that it would not have been legal to have restricted it to those going to the state fair. The basis of the contention of the state in this regard is that the state fair being an educational institution justifies an exception in the law as to the rates of transportation and that this classification requires that all persons be admitted at the same rates.

No authorities are cited to sustain this proposition. Of course, we realize that ordinarily the object of the law is to avoid discriminations in passenger rates, but the very object of the rule permitting the state to create classes will be done away with if the law be construed as claimed by the state.

While the state fair is an educational institution, there are many other educational institutions in Iowa, such as the State University, the State College at Ames, the State Normal School at Cedar Falls, meet-

ings of teachers' associations, the various short courses held in the counties, the meetings of the State Horticultural Society, the various district and county fairs held throughout the state. All these are educational in character and of only a little less importance to the local communities than the state fair is to Des Moines. There are at least a dozen other wholesale places in Iowa aside from Des Moines. There are a countless number of retailers who live equally distant from Des Moines and from some one of these cities. Des Moines is much the largest city in the state, and under this order as made all such persons can travel to any of these others cities at full fare or to Des Moines for three-fourths fare.

This law thus operates not only as a flagrant discrimination between those who are securing education at some point other than Des Moines, but it is a clear discrimination against those who are seeking to buy at wholesale or retail at some other city in Iowa than Des Moines.

Assuming for the sake of this case that the state fair constitutes such an educational institution as to justify a discrimination in its favor, we feel confident that the Constitution does not require that the state in making such discrimination as that contained in the order of the Railroad Commission shall make another discrimination against all the industries of the state except those at Des Moines.

This law as drawn not only discriminates as between cities and individuals, but is a violation of the long and short haul principle. To illustrate: One who wants to go from Davenport to Colfax will have to pay 2 cents each way, or \$3.04; but to go from Davenport to Des Moines through Colfax he will only have to pay 1½ cents per mile, or \$2.63, and less in the aggregate than it will cost to Colfax. If we take any point, A, which is more than four times as far from Des Moines as another point on the same line, B, the rate from A to Des Moines through B is less at 1½ cents per mile than the rate left in force from A to B at 2 cents.

If it is proposed to grant a reduced rate for educational purposes, as we understand it, there is no provision of the Constitution national or state which requires that the rate shall be extended to any but the persons who are the beneficiaries of such education. *San Antonio Traction Co. v. Altgelt*, 200 U. S. 304, 26 Sup. Ct. 261, 50 L. Ed. 491; *Interstate Consolidated Street Ry. Co. v. Massachusetts*, 207 U. S. 79, 28 Sup. Ct. 26, 52 L. Ed. 111, 12 Ann. Cas. 555; *Commonwealth v. Conn. Valley St. Ry.*, 196 Mass. 309, 82 N. E. 19; *Commonwealth v. Boston & N. St. Ry. Co.*, 212 Mass. 82, 98 N. E. 1075.

If a law be valid requiring reduced fares for school children, it then necessarily follows that if the state fair is an educational institution a reduced fare can be allowed to those attending it.

[2] While it thus appears that the law violates the long and short haul principle and discriminates against wholesalers and retailers at all points in Iowa other than Des Moines, and discriminates in favor of one educational institution as against others equally meritorious and does so unnecessarily by extending the reduced fare to all persons going to Des Moines, and does not limit it to those going to the state fair, which could have been readily done by requiring tickets to be

stamped on the state fair grounds to make them good on the return trip, all this may not show that the law necessarily conflicts with the Constitution of the United States.

To determine that requires, as before stated, a consideration of the subject of commutation, party, mileage, and excursion tickets.

The question of commutation tickets has been repeatedly before the Interstate Commerce Commission. *Sprigg v. B. & O. R. Co.*, 8 Interst. Com. Com'n R. 443; *Commutation Rate Case*, 21 Interst. Com. Com'n R. 428; *Commutation Rate Case*, 27 Interst. Com. Com'n R. 549.

In the *Commutation Rate Case*, 21 Interst. Com. Com'n R. 428, the Commission said:

"The literature relating to the origin and history of commutation rates is surprisingly meager and incomplete. As applied to passenger traffic, commutation seems to signify the payment in a single sum of the cost to the traveler for transportation, limited in point of time or in the number of trips, between two designated points; apparently it implies also a fare per trip that is less than the normal fare for a one-way journey. That use of the word is probably as old as steam transportation itself; the commuter not improbably antedates steam transportation although possibly not under that name. * * *

"As we have been able from various sources to gather some impression as to the history of commutation rates, there can be little doubt that commutation traffic was regarded originally as a mere incident to through traffic and was attractive because it could be handled at little additional cost to the carrier. Besides adding volume to the regular passenger traffic and thus tending materially to reduce the operating cost per passenger, it had the effect of substantially increasing the freight traffic. There is much testimony of record on this point. It tends to show that the freight tonnage moving between substantial suburban communities and adjacent large centers is often very considerable; and that there is a certain reciprocal relation between the carrier and its commuters in that while the latter enjoy special fares they create a general traffic that would not otherwise exist. It was for these reasons that the carriers found it of advantage not only to encourage the establishment of permanent homes adjacent to the large industrial cities, but to take steps to stimulate and advance the growth of suburban life and to make it attractive and agreeable. Having the tracks, the stations, and the equipment, suburban traffic was for a long time more or less a by-product of through traffic, and that is still the case in many instances. But it is undeniable that the enormous growth of suburban communities in recent years, and particularly around the great cities such as New York and Chicago, has resulted in material changes both in the character and the cost of commutation service. The increasing demands of commuters for more frequent trains and a faster time schedule, for club cars and parlor cars, and other conveniences, have undoubtedly minimized it as a factor, tending to a reduction in the unit of cost of passenger traffic; and instead of being an incident to through traffic and valuable because it added volume to it without adding proportionately to the cost and thus tended to a reduction in the operating expense per passenger, commutation traffic in many instances is now moved at a comparatively high operating expense. In some cases it has become an independent and special service, conducted largely in special trains with special equipment and motive power, and very often even on special tracks, and frequently with special stations. * * *

"Without going further into the history of commutation or the details that distinguish it from other passenger traffic, we are led to conclude from all these considerations that it stands by itself as a special and distinct kind of service for which the carrier may demand no more than a reasonable compensation. Excursion traffic is sporadic and occasional and altogether exceptional. But it does not follow, because section 22 provides that nothing in the act 'shall prevent the issuance of excursion tickets,' that no other pro-

vision in the act has any application to excursion tickets. On the contrary, we have held that carriers must publish and post their excursion rates as required in section 6; and with respect to some kinds of excursion traffic we have also applied section 4. We have not applied section 3 to excursion fares in the few cases that have come before us, but in the progress of time it is not improbable that complaints may arise where unusual conditions and special facts will require the enforcement of that section and also of section 2. Section 1, requiring that all rates must be reasonable, in the very nature of things can have no real application to excursion fares. This is perhaps no less true of mileage book rates. But it will not do to say that as section 1 cannot be enforced with respect to excursion and mileage book tickets it therefore has no application to commutation tickets. Nor does it follow, because the act provides that nothing therein 'shall prevent the issuance of commutation tickets,' that no other provision of the act applies to such tickets, and that we are without power under section 1 to regulate the reasonableness of the fares demanded for such a service. Necessarily that must depend somewhat upon the character of the service. Unlike excursion traffic, commutation traffic is neither occasional nor sporadic, but on the contrary is characterized by an unusual regularity in volume; it may be accurately measured and provided for more readily than in the case of any other kind of passenger traffic. It is ordinarily constant, except as it may gradually grow in volume. Its stability is established by the juxtaposition of a community of homes and a community of workshops; and this separation of the place of residence from the place of work is in many cases the direct result of the efforts of the carrier. It has been encouraged, developed, and fostered by the carriers, and large and numerous suburban communities have grown up in the belief, not that some fare less than the normal full passenger fare would be demanded in the future, but in the belief, as heretofore stated, that no more than a just and reasonable fare would at any time be exacted, considering the special character of the traffic and of the service and the conditions that differentiate both the traffic and the service so completely and absolutely from all other kinds of passenger traffic and service. That it has been regarded as a different class of traffic conducted under entirely different conditions and a different kind of service is shown not only by the origin of commutation and the subsequent traditions that have accumulated with its growth but by the general recognition of it by the carriers themselves as an independent and a special service. Suburban communities have grown into existence on the theory voluntarily accepted by the carriers as well as by the public that one who makes daily use of an agency of transportation between his place of business and his home must necessarily be accorded a special and a low rate. This theory is firmly fixed in the history and traditions of transportation by rail and must therefore be regarded as embraced in the law under which such transportation is regulated."

Again the Commission in the opinion said:

"It will not be necessary to dwell here upon the importance of the question not only to the particular suburban communities involved on the record before us, but to many other such communities throughout the country, the prosperity and growth of which largely depend upon an efficient and reasonable commutation service. Many such communities have not only been encouraged by the carriers, but were, in fact, originally established largely on their initiative. Suburban property has been bought, homes have been established, business relations made, and the entire course of life of many families adjusted to the conditions created by a commutation service. This may not have been done on the theory that the fares in effect at any particular time would always be maintained as maximum fares, but countless homes have been established in suburban communities in the belief that there would be a reasonable continuity in the fares and that the carriers in any event would perform the service at all times for a reasonable compensation."

This opinion has never been passed upon by the courts, but the reasoning of Mr. Commissioner Harlan is quite cogent and persuasive.

We come next to the consideration of party rates. They were deemed illegal by the Interstate Commerce Commission, but upon suit being brought to enforce its order its action was reversed by the Supreme Court of the United States. *Interstate Commerce Commission v. B. & O. R. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699. From that case it appears that party rates were then adjudged to be legal. It was the practice of the railroads to issue a single ticket for ten persons or more at reduced rates. In that case the Supreme Court quoted with approval the opinion of Judge Sage in the court below that:

"The difference between commutation and party-rate tickets is that commutation tickets are issued to induce people to travel more frequently, and party-rate tickets are issued to induce more people to travel. There is, however, no difference in principle between them, the object in both cases being to increase travel without unjust discrimination, and to secure patronage that would not otherwise be secured."

In that case no question was raised as to the power of Congress to establish rates on party tickets or to authorize the Commission to do so.

Turning now to the question of mileage rates, the Legislature of Michigan passed a law providing that a 1,000-mile ticket should be kept on sale at a price not exceeding \$20 in the lower peninsula and \$25 in the upper peninsula; that such 1,000-mile ticket might be made nontransferrable, but whenever requested by the purchaser they should be issued in the name of the purchaser and wife and children, these tickets should be valid for two years after the date of purchase and contained various other provisions.

The Supreme Court, in *Lake Shore & Michigan Southern Ry. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858, said:

"It is said that the power to create this exception is included in the greater power to fix rates generally; that, having the right to establish maximum rates, it therefore has power to lower those rates in certain cases and in favor of certain individuals, while maintaining them or permitting them to be maintained at a higher rate in all other cases. It is asserted also that this is only a proper and reasonable regulation.

"It does not seem to us that this claim is well founded. We cannot regard this exceptional legislation as the exercise of a lesser right which is included in the greater one to fix by statute maximum rates for railroad companies. The latter is a power to make a general rule applicable in all cases and without discrimination in favor of or against any individual. It is the power to declare a general law upon the subject of rates beyond which the company cannot go, but within which it is at liberty to conduct its work in such a manner as may seem to it best suited for its prosperity and success. This is a very different power from that exercised in the passage of this statute. The act is not a general law upon the subject of rates, establishing maximum rates which the company can in no case violate. The Legislature having established such maximum as a general law now assumes to interfere with the management of the company while conducting its affairs pursuant to and obeying the statute regulating rates and charges, and notwithstanding such rates it assumes to provide for a discrimination, an exception in favor of those who may desire and are able to purchase tickets at what might be called wholesale rates—a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule. And it assumes to regulate the time in which the tickets purchased shall be valid and to lengthen it to double the period the railroad company has ever

before provided. It thus invades the general right of a company to conduct and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute, and to that extent it would seem that the statute takes the property of the company without due process of law. We speak of the general right of the company to conduct and manage its own affairs; but at the same time it is to be understood that the company is subject to the unquestioned jurisdiction of the Legislature in the exercise of its power to provide for the safety, the health, and the convenience of the public, and to prevent improper exactions or extortionate charges from being made by the company.

"It is stated upon the part of the defendant in error that the act is a mere regulation of the public business, which the Legislature has a right to regulate, and its apparent object is to promote the convenience of persons having occasion to travel on railroads and to reduce for them the cost of transportation; that its benefit to the public who are compelled to patronize railroads is unquestioned; that it brings the reduction of rates of two cents per mile within the reach of all persons who may have occasion to make only infrequent trips; and that there is no reason why the Legislature may not fix the period of time within which the holder of the ticket shall be compelled to use it. The reduction of rates in favor of those purchasing this kind of ticket is thus justified by the reasons stated.

"The right to claim from the company transportation at reduced rates by purchasing a certain amount of tickets is classed as a convenience. As so defined, it would be more convenient if the right could be claimed without any compensation whatever. But such a right is not a 'convenience' at all within the meaning of the term as used in relation to the subject of furnishing conveniences to the public. And also the convenience which the Legislature is to protect is not the convenience of a small portion only of the persons who may travel on the road, while refusing such alleged convenience to all others; nor is the right to obtain tickets for less than the general and otherwise lawful rate to be properly described as a convenience. If that were true, the granting of the right to some portion of the public to ride free on all trains and at all times might be so described. What is covered by the word 'convenience' it might be difficult to define for all cases, but we think it does not cover this case. An opportunity to purchase a 1,000-mile ticket for less than the standard rate we think is improperly described as a convenience.

"The power of the Legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not reasonable regulation. We do not deny the right of the Legislature to make all proper rules and regulations for the general conduct of the affairs of the company, relating to the running of trains, the keeping of ticket offices open, and providing for the proper accommodation of the public.

"This act is not like one establishing certain hours in the day during which trains shall be run for a less charge than during the other hours. In such case it is the establishing of maximum rates of fare for the whole public during those hours, and it is not a discrimination in favor of certain persons by which they can obtain lower rates by purchasing a certain number of tickets by reason of which the company is compelled to carry them at the reduced rate, and thus, in substance, to part with its property at a less sum than it would be otherwise entitled to charge. The power to compel the company to carry persons, under the circumstances as provided for in this act, for less than the usual rates, does not seem to be based upon any reason which has hitherto been regarded as sufficient to authorize an interference with the corporation, although a common carrier and a railroad.

"The act also compels the company to carry not only those who choose to purchase these tickets, but their wives and children, and it makes the tickets good for two years from the time of the purchase. If the Legislature can, under the guise of regulation, provide that these tickets shall be good for two years, why can it not provide that they shall be good for five or ten or even

a longer term of years? It may be said that the regulation must provide for a reasonable term. But what is reasonable under these circumstances? Upon what basis is the reasonable character of the period to be judged? If two years would, and five years would not, be reasonable, why not? And if five years would be reasonable, why would not ten? If the power exists at all, what are the factors which make it unreasonable to say that the tickets shall be valid for five or for ten years? It may be said that circumstances can change within that time. That is true, but circumstances may change within two just as well as within five or ten years. There is no particular time in regard to which it may be said in advance and as a legal conclusion that circumstances will not change. And can the validity of the regulation be made to depend upon what may happen in the future, during the running of the time in which the Legislature has decreed the company shall carry the purchaser of the ticket? Regulations for maximum rates for present transportation of persons or property bear no resemblance to those which assume to provide for the purchase of tickets in quantities at a lower than the general rate, and to provide that they shall be good for years to come. This is not fixing maximum rates, nor is it proper regulation. It is an illegal and unjustifiable interference with the rights of the company. * * *

"If the Legislature can interfere by directing the sale of tickets at less than the generally established rate, it can compel the company to carry certain persons or classes free. If the maximum rates are too high in the judgment of the Legislature, it may lower them, provided they do not make them unreasonably low as that term is understood in the law; but it cannot enact a law making maximum rates, and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper. What right has the Legislature to take from the company the compensation it would otherwise receive for the use of its property in transporting an individual or classes of persons over its road, and compel it to transport them free or for a less sum than is provided for by the general law? Does not such an act, if enforced, take the property of the company without due process of law? We are convinced that the Legislature cannot thus interfere with the conduct of the affairs of corporations.

"But it may be said that as the Legislature would have the power to reduce the maximum charges for all, to the same rate at which it provides for the purchase of the 1,000-mile ticket, the company cannot be harmed or its property taken without due process of law when the Legislature only reduces the rates in favor of a few instead of in favor of all. It does not appear that the Legislature would have any right to make such an alteration. To do so might involve a reduction of rates to a point insufficient for the earning of the amount of remuneration to which a company is legally entitled under the decisions of this court. In that case reduction would be illegal. For the purpose of upholding this discriminatory legislation we are not to assume that the exercise of the power of the Legislature to make in this instance a reduction of rates as to all would be legal, and therefore a partial reduction must be also legal. *Prima facie*, the maximum rates as fixed by the Legislature are reasonable. This, of course, applies to rates actually fixed by that body.

"There is no presumption, however, that certain named rates which it is said the Legislature might fix but which it has not, would, in case it did so fix them, be reasonable and valid. That it has not so fixed them affords a presumption that they would be invalid, and that presumption would remain until the Legislature actually enacted the reduction. At any rate, there is no foundation for a presumption of validity in case it did so enact, in order to base the argument that a partial reduction, by means of this discrimination, is therefore also valid. And this argument also loses sight of the distinction we made above between the two cases of a general establishment of maximum rates and the enactment of discriminatory, exceptional, and partial legislation upon the subject of the sale of tickets to individuals willing and able to purchase a quantity at any one time. The latter is not an exercise of the power to establish maximum rates.

"True it is that the railroad company exercises a public franchise, and that its occupation is of a public nature, and the public therefore has a certain interest in and rights connected with the property, as was held in *Munn v.*

Illinois, 94 U. S. 113, 125 [24 L. Ed. 77], and the other kindred cases. The Legislature has the power to secure to the public the services of the corporation for reasonable compensation, so that the public shall be exempted from unreasonable exactions, and it has also the authority to pass such laws as shall tend to secure the safety, convenience, comfort, and health of its patrons and of the public with regard to the railroad. But in all this we find it neither necessary nor appropriate, in order that the Legislature may exercise its full right over these corporations, to make such a regulation as this, which discriminates against it and in favor of certain individuals, without any reasonable basis therefor, and which is not the fixing of maximum rates or the exercise of any such power.

"The Legislature having fixed a maximum rate at what must be presumed, *prima facie*, to be also a reasonable rate, we think the company then has the right to insist that all persons shall be compelled to pay alike, that no discrimination against it in favor of certain classes of married men or families, excursionists, or others, shall be made by the Legislature. If otherwise, then the company is compelled at the caprice or whim of the Legislature to make such exceptions as it may think proper and to carry the excepted persons at less than the usual and legal rates, and thus to part in their favor with its property without that compensation to which it is entitled from all others, and therefore to part with its property without due process of law. The affairs of the company are in this way taken out of its own management, not by any general law applicable to all, but by a discrimination made by law to which the company is made subject. Whether an act of this nature shall be passed or not is not a matter of policy to be decided by the Legislature. It is a matter of right of the company to carry on and manage its concerns subject to the general law applicable to all, which the Legislature may enact in the legal exercise of its power to legislate in regard to persons and things within its jurisdiction. * * *

"But in this case it is not a question of 'convenience' at all within the proper meaning of that term. Aside from the rate at which the ticket may be purchased, the convenience of purchasing this kind of a ticket is so small that the right to enact the law cannot be founded upon it. It is no answer to the objection to this legislation to say that the company has voluntarily sold 1,000-mile tickets good for a year from the time of their sale. What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a Legislature. Persons may voluntarily contract to do what no Legislature would have the right to compel them to do. Nor does it furnish a standard by which to measure the reasonableness of the matter exacted by the Legislature. The action of the company upon its own volition, purely as a matter of internal administration, and in regard to the details of its business which it has the right to change at any moment, furnishes no argument for the existence of a power in a Legislature to pass a statute in relation to the same business imposing additional burdens upon the company. * * *

"In this case there is not an exercise of the power to fix maximum rates. There is not the exercise of the acknowledged power to legislate so as to prevent extortion or unreasonable or illegal exactions. The fixing of the maximum rate does that. It is a pure, bald, and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road and permitting them to do so at a less expense than others, provided they buy a certain number of tickets at one time. It is not legislation for the safety, health, or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who in the legislative judgment should be carried at a less expense than the other members of the community. There is no reasonable ground upon which the legislation can be rested unless the simple decision of the Legislature should be held to constitute such reason. Whether the Legislature might not in the fair exercise of its power of regulation provide that ordinary tickets purchased from the company should be good for a certain reasonable time is not a question which is now before us, and we need not express any opinion in regard to it.

"In holding this legislation a violation of that part of the Constitution of the United States which forbids the taking of property without due process

of law, and requires the equal protection of the laws, we are not, as we have stated, thereby interfering with the power of the Legislature over railroads as corporations or common carriers, to so legislate as to fix maximum rates, to prevent extortion or undue charges, and to promote the safety, health, convenience, or proper protection of the public. We say this particular piece of legislation does not partake of the character of legislation fairly or reasonably necessary to attain any of those objects, and that it does violate the federal Constitution as above stated."

In *Wisconsin, Minnesota & Pacific R. v. Jacobson*, 179 U. S. 287, 297, 21 Sup. Ct. 115, 119 (45 L. Ed. 194), the court said:

"While this power of regulation exists, it is also to be remembered that the Legislature cannot under the guise of regulation interfere with the proper conduct of the business of the railroad corporation in matters which do not fairly belong to the domain of reasonable regulation."

The decision in *Lake Shore & Michigan Southern Ry. Co. v. Smith*, has been followed in *Beardsley v. New York, Lake Erie & Western Ry. Co.*, 162 N. Y. 230, 56 N. E. 488; in *Commonwealth v. Atlantic Coast Line Railroad Co.*, 106 Va. 61, 55 S. E. 572, 7 L. R. A. (N. S.) 1086, 117 Am. St. Rep. 983, 9 Ann. Cas. 1124; in *State v. Great Northern Railway Co.*, 17 N. D. 370, 116 N. W. 89; and has been cited by the Supreme Court of Iowa in *State v. O. & C. B. Ry. Co.*, 113 Iowa, 30, 84 N. W. 983, 52 L. R. A. 315, 86 Am. St. Rep. 357.

It is suggested that what is said in the *Michigan* case about the inability to fix rates for two years was mere dictum, and that the Interstate Commerce Commission has since been expressly authorized to fix rates for the same time, namely, two years.

True, the Interstate Commerce Commission is authorized to prescribe rates for two years. That is to say, it is provided by section 15 of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) as amended (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1911, p. 1284]):

"All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction."

In other words, if a rate should be prescribed and should be put in operation and at the end of one year should become confiscatory, there is no decision, so far as we know, that it could not then be set aside; but if the company issued a ticket, a contract to carry passengers for two years, the contract must be performed, and what the Supreme Court said upon this subject has not been modified by the Interstate Commerce Act.

It is suggested in one of the briefs that much of the so-called dicta in the *Michigan* case "have received many modifications the most notable of which are contained in recent decisions of the Interstate Commerce Commission."

While entertaining the highest respect for the Interstate Commerce Commission, we cannot conceive that it has any power to modify a rule laid down by the Supreme Court, and in justice to the Commission it has always respectfully declined to do so.

It must be freely conceded in this case that the state has power to prescribe maximum rates which permit a fair return to the carriers, and this involves the power to regulate suburban commutation rates to and from points reasonably adjacent to large cities, certainly where such rates have been long established and districts have been settled upon the reliance of the granting of such rates, and perhaps, though that has not been expressly recognized, such rates may be established by the government as an original proposition where they have not been established by the railroad companies.. It may also be presumed for the purposes of this discussion that the state has power to prescribe reduced rates for school children and the inmates of state institutions and for the National Guard, all of which inure directly and expressly to the benefit of the state, within the exercise of its right to promote the safety, health, convenience, and proper protection of the public.

We have already stated that the state fair is educational in its nature, and that many other large enterprises of a similar character are in some respects educational in their nature, and for the sake of this case we may concede that the state may properly recognize such as are legitimate beneficiaries of its bounty or worthy of its encouragement.

While the Michigan case was upon the question of mileage books, what is there said in reference to excursion tickets—and such we understand the tickets authorized by this act and order to be—is so persuasive that we must follow it until it shall have been modified by the Supreme Court. We find nothing in the later decisions of the Supreme Court which indicates a purpose to dissent from the principles therein announced. It must therefore be accepted by us as settled that the Legislature cannot enact a law making maximum rates and then proceed to make exceptions to it in favor of such persons as the legislative judgment may deem proper. It cannot invade the general right of the railroad company to conduct and manage its own affairs and compel it to give the use of its property for less than the rate it has itself fixed and which is therefore presumptively fair and reasonable. When maximum rates have been declared, they are presumed to be reasonable, and the Legislature is presumed to have fixed such rates upon reasonable basis after due investigation and consideration. It may not then depart from them in sporadic instances. It may not tell the company to charge smaller rates for conventions, church or political, or for other excursions, at least unless it be strictly limited to those attending the meeting which is deemed educational. The power when exercised must affect directly, peculiarly, and exclusively the public interest which may properly be promoted.

The question is whether the Legislature, having fixed the presumptively reasonable rates, may prescribe excursion and other extraordinary rates at greatly reduced fares.

If it may do this in one specific instance, it may multiply such occasions without let or hindrance. The conduct of the railroad's business will be transferred almost entirely to other hands, and its revenues greatly impaired, and that in the face of the fact that probably reasonable maximum rates have already been established which were

claimed by their authors to be dictated by the consideration that within the limits of such rates the roads might be free to increase their revenues by any legitimate and not extortionate system of management. This is doubtless why not only the Supreme Court but the Interstate Commerce Commission has set its face against any and all capricious and sporadic departure from such rates when once established.

As the Supreme Court said:

"If the maximum rates are too high in the judgment of the Legislature, it may lower them provided they do not make them unreasonably low as that term is understood in the law."

This does not mean that these rates may be attacked indirectly, without system, and in such manner as to leave them wholly unsettled and unable to be adjusted by any known and dependable principle, and so the court has said, and in view of the scope of the decision the pronouncement cannot be described as dictum, that it is not within the power of the Legislature to compel the company to charge smaller rates for excursions and similar extraordinary occasions.

Without any intention whatever to reflect upon the Legislature, its action is an attempt to establish the principle of legislative authority to prescribe mere excursion rates under the form of an exercise of the police power for the promotion of the public's convenience and interest. If any court or commission has ruled that in prescribing rates for an educational institution the Legislature is not confined to those attending such institution, it would seem that its conclusions are at variance with those of controlling authority. The fact that this law applies to all persons going to Des Moines either to attend the state fair or otherwise would itself invalidate it.

We recognize the rule that a temporary injunction against the enforcement of an act of the state Legislature fixing rates is seldom granted until after a trial of the rates if there is a bona fide resistance made by the state and there exists any doubt whatever as to the facts, but the question here involved is much broader than that embraced in such cases. Here it is not a question of whether the particular rate will be confiscatory or not. There is no conceivable chance of profit to the railroad company which would make this law valid. The court could not be further enlightened by additional disclosures of material evidence. On the other hand, the injury flowing from the unwarranted order would be accomplished and irreparable.

The question of confiscation is eliminated by a disclaimer.

In the view here taken the consideration of whether the carriers have in the past voluntarily established rates for this fair or other institution becomes immaterial. It has been decided that they cannot for that reason be compelled to do so again.

The city of Des Moines with its size, wealth, and its prestige has no need for discriminating rates from all parts of the state in its favor, and the state cannot exercise the right to reduce maximum rates to a fair return based upon investment and earnings, and then still insist upon the same gratuities voluntarily granted by the carriers when left in undisturbed control of their income.

While the railroads are subject to legislation providing rules for securing faithful and efficient service and equality between shippers and communities, the public is in no proper sense their general manager. *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, 172, 18 Sup. Ct. 45, 42 L. Ed. 414; *Interstate Commerce Commission v. Chicago Great Western Ry. Co.*, 209 U. S. 108, 28 Sup. Ct. 493, 52 L. Ed. 705. So long as any feature of private ownership is recognized by the law, the state must not proceed upon an assumed basis of unrestricted governmental control amounting practically to government ownership.

Our conclusion is that the question as to the validity of the act in question and the order of the Railroad Commission made in pursuance thereof involves the power of the state and not the reasonableness of the requirement. So viewed, it falls within the inhibition of the constitutional guaranties as construed by the Supreme Court, and a temporary injunction should be issued as prayed.

It will be ordered in each of the cases that a temporary injunction issue as prayed upon the complainant giving bond in the sum of \$5,000. All concur.

UNITED STATES v. ATCHISON, T. & S. F. RY. CO.

(District Court, D. Arizona. April 10, 1914.)

No. 92.

1. MASTER AND SERVANT (§ 17*)—HOURS OF SERVICE LAW—VIOLATION—PRIMA FACIE CASE.

Where, in an action by the United States to recover a penalty against an interstate carrier for a violation of the Hours of Service Law (Act Cong. March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1911, p. 1321]), the complaint alleged, and defendant in its answer admitted, that it had required or permitted its employés on the train in question to remain on duty for a longer period than 16 consecutive hours, a prima facie case of liability was established.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 16; Dec. Dig. § 17.*]

2. MASTER AND SERVANT (§ 13*)—RAILROADS—HOURS OF SERVICE LAW—"TERMINAL"—"END OF THE RUN."

Hours of Service Law (Act Cong. March 4, 1907, c. 2939, § 3, 34 Stat. 1416 [U. S. Comp. St. Supp. 1911, p. 1322]), provides that the act shall not apply in any case of casualty or unavoidable accident or act of God, or where the delay is the result of a cause not known to the carrier, or its officer or agent in charge of the employé at the time he left a terminal and which could not have been foreseen. *Held*, that where a passenger train was delayed after the train crew had left their starting point, by the derailment of a freight train, resulting in the passenger crew being required to remain on duty more than 16 hours, the railroad company was not bound to tie up the train at the first stopping place where its crew could have been replaced, but was entitled, without incurring liability, to operate the train to the end of the passenger crew's run, the word "terminal" as used in such section being synonymous with the "end of the run" of the particular employé involved.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*]

3. MASTER AND SERVANT (§ 13*)—RAILROADS—HOURS OF SERVICE LAW—VIOLATION—REASON FOR DELAY.

Where a revenue train operated in interstate commerce was delayed so as to require the crew to remain on duty longer than 16 hours, limited by Hours of Service Law (Act Cong. March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1911, p. 1321]), by the unnecessary hauling of a foreign freight car, which contained neither live stock nor perishable freight, by means of a chain, after its drawhead had become broken, in violation of Safety Appliance Act March 4, 1911, c. 285, 36 Stat. 1397 (U. S. Comp. St. Supp. 1911, p. 1338), making it unlawful to haul a defective car by means of chains in revenue trains, or in association with other cars commercially used, unless they contain live stock or perishable freight, the delay was not the result of casualty or unavoidable accident within the exception of the Hours of Service Law, and hence the railroad company was liable for the penalty prescribed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*]

Action by the United States of America against the Atchison, Topeka & Santa Fé Railway Company, to recover for violation of the Hours of Service Law. Judgment for defendant on the first three counts of the complaint, and for the United States on the remaining counts.

J. E. Morrison, U. S. Atty., of Bisbee, Ariz., O. T. Richey, Asst. U. S. Atty., of Phoenix, Ariz., and M. C. List, Sp. Asst. Atty. Gen., of Washington, D. C., for the United States.

Paul Burks, of Los Angeles, Cal., for defendant.

SAWTELLE, District Judge. This is an action brought by the United States against the Atchison, Topeka & Santa Fé Railway Company, under the provisions of the act of Congress of March 4, 1907 (Act March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1911, p. 1321]), entitled, "An act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon."

Section 2 of said act is as follows:

"That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employé subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employé of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty."

Section 3 provides "that any such common carrier, or any officer or agent thereof, requiring or permitting any employé to go, be or remain on duty," in violation of said second section above quoted, "shall be liable to a penalty of not to exceed five hundred dollars for each and every violation."

The first three counts of the government's complaint relate to the conductor and two brakemen in charge of defendant's train No. 18, on October 4 and 5, 1912.

No. 18 was a mail, passenger and express train running between Los Angeles, Cal., and Phoenix, Ariz., and in the course of its run

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

passed through San Bernardino, Barstow, and Parker. Los Angeles was the initial terminal or starting point for this train, for its engine crew and also for its train crew; that is, its conductor and brakemen. The final destination of the engine crew was Barstow, of the train crew was Parker, and of the train itself was Phoenix. The scheduled running time of this train between Los Angeles and Parker was as follows:

Leave Los Angeles.....	2:00 p. m.
Arrive Barstow.....	7:15 p. m.
Leave Barstow.....	7:40 p. m.
Arrive Parker.....	1:15 a. m.

Under the rules of the company the train crew were required to go on duty at Los Angeles at 1:30 p. m., so that under ordinary conditions these employes, on their regular run, would be on duty 11 hours and 45 minutes. On the particular days in question the movement of this train was as follows:

Train crew reported for duty.....	1:30 p. m.
Left Los Angeles.....	2:00 p. m.
Arrived Summit.....	6:20 p. m.
Left Summit.....	11:55 p. m.
Arrived Barstow.....	2:10 a. m.
Left Barstow.....	2:20 a. m.
Arrived (off duty) Parker.....	8:47 a. m.

The train crew, therefore, was kept in continuous service for a period of 19 hours and 17 minutes.

The defendant, in its answer, admitted the excess service of the train crew, but set up an affirmative defense, to wit, that all of the excess service was due to the detention of train No. 18 at Summit by reason of a casualty or unavoidable accident unknown to the carrier, and which could not have been foreseen at the time No. 18 left "said terminal at Los Angeles." The answer (as amended) also alleged that train No. 18 did not leave "a terminal" of the defendant after the casualty had happened, or after it was known to the defendant. The defendant, therefore, attempted to bring itself within the proviso of section 3 of the Hours of Service Act, which reads as follows:

"The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employe at the time said employe left a terminal and which could not have been foreseen."

The particular fact pleaded, and shown in evidence to be the casualty or unavoidable accident directly responsible for the excess service, was the derailment of a freight car in a west-bound freight train between Barstow and Los Angeles, known as "Extra West 954." It is not necessary here to refer particularly to the movement of Extra 954, nor to the inspection to which it was subjected before it left Barstow, for the reason that the government does not contend that it was not properly inspected, but, for the purposes of this case, admits that the breaking in two of this extra near Summit and the consequent derailment of a car and the blocking of the main line at that

point was clearly unavoidable and unknown and unforeseen to the carrier at the time train No. 18 left both Los Angeles and San Bernardino. At the time the train left Summit it was known to the officials of the company in charge of this train that the conductor and brakemen, if allowed to continue on their regular run to Parker, would be on duty over 16 consecutive hours. The evidence shows that Barstow was a terminal of the defendant for freight trains and freight crews, and also it was the terminal for one or more passenger crews running between Barstow and Bakersfield, but was not the terminal for passenger crews running between Los Angeles and Parker.

It is contended by the government that the court should direct a verdict in its favor for the following reasons: Barstow was a "terminal," within the meaning of that term in the proviso, and therefore any delays known to the officials of the company before train No. 18 left Barstow could not be accepted as an excuse, and that, even if Barstow were not a "terminal," as that term is used in the proviso, still train No. 18 was allowed to leave there, knowing that the conductor and brakemen would be in continuous service over 16 hours when a relief crew (although the evidence shows that at that time there was no passenger crew that could have been used as a relief crew on train No. 18) could have been put on this train at Barstow and relieved the old crew at any time within, or at the expiration of, the 16 hours.

[1] The complaint alleging, and defendant in its answer admitting, that the defendant had required or permitted its said employes on said train No. 18 above named to remain on duty for a longer period than 16 consecutive hours, this made a *prima facie* case. *United States v. Kansas City Southern Ry. Co.* (C. C. A. 8th Cir.) 202 Fed. 828, 121 C. C. A. 136; *C., B. & Q. R. R. Co. v. United States*, 195 Fed. 241, 115 C. C. A. 193.

There appear to be three separate provisions in section 2 of said act, the violation of which subjects the carrier to a penalty: (1) That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employé subject to this act to be or remain on duty for a longer period than 16 consecutive hours; (2) and whenever any such employé of such common carrier shall have been continuously on duty for 16 hours, he shall be relieved and not required or permitted again to go on duty until he has had at least 10 consecutive hours off duty; (3) and no such employé who has been on duty 16 hours in the aggregate in any 24-hour period shall be required or permitted to continue or again go on duty without having had at least 8 consecutive hours off duty.

Section 3 of said act sets forth the penalty for violation thereof, and then provides that the *provisions* (meaning all of the provisions of the act, including the one in section 2 above quoted, fixing a penalty for violation thereof) *shall not apply*—

"in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time said employé left a terminal, and which could not have been foreseen: Provided further, that the provisions of this act shall not apply to the crews of wrecking or relief trains."

[2] It is contended by the government that it was unlawful for the defendant company to have caused its employes to work or remain on duty after the 16-hour limit, longer than was necessary to reach the first proper stopping place where its crew could have been replaced, and there it should have been tied up, and that it was its—

“duty to have suitable stopping places where rest can be had for its employes, or proper places along its route proportionate to the exigencies of the business.”

It has been said that this act is remedial in its nature, and should “receive such construction as will give its general purpose reasonable effect.” To this we are agreed; but at the same time we cannot lend ourselves to a construction which would violate the plain letter of the act and entirely destroy the proviso therein contained. Had Congress not intended that the carriers should be relieved in case of casualty, unavoidable accident, or the act of God, it would not have inserted the proviso in the act. It is a well-known fact that this legislation was before Congress for many months, and that much testimony was taken by the several committees of that body before the final draft of the act was completed; and we must assume that Congress intended that the carriers should be excused from the penalties of the act, and that the act should not apply whenever the delay was caused by casualty, unavoidable accident, or act of God.

The plain wording of the proviso involved is:

“The provisions of this act *shall not apply* in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employe at the time said employe left a terminal, and which could not have been foreseen.”

How, then, can this court assess a penalty in a case like the one at bar, where it is plainly shown that the crew were kept on duty by reason of casualty or unavoidable accident, in face of the statute, which for such causes excuses defendant? In cases of this nature, to adopt the construction contended for by the government would be equivalent to nullifying the proviso contained in the act, and would require of the defendant the performance of a duty not only not required, but expressly excused by the act itself. Had Congress intended that, in case of delay occasioned by “casualty, unavoidable accident or the act of God,” the train should only be allowed to go to the first suitable stopping place and there tie up, it would have inserted such a provision in the act—one similar to the provision contained in the amendment to the Safety Appliance Act, approved March 4, 1911 (Act March 4, 1911, c. 285, 36 Stat. 1397 [U. S. Comp. St. Supp. 1911, p. 1338]). Section 4 of this act (Act April 14, 1910, c. 160, 36 Stat. 299 [U. S. Comp. St. Supp. 1911, p. 1329]) contains a proviso as follows:

“That where any car shall have been properly equipped, as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by Section Four of this Act,” etc.

In this connection, it might be well to refer to the administrative rulings of the Interstate Commerce Commission, as contained in its Twenty-Second Annual Report, dated December 24, 1908. In referring to the act in question, the Commission said:

"Questions immediately arose as to its proper interpretation. With a view to explaining in so far as possible those features of the act which might be claimed to be ambiguous, the Commission issued the following administrative rulings: * * * 'Section 3. * * * Employés unavoidably delayed by reason of causes that could not, at the commencement of a trip, have been foreseen, may lawfully continue on duty to the terminal or *end of that run*.'"

Thus it appears that the Commission to which was intrusted the execution of this law, and whose duty it was to ascertain whether or not its provisions were being observed, not only ruled that, "Employés unavoidably delayed by reason of causes that could not, at the commencement of a trip, have been foreseen, may lawfully continue on duty to the terminal or end of that run," but actually used the words "terminal" and "end of that run" synonymously. In other words, they not only defined the word "terminal" to mean the equivalent of the end of that run, but actually held that employés unavoidably detained by reason of causes that could not, at the commencement of the trip, have been foreseen may "lawfully continue on duty to the terminal or end of that run." See Conference Rulings of the Commission issued April 1, 1911, page 24, Rule 287, which is as follows:

"Any employé so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip."

See, also, pamphlet issued by the Interstate Commerce Commission, containing "The Hours of Service Law and the administrative rulings and opinions therein printed by order of the Commission March 25, 1912," which contains this same rule 287.

The Commission did not then believe that it was the duty of the carrier to stop the train at the first suitable stopping place and there tie up until the men could be relieved, as is contended was the duty of the railroad company in this case.

These administrative rulings were promulgated by the Commission because, as was stated by them, questions immediately arose as to the proper interpretation of the act, and with a view to explaining, in so far as was possible, those features which might be claimed to be ambiguous, the Commission adopted the rulings above quoted; and it is reasonable to suppose that such administrative rulings were intended for the guidance of the carrier and trainmen and others having to do with the movement of trains. We heartily agree with the Commission that the terms of the act "are susceptible of more than one interpretation."

That the "construction of a statute by those charged with the execution of it is always entitled to the most respectful consideration, and ought not to be overruled without potent reasons," was the rule announced at a very early day by the Supreme Court of the United States and reiterated in a very large number of cases. *Heath v. Wallace*, 138 U. S. 573, 11 Sup. Ct. 380, 34 L. Ed. 1063, and cases cited.

We cannot adopt the interpretation contended for by the government in this case, namely, that, if the train was delayed by reason of any of the causes set out in the proviso in section 3 of the act, the train crew may not lawfully continue on duty to the terminal or end of that run. This court holds that in such a case there is nothing in the act which requires a carrier to proceed to the next suitable stopping place and there tie up and relieve the crew, or which prevents the crew from continuing on duty and proceeding on their trip to the terminal or end of that run, which in this case was at Parker, even though at the time they left Summit, the place where the train was delayed and remained on account of the unavoidable accident or casualty which occasioned the delay, they had no reasonable expectation of being able to reach the end of their run, Parker, within the 16-hour limit. In the opinion of this court, such a construction is not authorized.

The manifest purpose and effect of this statute is to prohibit railroad companies from requiring or permitting their employes to be or remain on duty for a longer period than 16 consecutive hours, except in case of casualty, unavoidable accident, or act of God, or where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time such employé left a terminal, and which could not have been foreseen, and in case of casualty, unavoidable accident, or the act of God, or where the delay was the result of a cause not known to the carrier or its officers or agent in charge of such employé at the time such employé left a terminal, and which could not have been foreseen, preventing the train crew from completing its run or reaching its destination within 16 hours from the time of going on duty for the run, to take the case out of the operation of the statute, and to permit the crew in charge of any train delayed by such casualty or unavoidable accident or act of God, or other cause not known to or which could not have been foreseen by the officers or agent of the carrier in charge of such crew at the time the crew left a terminal, to continue on duty to the end of the run, *except* where the officers or agent of the railroad in charge of such crew or employes knew of the existence of, or could have foreseen, such casualty, accident, or act of God, or other cause of delay, before such train crew started upon its run upon which the delay occurred. *If* the officers or agent of the carrier in charge of such train crew knew of the existence of, or could have foreseen, the casualty, accident, or act of God, or other cause of delay, before such train crew started on its run, the statute would apply, regardless of the delay caused thereby, and the railroad company requiring or permitting such crew to continue on duty after 16 hours would, in such case, be liable to the penalty provided by the statute. In all other cases of casualty, unavoidable accident, or act of God, or other cause of delay, the statute would not apply. In other words, the proviso takes the case out of the operation of the statute in every instance except those in which the officers or agent in charge of the employé *knew*, or could have foreseen, the existence of the cause of the delay at the time such employé left the terminal or starting point.

The government also contends that the railroad company violated

the provisions of said act by requiring or permitting the said train crew to remain on duty after leaving Barstow, upon the theory that Barstow, although not shown to be a terminal for train No. 18, or for the crew on said train, was nevertheless a terminal, and that said act makes it unlawful for a carrier to require or permit any employé to remain on duty in violation of section 2 of said act, because the proviso in said act contained does not excuse the defendant "where the delay was the result of a cause not known to the carrier or its officers or agent in charge of such employé at the time such employé left a terminal"; in other words, that the officials of the defendant company knew of the unavoidable accident or casualty which was the cause of the delay to train No. 18 at the time said employés left Barstow, a terminal.

It does not appear that the word "terminal" has been judicially defined. According to the usage of railroad men in the United States, as shown by the evidence in this case, each train crew is assigned by the officers of the company to a definite, fixed run, beginning and ending at fixed points or places on its line of railroad; and, in my judgment, these fixed beginning and ending points of a given run for a given crew are the "terminals" of that run within the meaning of the word "terminal" as used in the proviso in section 3 of this act. In the usage of railroad men there are different "runs" for different train crews, and also different runs for different employés on the same train, and the run of an engineer on a passenger train might be different from the run of a conductor or brakeman. There may be one run for a freight crew and another run for a passenger crew, and these runs may not be, and usually are not, coterminous, and one run or several runs for freight crews may lie between the terminals of the run of a single passenger crew, and each of these runs has its own terminals. And in applying this act to a given case, regard must be had to the line of service in which the train crew or employés in question were engaged at the time of the alleged violation of the act, and to that alone.

It follows that Barstow was not a terminal for train No. 18, or for said conductor or brakemen, and that the defendant did not violate said act by requiring or permitting the employés mentioned in the complaint to be or remain on duty for a longer period than 16 consecutive hours and in requiring said train crew to continue on duty to the terminal or end of that run.

The remaining counts of the complaint relate to the employés on defendant's train Extra West and East 977. This was a freight train running from Winslow to Belmont and return, and the round trip was usually made in 14 hours. It was stipulated that the crew upon this train were kept in continuous service upon this trip for 20 hours and 15 minutes. Four causes are assigned by the answer for this excess service, to wit, a delay at Cliffs of 2 hours and 40 minutes, at Hibbard of 40 minutes, at Mile Post 315 of 15 minutes, and 50 minutes at Sunshine. The causes of delay at these places, as claimed by the company, are as follows: When the train was pulling into Cliffs, it broke in two, on account of a defective knuckle lock or lock block on a

Wheeling & Lake Erie car, causing the air brake to go into emergency and jarring the train to such an extent that several drawbars were pulled out, and one car was so badly damaged that it had to be burned. Several of the damaged cars were set out on the side track at Cliffs, but a New York Central & Hudson River car was chained up to another car in the train and hauled to Winslow. A delay at this point of 2 hours and 40 minutes was had, about 20 minutes of which was for the purpose of chaining up the said New York Central & Hudson River car. At Hibbard a delay of 40 minutes was caused by a break in two of the train, which the testimony without dispute shows to have been the result of the shock to the train at Cliffs. At Mile Post 315 there was a delay of ten minutes caused by the chain on the New York Central & Hudson River car, becoming loose and requiring a stop to tighten it. At Sunshine there was a delay of 50 minutes, which the conductor states was caused by a knuckle of one of the cars breaking and thereby causing the train to break in two. The Railroad Company, in its report to the Interstate Commerce Commission, which was under oath, states that the cause of the break in two at Sunshine was due to the breaking of the chain on the New York Central & Hudson River car. When the train left Cliffs, it was thus engaged in hauling an empty car by means of chains instead of drawbars, and it continued to haul it all the way to Winslow.

[3] It is without dispute that the train was a revenue train, and the car thus hauled by a chain did not contain live stock or perishable freight. No necessity was shown for the chaining up of this car and its haul to Winslow; and such action was a violation of the Safety Appliance Act of March 4, 1911, 36 Stat. L. 1397, which makes it unlawful to haul a defective car by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such cars contain live stock or perishable freight.

The proviso in the statute allows the carrier credit for all lawful delays caused to a train crew on its run by casualty, unavoidable accident, or act of God, or by any cause not known to, or which could not have been foreseen, by the officers or agents of the carrier at the time the crew started from its terminal on its run, but allows no credit for delays not covered by the proviso; and, consequently, if the train is delayed by casualty, accident, act of God, or other lawful cause, for one hour at one place and another hour at another place, and then is delayed another hour at another place by a cause which was known to or could have been foreseen by the officers and agents of the carrier at the time the crew left the terminal or started on its run, and the regular schedule time of the train was 16 hours, and in consequence of the delays mentioned, the time taken for the run is 19 hours, the carrier is liable, because it was entitled to have spent 18 hours only on the run, and not 19 hours. It being thus unlawful to haul this car with chains, and the evidence without dispute showing that delays to the train between Cliffs and Winslow were caused by this car, it follows that such delays were not the result of casualty or unavoidable accident, and not within the proviso.

As any service beyond the 16 hours, which is not excused by the

proviso, is unlawful and forbidden by the act, a judgment for the plaintiff must follow.

As a result of these views, the jury are instructed to return a verdict for the defendant on the first three counts of the complaint, and for the plaintiff on the remaining counts.

BALL ENGINEERING CO. v. J. G. WHITE & CO.

(District Court, D. Connecticut. March 31, 1914.)

No. 813.

UNITED STATES (§ 75*)—CONTRACTS—ABANDONMENT—MATERIALS AND MACHINERY—RIGHTS OF GOVERNMENT.

Where a government contract for the construction of a lock and dam in a navigable river provided that, in case of annulment of the contract, the United States should be entitled to take possession of and retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of the same prepared for use or in use in the prosecution of the work, together with all leases, rights of way, or quarry privileges, under purchase, at a valuation to be determined by the engineer in charge, such provision did not authorize the government to take materials, tools, etc., belonging to a person other than the contractor without payment to the owner, nor did it authorize the government to retain materials, tools, etc., whether the property of the contractor or other person, on payment of the rental value instead of the purchase value thereof.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 57; Dec. Dig. § 75.*]

At Law. Action by the Ball Engineering Company against J. G. White & Co. On motion to recommit report of committee, on plaintiff's demurrer to the remonstrance filed to the report of the committee, and on motion by plaintiff to accept such report. Motion to recommit denied, plaintiff's demurrer sustained, and plaintiff's motion for acceptance of the report granted.

The following is the report of the committee:

The undersigned, having been appointed by the Honorable James L. Martin, holding, by appointment, a term of this court, sole committee to hear and determine the above-entitled cause, and to report his findings of fact and conclusions of law therein, by order dated the 8th day of October, 1912, pursuant to stipulation of counsel, respectfully submits his report as follows, certain of the facts herein set forth having been found at the request of the defendant, as the basis for the submission to this court of certain rulings hereinafter set forth, adverse to the defendant, and certain of said facts being found at the request of the plaintiff, as a basis for its claims in relation to said rulings:

1. On the 6th day of March, 1913, being the earliest date convenient to counsel, he proceeded to a hearing in said cause, at his office in the city of New Haven, where counsel and their witnesses were in attendance; the parties being at issue as on file. The committee and the stenographer having been duly sworn, the parties were then heard, by their counsel and witnesses, and thereafter, by continuance to the 7th, 10th, 11th, and 12th days of March, 1913, when the hearings closed; briefs being thereafter filed by counsel, pursuant to stipulation.

2. It was admitted that the corporate name of the defendant was "J. G. White & Company, Incorporated," and the committee so finds.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 212 F.—64

3. On or about April 2, 1910, the plaintiff, "Ball Engineering Company," was incorporated under the laws of the state of Missouri, with a capital stock of \$50,000, divided into 500 shares, of the par value of \$100 each. Ever since the incorporation of the plaintiff, Ball Engineering Company, said P. D. C. Ball has been the president and a director of said Ball Engineering Company, and the holder and owner of 498 out of the 500 shares of stock of said company. On the 2d day of April, 1910, said P. D. C. Ball was the owner of the personal property described in the complaint, and on said day executed and delivered to the plaintiff, Ball Engineering Company, an instrument, a copy whereof is hereto annexed and by reference made a part hereof, marked "Plaintiff's Exhibit C," whereby said P. D. C. Ball sold and delivered to said Ball Engineering Company, among other things, all of the property described in the complaint and in plaintiff's Exhibit A, a copy of which is hereto annexed, whereby said property had been theretofore sold by one George A. Carden, to said P. D. C. Ball. Said property was then situated upon land belonging to the United States, known as the site of lock and dam No. 6, on the Trinity river, in the county of Dallas, in the state of Texas.

4. On the 10th day of July, 1906, the United States entered into a contract with the Hubbard Building & Realty Company, a corporation organized under the laws of the state of Texas, whereby said company agreed to construct lock and dam No. 6 in accordance with the plans and specifications forming a part of said agreement, which agreement, marked "Defendant's Exhibit 8," is submitted herewith and by reference made a part hereof.

5. In or about the year 1905, a partnership was formed by and between George A. Carden, of Dallas, Tex., and P. D. C. Ball, of St. Louis, Mo., which was known as the "Ball-Carden Company." During the 12 months prior to September, 1909, said partnership purchased the property in paragraph 3 of the complaint herein. The great majority thereof was new when placed on the site of said lock and dam, and all of said property was purchased with moneys furnished by said P. D. C. Ball. Said property was placed by said copartnership at the site of said lock and dam No. 6 and was thereafter and until in or about the month of May, 1909, used by said copartnership in the construction of said lock and dam.

6. The said Hubbard Building & Realty Company having failed to complete the construction of said lock and dam within the period of time limited by the contract between the said Hubbard Building & Realty Company and the United States, on or about the 21st day of August, 1908, an application was made in the name of the said Hubbard Building & Realty Company by the said George A. Carden as president of said company for an extension of the time for the completion of said lock and dam until eight months from September 1, 1908. Said extension of time so requested was granted by the United States government. The said lock and dam not having been completed prior to May 1, 1909, on or about May 29, 1909, a request for a further extension was made by a letter dated May 29, 1909, signed in the name of the Hubbard Building & Realty Company by said George A. Carden as president of that company. Said further extension was granted by the government of the United States.

7. In April or May, 1909, said partnership was dissolved, and discontinued the work theretofore carried on by it in the construction of said lock and dam No. 6. On or about the 24th day of July, 1909, said George A. Carden executed and delivered to said P. D. C. Ball an instrument, a copy whereof is hereto annexed and by reference made a part hereof, being "Plaintiff's Exhibit A" as marked in evidence herein, whereby said George A. Carden sold and delivered to said P. D. C. Ball all of his right, title, and interest in and to all of the personal property of every kind and description, including material, machinery, and appliances, belonging to the said partnership between the said George A. Carden and the said P. D. C. Ball, known as the "Ball-Carden Company," used in connection with or located at or near lock and dam No. 6, then in process of construction by the United States government at Trinity river below Dallas, Tex., in the county of Dallas; said property being the same described in paragraph 3 of the complaint herein.

8. After the dissolution of the said copartnership between said George A.

Carden and said P. D. C. Ball, and until on or about September 8, 1909, said P. D. C. Ball, operating under the name of the "Ball Engineering Company," continued the work of constructing the said lock and dam No. 6, using for that purpose the said property referred to in said paragraph 3 of the complaint herein, sold to him as aforesaid by said George A. Carden.

9. From about June 1, 1909, until the incorporation of the plaintiff, Ball Engineering Company, one Oscar Shanks was the personal representative at the site of said lock and dam No. 6 of said P. D. C. Ball, doing business under the name of "Ball Engineering Company," and was the general superintendent of said P. D. C. Ball at the site of the said lock and dam No. 6, and as such representative and superintendent was in charge of the construction work upon said lock and dam No. 6 from on or about June 1, 1909, until on or about September 8, 1909, at which time said work ceased.

10. During the period when said Shanks was present at the site of said lock and dam No. 6, and in charge of the work of constructing said lock and dam, as aforesaid, he saw, and had in his possession, the plans and specifications contained in defendant's Exhibit 8, hereinbefore referred to, which were turned over to him by his predecessor. During said period said Shanks, from time to time, discussed such portions of said specifications as were necessary in the construction of the work with Capt. A. E. Waldron, the engineer officer of the United States government in charge of the work of constructing said lock and dam, and said Shanks carried on the work of constructing said lock and dam, as aforesaid, under the direction of said P. D. C. Ball. No portion of the property mentioned in the complaint was brought upon the work after the arrival of Mr. Shanks at lock and dam No. 6.

11. On September 9, 1909, work upon said lock and dam No. 6 was abandoned. On October 22, 1909, notification of the annulment of said contract pursuant to its provisions was given to the Hubbard Building & Realty Company by letter of that date signed by A. E. Waldron, Captain Corps Engineers, U. S. A., payable to the order of the said Hubbard Building & Realty Company in payment of vouchers issued in favor of said Hubbard Building & Realty Company approved by said Capt. A. E. Waldron for work done and material furnished on said lock and dam No. 6, Trinity river, Tex., and each of said checks bore the indorsements, "Hubbard Building & Realty Company by George A. Carden, President," and, "Pay to the order of National Bank of Commerce, P. D. C. Ball"; the only variation from such indorsements being on one of said checks dated January 4, 1909, whereon the indorsements were as follows: "Hubbard Building & Realty Company, by George A. Carden, President," and, "P. D. C. Ball." Each of said checks bore on its face the following statement, "State object for which drawn," under which the following further statement appeared on each of said checks, "Constructing lock and dam No. 6, Trinity river, Texas." Ten other checks were issued and signed, five by W. P. Wooten, Captain Corps of Engineers, U. S. A., and five by Capt. A. E. Waldron, Corps of Engineers, U. S. A., dated respectively on dates beginning December 7, 1907, and ending August 7, 1909, payable to the order of the Hubbard Building & Realty Company, in payment of vouchers issued in favor of the Hubbard Building & Realty Company, five of which were approved by said Capt. W. P. Wooten and five by said Capt. A. E. Waldron, for work done and material furnished on lock and dam No. 6, Trinity river, Tex. Each of said last-mentioned ten checks bore the following indorsement: "Hubbard Building & Realty Company, by George A. Carden, President." Another check was issued, signed by Capt. W. P. Wooten, Corps of Engineers, U. S. A., dated November 18, 1907, and payable to the order of the Hubbard Building & Realty Company, in payment of a voucher issued in favor of the Hubbard Building & Realty Company and approved by said Capt. W. P. Wooten, for work done and material furnished on lock and dam No. 6, Trinity river, Tex. Said last-mentioned check bore the following indorsements: "Hubbard Building & Realty Company, G. E. White, Secty." and, "The Southern Trading Company, G. E. White, V. Pt." All of the above-mentioned checks bore upon their face the following statement, "State object for which drawn," under which the following further statement appears on each of said checks, "Constructing lock and dam No. 6, Trinity river, Texas."

13. After the time of the incorporation of the plaintiff, Ball Engineering Company, the said Oscar Shanks was in the employ of said company, and was the representative and superintendent of said company at the site of the work on said lock and dam No. 6, and also at locks and dams Nos. 2 and 4, on the said Trinity river.

14. It did not appear under what circumstances either the plaintiff or said P. D. C. Ball, operating under the name of the Ball Engineering Company, undertook to perform said work or furnish said materials, nor did it appear under what circumstances said Ball-Carden Company entered upon said work, other than that this was done without the actual knowledge of said P. D. C. Ball, who did not learn thereof until two or three months later.

15. Pursuant to advertisement dated April 30, 1910, a contract, dated May 18, 1910, and approved June 6, 1910, was entered into between the United States and the defendant for the completion of lock and dam No. 6. An original of this agreement, marked Exhibit 21, is submitted herewith and by reference made a part hereof.

16. Prior to the making of said contract, one F. G. Ward and one E. G. Williams, employes of the defendant, attempted, in behalf of the defendant, without success, to agree with the plaintiff for the purchase or rental of the personal property and materials specified in the complaint, and on June 8, 1910, a notice, signed in the name of said P. D. C. Ball, by Oscar Shanks, was sent to the defendant, stating that said property did not belong to the Hubbard Building & Realty Company but that it was the personal property of said P. D. C. Ball, a copy whereof is hereto annexed, marked "Defendant's Exhibits 1 and 2."

17. On June 6, 1910, Capt. A. E. Waldron, United States engineer in charge of said work, notified the Hubbard Building & Realty Company that the defendant had requested the United States to take the articles of personal property specified in the complaint, and a portion of the materials, pursuant to the provisions of the contract with the Hubbard Building & Realty Company, and that they "are taken possession of under the provisions of paragraph 33 of the original specifications which form a part of the contract," and requested that the remainder of said material be removed within 30 days. A copy of this notification was sent to the plaintiff.

18. On said June 6, 1910, Capt. Waldron notified the defendant of the action taken by him, and stated: "The fact that the material and machinery is on the government reservation or in the near vicinity thereof, and the circumstances under which this office has not permitted its removal from the lock site, is sufficient to assume that the government has taken possession of the items you speak of at the present time. They are therefore turned over to you under the conditions contained in Insert E, following paragraph 38 of the specifications for the construction of lock and dam No. 6, Trinity river, Texas, for use in further work on lock and dam No. 6, Trinity river, Texas."

19. On June 22, 1910, Capt. A. E. Waldron, the engineer officer in charge, notified the defendant that the Hubbard Building & Realty Company had been directed to remove all property at said lock and dam No. 6, except that specified in said letter, and determined the valuation of the said property at the sum of \$11,578, and fixed a monthly rental of \$380 therefor from the government to the defendant. He also fixed a valuation upon the materials at the lock site and notified the defendant to take such of them as it deemed proper, at such valuations respectively.

20. The plaintiff refused to assent to either valuation.

21. On July 18, 1910, the defendant receipted to the United States government for the articles constituting said plant, and for such of the materials as it was willing to and did receive.

22. On August 5, 1910, Capt. Waldron notified the Hubbard Building & Realty Company and Mr. P. D. C. Ball that of the materials on hand the defendant had taken 13,120 lineal feet of round piling, 10,768 feet of sheet piling, and 9,552 feet of Wakefield piling; 480 bolts, with washers, $\frac{3}{4}$ "x12; 100 pounds nails; 50 cords of wood; 22 foot gauges for pier; 8 capstan levers; 8 friction roller arms; 8 journal boxes for dam; 8 cast gate anchors; 52 cast journals—upon which articles, exclusive of the piling, a valuation of

\$570 had been placed by him, and notified said company and said Ball to remove the balance within 30 days. It did not appear that the balance was ever removed. The total valuation assessed by Capt. Waldron upon the material taken by the defendant and incorporated in the work was \$2,640.96.

23. On June 22, 1910, Capt. A. E. Waldron forwarded to the defendant a memorandum invoice and receipt for the articles constituting the plant, and for such of the materials as the defendant was willing to and did receive, and on July 18, 1910, the defendant signed and delivered to the United States government a receipt for said plant and material theretofore turned over to it by said Capt. A. E. Waldron, as aforesaid.

24. On or about July 6, 1910, the defendant commenced work on lock and dam No. 6, and made use of the property belonging to the plaintiff, and described in the complaint, with the exception of 1,382 feet of round piles, 252 feet of sheet piling ready to drive, and 928 feet of sheet piling 12x12 ready to drive, and paid to the United States a rental of \$380 per month, or was credited therewith, for use of the plant.

25. On or before the completion of said lock and dam No. 6 by the defendant, the property, other than materials taken and used by the defendant, was returned to the United States, and by it offered to the Hubbard Building & Realty Company and to said Ball, neither of whom accepted said property.

26. The United States neither paid, credited, nor tendered either purchase price or rental of said property to the plaintiff or to the Hubbard Building & Realty Company, except that in the final account between the United States and the Hubbard Building & Realty Company, after the completion of the work, the United States gave credit to the Hubbard Building & Realty Company for the value of said personal property and materials at the valuation determined by the engineer officer in charge. After the deduction of this credit, a balance was by the account shown to be due from the Hubbard Building & Realty Company to the United States.

27. The United States tendered to the Hubbard Building & Realty Company from time to time certain articles which the defendant no longer needed. On November 10, 1910, a letter was written by A. E. Waldron, Captain Corps of Engineers, to the Hubbard Building & Realty Company, a copy of which is hereto annexed, marked "Plaintiff's Exhibit D," and upon the completion of the work a letter, dated January 30, 1911, marked "Plaintiff's Exhibit E," a copy whereof is hereto annexed, was written by Capt. A. E. Waldron to the said Hubbard Building & Realty Company, whereby an offer was made to relinquish to said Hubbard Building & Realty Company certain items of said personal property therein described. This offer was never accepted, and no part of said personal property was removed from the site of lock and dam No. 6, either by the plaintiff or by the Hubbard Building & Realty Company.

28. Thereafter the Chief of Engineers of the United States Army by telegram dated Washington, D. C., February 3, 1911, directed to said Capt. A. E. Waldron, a copy whereof is hereto annexed and marked "Defendant's Exhibit 30," instructed said Capt. Waldron to withdraw his said letter of January 30, 1911, to the Hubbard Building & Realty Company, and to retain possession of all of said personal property until further advised by the office of said Chief of Engineers.

29. Thereafter and on February 3, 1911, said Capt. A. E. Waldron wrote a letter to the Hubbard Building & Realty Company, a copy whereof is hereto annexed and marked "Defendant's Exhibit 32," wherein it was stated that said Waldron was in receipt of telegraphic instructions from the Chief of Engineers at Washington directing that he withdraw his said letter of January 30, 1911, to the Hubbard Building & Realty Company, and retain possession of all of said plant until further advised by said Chief of Engineers, and a copy of said letter was sent to the said Chief of Engineers of the United States Army, to said P. D. C. Ball, and to the defendant.

30. On February 3, 1911, said Waldron also wrote a letter to John Ehrhardt, United States inspector upon the work on lock and dam No. 6, a copy of which is hereto annexed and which is marked "Defendant's Exhibit 33," wherein said Waldron stated that in view of the instructions from the Chief of Engineers said Ehrhardt should under no circumstances allow the Hub-

bard Building & Realty Company or any other claimant to take possession of any item of property or machinery at said lock and dam No. 6.

31. After the return of said property by the defendant to the United States government, the said property remained at the site of said lock and dam No. 6 in the possession of the United States government.

32. In the accounts between the United States and the Hubbard Building & Realty Company kept at the office of the engineer of the United States at Dallas, Tex., entries were first made by employes of the United States crediting to the Hubbard Building & Realty Company the same rental which was charged against the defendant for the use of said property; but thereafter, and after the receipt by said Waldron of the telegram of February 3, 1911, "Defendant's Exhibit 30," a copy whereof is hereto annexed, said credits of said rental were canceled, and the said Hubbard Building & Realty Company was credited with the valuation of said property determined by the engineer officer in charge.

The following conclusions have been reached:

1. That on the 6th day of July, 1910, the defendant unlawfully converted the personal property described in the complaint, with the exception of the following articles: 1,382 feet of round piles; 252 feet of sheet piling ready to drive; and 928 feet of sheet piling 12x12, ready to drive.

2. That on the 6th day of July, 1910, the fair market value of said property so converted at the site of lock and dam No. 6 was \$15,000.

3. That paragraph 33 of the specifications, forming a part of the agreement with the Hubbard Building & Realty Company, approved July 28, 1906, which reads as follows: "33. Annulment.—In case of the annulment of this contract as conditionally provided for in the form of contract adopted and in use by the Engineering Department of the Army, the United States shall have the right to take possession of, wherever they may be, and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way or quarry privileges, under purchase, at a valuation to be determined by the engineer officer in charge"—does not, as a matter of law, authorize the United States to purchase materials, tools, etc., belonging to a third party, in the absence of agreement of the owner to assent to the provisions of paragraph 33.

4. That said paragraph 33 does not authorize the United States to purchase materials, tools, etc., prepared for use or in use in the prosecution of the work save on payment to the owner thereof at a valuation to be determined by the engineer officer in charge.

5. That said paragraph 33 does not authorize the United States to retain materials, tools, etc., whether the property of the contractor or of other parties, upon payment of a rental value to be determined by the engineer officer in charge.

6. That the plaintiff is entitled to a judgment in its favor for \$15,000 with interest at the rate of 6 per cent. per annum, from July 6, 1910, to the date of judgment.

The defendant submitted the following claims, which were overruled:

1. P. D. C. Ball, doing business under the name of "Ball Engineering Company" and the plaintiff herein, was during the times when the property referred to in the complaint herein was owned by them, respectively, and now are, chargeable with notice of the provisions of the contract between the United States and the Hubbard Building & Realty Company and the specifications incorporated therein, "Defendant's Exhibit 8."

2. That the taking possession of said property by the United States government, and the allowance to the contractor the Hubbard Building & Realty Company of the amount of the valuation of said property, as determined by the engineer officer in charge, as a credit in the final statement of account between the said contractor and the United States government after the entire work of construction had been completed and accepted, constituted a rightful taking and retention of said property by the United States government pursuant to the provisions of the contract and specifications "Defendant's Exhibit 8."

3. No act of the defendant constituted a conversion of the property referred to in the complaint or of any part thereof.

New Haven, November 20th, 1913.

Respectfully submitted,

George D. Watrous, Committee.

Cummings & Lockwood, of Stamford, Conn., for plaintiff.

Lewis Sperry, of Hartford, Conn., for defendant.

THOMAS, District Judge. This is an action in conversion in which the parties waived a trial to the jury, and by consent the action was referred to George D. Watrous, Esquire, of New Haven, as sole committee to hear and determine the same and to report his findings of fact and conclusions of law. Thereafter the cause was duly heard by the said committee and a report filed in which it was found that the plaintiff is entitled to a judgment in its favor for \$15,000, with interest at the rate of 6 per cent. per annum from July 6, 1910 to the date of judgment.

Following the state practice, the defendant filed a motion to recommit the report to the committee, and later a substituted motion to recommit the report to the committee was filed by consent, and the defendant also filed a remonstrance to the report of the committee. The plaintiff filed a demurrer to the remonstrance and a motion for the acceptance of the report of the committee and for the entry of judgment. By agreement of the parties, the motions and the remonstrance were argued on the 10th day of March, 1914, and it was agreed by counsel that the arguments as then made should apply to the defendant's motion to recommit, to the defendant's remonstrance to the report of the committee, and to the plaintiff's motion for acceptance of the report and the entry of judgment.

It appears that the cause was heard at length before the committee, and on the hearing before this court on the defendant's motion to recommit and on the remonstrance no question was raised as to any rulings of the committee on the admission or exclusion of evidence, so that the only questions arising on the rulings of the committee in respect to matters of law are whether the conclusions were correct upon the facts as found by the committee. It is clear that the defendant unlawfully converted the personal property described in the complaint, with the exception of certain material mentioned in paragraph 1 of the conclusions of the committee, unless the United States obtained title to the property under clause 33 of its contract with the Hubbard Building & Realty Company. The principal questions of law before the committee were as follows:

1. Whether the said clause 33 gave the United States a right to take, under purchase, property not owned by the Hubbard Building & Realty Company, in the absence of agreement of the owner of such property to assent to the provisions of said paragraph 33.

2. If property belonging to a third party could be taken by the United States under paragraph 33, could such a taking be lawfully made by making payment for the property to the Hubbard Building & Realty Company and not to the owner?

3. Whether, in any event and irrespective of all questions of owner-

ship of the property, the United States took the property mentioned in the complaint under purchase.

The learned committee has reached the conclusion in paragraphs 3, 4, and 5 of his conclusions that the said paragraph 33 does not, as a matter of law, authorize the United States to purchase material, tools, etc., belonging to a third party, in the absence of agreement of the owner to assent to the provisions of paragraph 33, and that said paragraph does not authorize the United States to purchase materials, tools, etc., prepared for use or in use in the prosecution of the work, save on payment to the owner thereof at a valuation to be determined by the engineer officer in charge, and further that said paragraph 33 does not authorize the United States to retain materials, tools, etc., whether the property of the contractor or of other parties, upon payment of rental instead of a taking under purchase.

Upon considering the arguments and reading the briefs, together with the report of the committee, this court is satisfied that the committee was correct in his conclusions as set forth in the report and in his rulings of law. No substantial question is presented by the motion to recommit the report to the committee, and that motion is therefore denied.

Plaintiff has filed a demurrer to the remonstrance, and if the rulings complained of were correct, or, if not correct, they were not harmful to the remonstrant, and the demurrer must be sustained. *Fox v. South Norwalk*, 85 Conn. 237, 241, 82 Atl. 642. The demurrer to paragraphs 1, 2, 3, and 4 of the remonstrance is sustained for the reasons set forth in the demurrer, as said paragraphs do not show a mistake or error of law affecting the result; and the demurrer to all of the paragraphs of the remonstrance is sustained because all of the rulings complained of were correct.

As stated above, the motion to recommit is denied, the demurrer to the remonstrance sustained, and the remonstrance is overruled. Judgment may therefore be entered as of this date for the plaintiff to recover \$18,362.50, together with the costs of this action.

THE HAMILTON.

(District Court, E. D. Virginia. March 17, 1914.)

COLLISION (§ 105*)—STEAMSHIP AND TOW MEETING—VIOLATION OF NARROW CHANNEL RULE—LENGTH OF HAWSER, ETC.

A collision in the Elizabeth river at night between a steamship passing out from Norfolk and car float in tow of a tug coming up the river *held* due solely to the fault of the steamship, which, as the free vessel, was bound to keep out of the way, in that she was in the west side of the channel, in violation of article 25 of the Inland Rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), and that, although when the passing signals were exchanged the red light of the car float, which had sagged to the eastward because of the wind, was to the starboard of the steamship's course, she kept her speed of 12 miles an hour until it was too late to avoid the collision. The tug *held* not in fault because of using too long a hawser, which did not result in obstructing the channel nor otherwise contribute to the collision.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 105.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Admiralty. Suit for collision by the New York, Philadelphia & Norfolk Railroad Company against the steamship Hamilton, the Old Dominion Steamship Company, claimant, with cross-libel. Decree for libelant.

Thomas H. Willcox and Floyd Hughes, of Norfolk, Va., for libelant.
Loyall, Taylor & White, of Norfolk, Va., for respondent.

WADDILL, District Judge. This is a case of a libel and cross-libel to recover damages growing out of a collision between a car float of the libelant company, and the steamer Hamilton, which occurred about 8 o'clock on the night of the 30th of January, 1909, in the waters of the Elizabeth river, a short distance below Boush Bluff Lightship. The car float was one of the libelant's fleet of barges used for freight transportation between Norfolk and Cape Charles, Va; and at the time of the collision was in tow of its tug Delmar, en route from Cape Charles to Norfolk, loaded with some 20 railroad freight cars. The Delmar was a powerful tug, 122 feet 3 inches long, 26 feet 9 inches beam, 11 feet 7 inches deep, gross tonnage 294. The car float was a strong and heavily built barge, about 325 feet long, 45 feet beam, with four tracks to carry 30 cars, and at the time of the collision was being towed on a hawser 125 fathoms long. Both the tug and barge were in first-class condition, and properly equipped with the latest and most approved appliances, and manned by competent officers and crew. The Hamilton, one of the fine passenger and freight steamers of the Old Dominion Steamship Company, used on its line between New York and Norfolk, 351 feet 8 inches in length, 42 feet beam, 17 feet deep, 2,340 gross tons, was also properly equipped and manned and was en route from Norfolk to New York. At the time of the collision, the tide was ebb, and the wind blowing a strong gale from the west northwest. The Hamilton struck the barge about the center of its bow, or forward end, and penetrated into the float 10 or 12 feet, and threw 4 or 5 cars overboard. The bow of the Hamilton was also considerably injured.

A few months after the collision, to wit, on the 30th of April and 1st of May, 1909, a trial was had, and for various reasons the final argument was postponed for about four years, when written briefs were filed, and the case submitted for consideration.

Sundry assignments of fault are alleged by the vessels one against the other, but the case really turns upon the question of how far each vessel was observing the rule of navigation determining their location in the channel at the time, and whether they were each conforming to the rule governing them in meeting and passing each other in the narrow channel being navigated.

The court has given much thought and consideration to these questions, and will dispose of them in the order indicated.

First. Article 25 of the Inland Rules of Navigation in terms prescribes that:

"In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the star-board side of such vessel."

The Delmar insists that it was strictly adhering to this rule, and that for some time prior to, and at the time of the collision, with a high wind directly on its starboard side, it had been navigating outside of the line of buoys marking the westward side of the channel, and that its tow, though tailing considerably to leeward because of the force of the storm, was nevertheless in the western portion of the deep-water channel, which at the point of the collision was some 700 feet wide for the navigation of vessels of the draft of those in collision, and she seeks to demonstrate her contention by the location in the channel of a freight car loaded with coal, thrown by the impact over the bow of the barge. The Hamilton, on the other hand, claims that the collision occurred to the eastward of mid-channel, and that she was navigating in that portion of the channel at the time of the accident.

After careful consideration of the testimony bearing upon this conflict between the parties, the conclusion reached by the court is that the evidence strongly preponderates in favor of the Delmar's contention that the collision occurred approximately in mid-channel. The location of the wrecked coal car almost conclusively establishes this fact, and the same is strongly supported not only by the libellant's testimony, but also by that of the steamship. It is quite apparent, taking the testimony of those in charge of the navigation of the Hamilton, particularly of her master, first officer, and quartermaster, that she was navigating immediately preceding the collision, certainly in the middle of, if not to the westward of, mid-channel. These officers, particularly the ship's master, Capt. Boaz, now deceased, a highly reputable navigator of 30 years' experience, as master of this class of ship, who testified fully and with commendable frankness, make it manifest not only that the Hamilton was not complying with the rule of navigation above referred to, but that he paid little heed generally to the same in passing down this channel; Capt. Boaz's statement being that he preferred to navigate to the westward, rather than to the eastward of the channel. A strict adherence to this rule of navigation cannot be too strongly impressed upon those navigating this busy and much frequented channel, particularly when, as at the time of this collision, it was entirely safe and practicable so to do.

Second. Coming to the question of fault between the two vessels in attempting to pass each other, consideration should be given to the character of the vessels, the manner in which they approached each other, and the signals exchanged between them at and about the time of the collision. As between the steamship and the tug and tow, the latter was the incumbered vessel, and the burden was upon the free vessel to avoid collision or the risk of collision with the other; and whether this be treated as a "head-on" case under article 18, rule 1, or a "crossing" case, under article 19, the Hamilton, the free vessel, having the barge on her starboard side, should have kept out of the way of the same. The navigators of the Hamilton admit having seen the tug and tow some distance above Boush Bluff, and before meeting the Pennsylvania, which was passed port to port slightly below Boush Bluff. The vessels were approaching head and head, or nearly so (Inland Rules of Navigation, art. 18, rule 1). Both running lights of the

steamer were visible to the navigators of the Delmar, and, after so passing the Pennsylvania, the tug and tow were fully seen and observed coming up the channel, and the two vessels interchanged signals to pass port to port, the tug inaugurating the maneuver, which the Hamilton accepted. The vessels were about half a mile apart at that time, and it is conceded by the ship's navigators that the red light of the tug was bearing upon the port bow of the Hamilton, and the red light of the barge upon her starboard bow; in other words, that the tug and tow was navigating immediately across her stem. With the two vessels proceeding—the Hamilton at 12 knots an hour, approximately, and the tug and tow about $6\frac{1}{2}$ knots an hour—they were certainly within two minutes distance apart at their then speed. The Hamilton, in this position of obvious danger, put her wheel to port, and subsequently hardaported, with the view of carrying out her undertaking to pass port to port, and continued at full speed until, when about abreast of the tug, the ship, as she claims, sheered and ran into and collided with the barge, as indicated. Upon the ship's sheer, or failure to respond to her wheel, she reversed her engines promptly, gave danger signals, and did all in her power to avoid the collision, but without effect. The ship's position is that in the effort to pass the barge, which as she claims was in the eastern portion of the channel, she proceeded too close to the eastern bank thereof, smelled bottom, and as a result the ship failed to respond to her helm, and took the sheer mentioned, bringing about the disaster.

The ship's version cannot be accepted by the court, so as to exempt her from liability. The fact that the accident was caused by the near approach to the eastern bank of the channel, the smelling of the bottom, and consequent sudden sheer, is not borne out by the testimony, especially having regard to the place of collision in the channel. On the contrary, the court thinks it is quite clear that the collision was the result of the Hamilton's failure to properly navigate and give appropriate warning of her movements upon seeing the perilous danger in which she was placed, with the red light of the tug bearing on her port bow, and the red light of the tow bearing on her starboard bow. She should have directed her attention to these conditions earlier; and it was inexcusable on her part to have continued apparently heedlessly and thoughtlessly at full speed until within such close proximity to the obstruction across her course as to be unable to avoid collision therewith. The Hamilton was charged with knowledge of the width of the channel, of the danger of proceeding too close to its banks, and especially so at a high rate of speed, as she would thereby the more quickly smell bottom. Good seamanship required that she should have anticipated these dangers, and in no case should she have taken a chance to pass this incumbered vessel at full speed in the nighttime, without knowing whether there was ample room for her to do so; and she cannot avoid the consequences of the collision, arising from these obvious omissions on her part, nor call upon others, themselves free from fault, to share her losses. The recent case of *The Howard Reeder*, *The Columbia*, 207 Fed. 929, 934, 935, 936, 125 C. C. A. 377, a decision of the Circuit Court of Appeals of this circuit, very similar to the one in hand,

contains a full discussion of the law applicable to this case, and to it, and the authorities there cited, reference is made, as also to the *Victory & Plymouthian*, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519, a decision growing out of a collision in these immediate waters.

Third. This case is in many respects a counterpart of *The Jamestown*, 114 Fed. 593, a decision of this court, which involved a collision between another ship of the respondent's line and a tug and tow of the libellant, occurring virtually at the identical place of this collision, under almost precise conditions, save that there the tide was flood, and here ebb. The same defense was there interposed by the respondent, as here, that the ship, running at full speed, took a sudden sheer and ran into the car float. The court held then, as now, that this defense was not well taken; but it nevertheless divided the damages for the reason that the tug and tow was not free from fault, as in this case.

The charge of negligence, growing out of the length of hawser used, was there, as here, made; and the court decided, notwithstanding the obvious fault on the part of the steamship, that the tug was in fault also, because of obstructing the channel by the tow with its long hawser at and for some time prior to the accident, and divided the damages. In this case, while the hawser was undoubtedly too long, whether the case be treated as within the purview of section 14 of the act of May 28, 1908, c. 212, 35 Stat. 428 (U. S. Comp. St. Supp. 1911, p. 1244), and the regulations of the Secretary of the Treasury of December 7, 1908, effective February 1, 1909 (the day before this collision took place), still that fact seems in no manner to have contributed to the collision, nor was the channel at any time, or in any manner, because of such hawser, obstructed, and hence the vessel should not be condemned solely on account of the use thereof, however reprehensible it may have been to have used the same, certainly after entering the Elizabeth river.

It follows from what has been said that the collision occurred solely from the negligence of the *Hamilton*, and a decree will be entered so ascertaining.

THE TERJE VIKEN.

THE BARAVIA.

(District Court, E. D. Virginia. March 27, 1914.)

COLLISION (§ 71*)—ANCHORED VESSELS—INSECURE ANCHORAGE.

A steamship, light and having an unusually high free board, and a whaleback barge loaded with coal, were anchored near each other on the west side of Elizabeth river, where they had been for two days, the barge anchoring last. Both vessels were tiding downstream with an ebb tide when a very strong wind came up from the northwest, driving the steamship back against the tide, where she came into collision with the barge which was not affected by the wind. *Held*, on the evidence, that the barge on anchoring left sufficient room for the other vessel, and that the collision arose through the fault of the steamship in putting out only one anchor, which dragged, and in any event in not dropping another when the storm came up.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. § 71.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Admiralty. Suit for collision by A. Harbitz, master of the steamship Terje Viken, against the barge Baravia. Decree for respondent:

Hughes, Little & Seawell, of Norfolk, Va., for libellant.

Hughes & Vandeventer, of Norfolk, Va., for respondent.

WADDILL, District Judge. On the evening of the 2d of October, 1913, about 5 o'clock, the steamship Terje Viken, hereinafter called the "steamship," and the barge Baravia, hereinafter called the "barge," were at anchor in the waters of the Elizabeth river, on the western side of the channel, about opposite piers 1 and 2 of the Norfolk & Western Railroad at Lambert's Point, Va. The steamship came to anchor on the morning of September 30th, about 7:30 o'clock, and the barge either that evening, or the morning of the next day; the evidence not being clear on that point. The two vessels remained at anchor until the time of the accident. The steamship, 335 feet long, was light, and, by reason of its construction, about 20 feet out of the water. The barge was what is known as a "whaleback" or pig barge, and was heavily laden with coal, having only some three or four feet freeboard. The tide was running strongly ebb, and the two vessels were tailing downstream, when a sudden and violent windstorm came up from the northwestward, blowing for a short time at considerable velocity, which caused the steamer, high out of the water, to be blown around against the tide; whereas the barge, low down in the water, and not affected by the wind, continued to tail downstream, causing the vessels to collide, one being tide-rove and the other wind-rove; and as a result each vessel sustained injury, the steamer much the more serious.

Sundry faults are alleged by the two vessels one against the other, and the case turns entirely upon whether the accident was the result of the failure of the barge, which last came to anchor, to give to the already anchored ship sufficient berth room, or whether the steamship dragged her anchor when subjected to the force of the violent windstorm, and in that way came into collision with the barge.

The law applicable to the case is well settled (*The Juniata* [D. C.] 124 Fed. 861) that the obligation imposed on the vessel last coming to anchor is to give ample berth room to one lying at anchor, and, if the barge on this occasion failed in this respect, she is clearly liable. Whereas, if the occurrence came about as the result of the failure of the steamship to safely anchor, or provide increased and other anchorage appliances in contemplation of an impending storm, then she is liable.

After much consideration of the testimony, the conclusion reached is that the preponderance of the evidence clearly shows that at the time of anchoring, two days before the collision, the barge did allow ample room for the steamship to swing. They had been in that position during the turn of certainly three or four tides, and had encountered no difficulty until the storm arose. It is true, in the absence of the violent storm, each vessel was influenced by and turned with the tide; whereas, in the storm the barge swung with the tide one way, and the steamship was blown the other. Nevertheless, the court thinks that the tes-

timony shows that the space allowed was sufficient for the double swing under ordinary circumstances, and that the accident came about not as the result of the original anchorage, or any failure on the part of the barge to perform its duty at the time of the accident, but because of omissions on the part of the steamship to properly and timely perform her duty, as well in the manner of her original anchorage, as her neglect to take extra precautions in the face of the impending storm, especially as it was apparent that her then anchorage was insufficient. The steamship was greatly exposed by reason of her unusual freeboard to a storm such as then prevailed, and she should have anticipated the effect of the wind when she came to anchor, and have put out both anchors, whereas she dropped only one, and that on a chain of only 15 fathoms, which caused her to drag down upon the barge. A longer anchor chain would have lessened the probability of the anchors letting go by the turning of the ship, and with only one anchor out, clearly another should have been cast, and as a matter of fact her port anchor was in the act of being turned loose when the collision happened. It was not, however, dropped, and at no time was there but one anchor out, when good seamanship and prudence required two.

The conclusion of the court therefore is that this failure on the part of the ship as well to make suitable anchorage in the beginning, as to increase and strengthen the same when the emergency came, brought about the collision, and not the lack of sufficient anchorage room.

Sight is not lost of the fact that the ship claims that the squall was so sudden that it was impracticable for her to cast the additional anchor in time to have been of use, had it been thought necessary; but the court thinks the evidence establishes the contrary to be the fact, and that ample warning of the approach of the storm was afforded, and additional precautions should have been taken to secure her safety, as was done by other shipping in the vicinity.

It follows from what has been said that the libel will be dismissed at the cost of the libellant.

THE SISILINA.

(District Court, S. D. New York. February 16, 1914.)

ADMIRALTY (§ 75*)—RULES OF PROCEDURE—EXAMINATION OF WITNESSES BEFORE TRIAL.

Admiralty rule 38 of the District Court for the Southern District of New York, which provides that "after joinder of issue, and before trial, any party, by leave of the court, granted on motion, may examine the opposite party, his agents or representatives," etc., must be construed as applying to parties only, by analogy to the principles of discovery in chancery, and does not authorize the examination, before trial, by the libellant in a suit for collision, of the officers and crew of respondent's vessel at the time of the collision.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 559, 586, 587; Dec. Dig. § 75.*]

In Admiralty. Suit for collision by one Harris against the steam yacht *Sisilina*; Strauss, claimant. On motion by libellant for examination of witnesses before trial. Denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The suit was brought to recover damages for the death of libelant's intestate by drowning, resulting from a collision in the St. Lawrence river between the motor launch Frost King and the respondent's steam yacht Sisilina. After joinder of issue, libelant applied under rule 38 of the Admiralty Rules of the District Court for the Southern District of New York for an examination before trial of the master and lookout of the steam yacht. The affidavit on behalf of the respondent set up in substance that the master and lookout were no longer in the employ of the respondent, that the whereabouts of the lookout were unknown, and that the master resided at Alexandria Bay, N. Y., out of the district and more than 100 miles from the place of trial.

Hays, Hershfield & Wolf, of New York City, for libelant.

Max J. Kohler, of New York City (Mark Ash, of New York City, of counsel), for respondent.

WARD, Circuit Judge. The libelant in a cause of collision applies for an order under District Court rule 38 in admiralty, giving her leave to examine the master and lookout of the respondent's vessel. The rule reads:

"After joinder of issue, and before trial, any party, by leave of the court, granted on motion, may examine the opposite party, his agents or representatives, or deliver interrogatories in writing, for the examination of such party, his agents or representatives, with regard to any fact material to the issues. In case the order shall provide for an examination by interrogatories, the answer to the interrogatories shall be under oath and filed within ten days after the delivery thereof, or within such further time as may be allowed by the court."

The witnesses in question are not now in the employment of the respondent, and, if they were, are, in my opinion, not within the rule. It was, no doubt, adopted in analogy to the principles of discovery in chancery, and must be understood to apply to parties only.

The purpose cannot have been to authorize one party to examine the officers and crew of the other party's vessel, and so discover his entire case, without being bound by the testimony. There is no hardship whatever upon the libelant, because under section 863, U. S. Rev. Stat. (U. S. Comp. St. 1901, p. 661), she can examine the master, who lives more than 100 miles from the place of trial, and probably can examine the lookout under the same section, when his whereabouts are discovered.

The motion is denied.